

2011

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Recommended Citation

Lucas Bento, *Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish*, 29 BERKELEY J. INT'L LAW. 399 (2011).

Available at: <http://scholarship.law.berkeley.edu/bjil/vol29/iss2/1>

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Toward an International Law of Piracy *Sui Generis*: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish

By
Lucas Bento*

I. INTRODUCTION

“The sea with its winds, storms, dangers, doesn’t change; it calls for a necessary uniformity of juridical regimes.”¹

*“Who are you, strangers? From where have you set sail / Along liquid paths?
Do you roam for trade / Or for adventure, crossing the seas, like pirates, /
Risking their lives and bringing harm to others?”²*

This article explores the divergence between international and national legal responses to maritime piracy, and it addresses the benefits of a unified international legal framework. Current domestic, regional, and international legal frameworks fail to adequately combat the nature and scale of maritime

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1. PASQUALE STANISLAO MANCINI, *Prelezione al corso di diritto pubblico marittimo insegnato nella R. Università di Torino nell'anno 1852-1853* (Nov. 29, 1852), in *DIRITTO INTERNAZIONALE – PRELEZIONI CON UN SAGGIO SU MACHIAVELLI*, Naples, 1873, 93, at 105-106, English translation by VAN DEN BOSCH, L., *LE COMITÉ INTERNATIONAL 1897-1972* (Antwerpen, 1972), at 6.

2. HOMER, *ODYSSEY*, 15.427; 3.71-74; 9.252-55 in DANIEL HELLER-ROAZEN, *THE ENEMY OF ALL: PIRACY AND THE LAW OF NATIONS* 31 (2009).

piracy,³ which increasingly impacts the shipping, global manufacturing⁴ and tourism industries,⁵ and which governments now consider to be a serious problem.⁶ As of yet, no unified legal approach exists to address the problem of modern piracy. The crux of the argument advanced in this article is that an inadvertent–yet dangerous–bifurcation of legal developments has unfolded within the field of maritime piracy, consequently creating a body of law that lacks harmony.

Effective anti-piracy efforts require uniformity of law, such that legal solutions suppress piracy internationally rather than treat its symptoms in an ad hoc local or regional fashion. Although piracy off the coast of Somalia has recently attracted significant media attention, maritime piracy is a *global* crime impacting a number of areas around the world, such as South East Asia, the Far East, and the Americas.⁷ Until now, states and international legal institutions have addressed the piracy problem through a series of conventions, treaties, resolutions, codes, and regional and bilateral agreements. Without a uniform, comprehensive legal framework to rely on, state, commercial and private actors have attempted to tackle piracy as best they can. These limited approaches highlight the deficiencies of international anti-piracy instruments. Now that piracy is growing at an alarming rate,⁸ there is a great need for a definitive, international,⁹ body of law to systematically govern this field.¹⁰

3. See S.C. Res. 1918, ¶ 17(1), UN Doc S/RES/1918 (Apr. 27, 2010) (affirming that “*the failure to prosecute* persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia undermines anti-piracy efforts of the international community” (emphasis added)) [hereafter “S.C. RES. 1918”].

4. See Alexa K. Sullivan, *Piracy in the Horn of Africa and Its Effects on the Global Supply Chain*, 3 J. Transp. Sec. 231, 231 (2010) (“Piracy is not only a major issue to the shipping industry, but also to any companies that manufacture goods and transport them internationally.”)

5. See *Cosco Bulk Carrier Co. Ltd. v. Team-Up Owning Co. Ltd.* [2010] EWHC (Comm) 1340 [11] (Gross, J., stating: “The issue of piracy is topical and, I suspect, of interest to the industry.”). See also HOUSE OF COMMONS TRANSPORT COMMITTEE, *PIRACY: GOVERNMENT RESPONSE TO THE COMMITTEE’S EIGHTH REPORT OF SESSION, 2005–06*, ¶ 5 (U.K.) [hereafter “Trans. Comm. Report”].

6. See Trans. Comm. Report, *supra* note 5, ¶ 100 (“The popular image of piracy as a joke is redundant and has failed to keep pace with reality. The Government must now consider what imaginative and practical measures might be taken to broaden the public understanding of piracy as a brutal and cowardly crime.”). See also *Sixth Plenary Meeting of the Contact Group on Piracy off the Coast of Somalia*, U.S. DEPARTMENT OF STATE (Jun. 11, 2010), <http://www.state.gov/r/pa/prs/ps/2010/06/143010.htm>.

7. See generally *Piracy and Armed Robbery Against Ships Annual Report*, ICC INTERNATIONAL MARITIME BUREAU (Jan. 2011), <http://www.simsl.com/Downloads/Piracy/IMBPiracyReport2010.pdf> [hereinafter “IMB Annual Report”].

8. Heller-Roazen, *supra* note 2, at 27: “In the ten years between 1995 and 2005, the number of attacks at sea rose by more than 47 percent.”

9. See Martin Murphy, *Piracy and UNCLOS: Does International Law Help Regional States Combat Piracy?*, in *VIOLENCE AT SEA: PIRACY IN THE AGE OF TERRORISM* 163 (Peter Lehr, ed., 2007) (“If piracy is a universal crime, then it should merit a universal response.”).

10. See Michael J. Struett et al., *Maritime Piracy and Regime Complexes: Explaining Low Levels of Coordination* (International Studies Association Annual Meeting, Working Paper Abstract,

This article is divided into six parts. Part I is the introduction. Part II briefly reviews the history of piracy law in England as a backdrop to, and point of comparison with, modern piracy. Part III provides an overview of modern piracy, especially its criminal dimensions and impact on international commercial and individual actors. Part IV explores the international, regional and national responses to piracy law. It also identifies a number of deficiencies in the international response, which arise from today's dual legal frameworks. Part V considers a number of legal and practical proposals to suppress piracy off the coast of Somalia and across the world. Finally, Part VI concludes by highlighting how greater uniformity in maritime piracy law and legal institutions might also contribute to the continuing theoretical and institutional development of international law.

On a final note, international piracy law appears in literature as "piracy jure gentium," "general piracy," "piracy as defined by the law of nations," and the "international crime of piracy."¹¹ Here it will be referred to as international piracy law or piracy jure gentium. By comparison, the literature on piracy also often refers to national or domestic piracy law as "municipal" piracy law.¹² For the sake of clarity among a wider readership, this article refers to piracy laws within individual nation-states as national or domestic piracy law.

II.

HISTORICAL PERSPECTIVES DEFINING PIRACY

An historical divergence in the definition of and approach to piracy creates our present difficulties in devising adequate responses to piracy. Although Roman authorities considered pirates to be common enemies of mankind,¹³ and while "[s]tates going back to the days of the Roman Empire reserved the right to capture and summarily execute pirates,"¹⁴ there has never been a single, comprehensive body of international law or legal system for addressing piracy. As a result, international and domestic piracy laws have always been inconsistent.¹⁵ The rich history of English piracy law serves as a model for a

2011) ("There is a 'regime complex,' or web of regimes, that addresses maritime piracy, and while some states have taken modest steps to deter and punish pirates, in general states are not taking aggressive action against piracy, and policy coordination between states has been limited We hypothesize that the overlapping regime covering piracy is itself a major barrier to effective cooperation because it does not comprise a coherent, comprehensive, and focused anti-piracy regime.")

11. *United States v. Hasan*, No. 2:10cr56, 2010 U.S. Dist. LEXIS 115746, at *70 (E.D. Va. Oct. 29, 2010).

12. *Id.* at *18-19.

13. See Heller-Roazen, *supra* note 2, at 16. See also Marcus Tullius Cicero, *De officiis* 3.107, translated in ON DUTIES (E. Margaret Atkins, ed., 1991).

14. Max Boot, *Pirates, Then and Now: How Piracy was Defeated in the Past and Can be Again*, 88 FOREIGN AFF. 94, 99 (2009).

15. Murphy, *supra* note 9, at 156.

modern legal solution to the piracy problem because it exemplifies how successful a singular, coextensive geographic and jurisdictional approach to piracy can be.

States have not always recognized piracy as an objectionable crime. Indeed, there is a long tradition of romanticizing pirates in popular culture that goes back at least as early as the mid-nineteenth century.¹⁶ This treatment of the *pirate* in popular culture may have under-stigmatized the crime of piracy. This in turn may have handicapped the gravitas of anti-piracy provisions in the law.

In England, the fine and cyclical distinctions between independent pirates and state-sponsored privateers, which shifted in time of war and peace, may have lessened the seriousness attributed to acts of piracy.¹⁷ Piracy often masqueraded as privateering,¹⁸ with the sole distinction that privateering was conducted under a state-authorized license granted by a prize court, a special type of maritime court for ships in times of war.¹⁹ Arguably, England and other states manipulated the legal status of piracy to fulfill their desired political or military interests.²⁰ It was not until 1856 that the Paris Declaration Respecting Maritime Law abolished privateering as a distinct category from piracy.²¹ This may have set the foundations for international law's classification of piracy as a serious and definite crime.

16. See, e.g., Robert J. Antony, *Piracy on the South China Coast through Modern Times*, in *PIRACY AND MARITIME CRIME: HISTORICAL AND MODERN CASE STUDIES* 48 (Bruce A. Elleman et al., ed., 2010), <http://www.usnwc.edu/Publications/Naval-War-College-Press/Newport-Papers/Documents/35.aspx> (discussing the American comic strip about a female Chinese pirate, among other examples from the mid-nineteenth century). See also Trans. Comm. Report, *supra* note 5, at 12 (discussing the statement that the “popular image of piracy as a joke is redundant” and the “Hollywood myths” of piracy).

17. See Lauren Benton, *Legal Spaces of Empire: Piracy and the Origins of Ocean Regionalism*, 47 *COMP. STUD. IN SOC'Y AND HIST.*, 700, 706-07 (2005). See also Máximo Q. Mejía Jr. et al., *Piracy In Shipping 5* (Laboratoire d'Economie et de Management Nantes-Atlantique, Université de Nantes, Working Paper, 2010), available at http://hal.archives-ouvertes.fr/docs/00/47/06/16/PDF/LEMNA_WP_201014.pdf.

18. See *Hasan*, 2010 U.S. Dist. LEXIS 115746, *35 (noting that privateering and piracy largely consisted “of the same acts.”).

19. JANICE E. THOMSON, *MERCENARIES, PIRATES, AND SOVEREIGNS: STATE-BUILDING AND EXTRATERRITORIAL VIOLENCE IN EARLY MODERN EUROPE* 107-08 (Princeton University Press, 1994).

20. For a treatment of this issue in the American context, see Jeffrey Gettleman's New York Times article on February 26, 2011, titled “Suddenly, a Rise in Piracy's Price.” Gettleman writes:

For years, the infant American government, along with many others, had accepted the humiliating practice of paying tribute—essentially mob-style protection fees—to a handful of rulers in the Barbary states so that American ships crossing the Mediterranean would not get hijacked. But in 1801, Tripoli's pasha, Yusuf Karamanli, tried to jack up his prices. Jefferson said no. And when the strongman turned his pirates loose on American ships, Jefferson sent in the Navy to bombard Tripoli, starting a war that eventually brought the Barbary States to their knees. Rampant piracy went to sleep for nearly 200 years.

Available at http://www.nytimes.com/2011/02/27/weekinreview/27pirates.html?_r=1.

21. Murphy, *supra* note 9, at 160.

Further, the elusive nature of pirates – that they “roam” along unpredictable “liquid paths”²² – defied and continues to defy the application of laws intended to prosecute them. The history of the British Empire’s struggle to develop practical solutions for piracy, which historians widely recognize as successful, exemplifies how difficult it is to translate legal regimes into practice. England first tried pirates under a civil law process that required a confession from the alleged pirate or two testimonial eyewitnesses before the court could declare that an act of piracy had occurred.²³ The civil law procedure was deficient, however, because neither of the eyewitnesses could be accomplices. This ruled out the possibility that the authorities strike a deal with the pirates in exchange for providing evidence incriminating the accused.

In 1536, England enacted the Offenses at Sea Act and began to try pirates under the common law.²⁴ This was an improvement over the civil law because it allowed accomplice testimony. The authorities could therefore extract evidence from a wider pool of witnesses, facilitating the prosecution of pirates. However, it soon became apparent that the common law procedure under the Offenses at Sea Act was also flawed, as it did not provide practical ways to prosecute pirates in a continuously expanding British Empire. This delayed criminal prosecutions because colonies extradited pirates to England. Given the delays and costs of extradition, some colonies assumed power by improvising their own legal procedures to handle piracy cases.²⁵

In 1684, however, the British government terminated most colonial trials of pirates when it decided that its colonies lacked jurisdiction to try piracy cases.²⁶ The English Parliament passed An Act for the More Effectual Suppression of Piracy,²⁷ which established vice-admiralty courts in the colonies and authorizing these to try pirates.²⁸ The jurisdictional reach of the vice-admiralty courts, coupled with the geographic expansion of the Royal Navy,²⁹ greatly enhanced the British Empire’s ability to capture and prosecute pirates.

22. HOMER, *supra* note 2.

23. Peter T. Leeson, *Rationality, Pirates, And The Law: A Retrospective*, 59 AM. U. L. REV. 1219, 1220 (2010).

24. *Id.* at 1221.

25. *Id.*

26. *Id.*

27. An Act for the More Effectual Suppression of Piracy, 1700, 11 Will. 3, c. 7 in BRITISH PIRACY IN THE GOLDEN AGE: HISTORY AND INTERPRETATION, 1660– 1730, 59 (Joel H. Baer ed., 2007).

28. Boot, *supra* note 14, at 99.

29. *Id.* at 100. See also PIRACY AND MARITIME CRIME, *supra* note 16, at 2 (“Many navies were created in the fourteenth and fifteenth centuries to protect their shipping and trade from piracy, which was then widespread. However, absent a navy, a state had only limited means of redress or protection [from piracy].”)

III.

MODERN PIRACY: NATURE, SCOPE, IMPACT AND RESPONSE

A. *The Nature and Scope of Modern Piracy*

Eugene Kontorovich of the Northwestern University Law School has characterized modern piracy as an “epidemic.”³⁰ Indeed, maritime piracy is a growing global issue in today’s world. Pirates interfere with shipping and maritime transport in diverse locations such as the coast of Somalia, the Straits of Malacca, the South China Sea, the Gulf of Nigeria and the Americas. The number of piracy incidents has consistently increased over the last two decades, with a significant percentage of this increase occurring in Somalia since 2007.³¹ According to the International Maritime Organization (IMO), there were 5,667 acts of piracy and armed robbery against vessels reported worldwide between July 2002 and December 2010.³² Correspondingly, in January 2009 the International Maritime Bureau (IMB) noted an “unprecedented rise” in maritime hijackings, which it attributed to pirates operating in the Gulf of Aden and off the coast of Somalia.³³ In 2010, the Contact Group on Piracy off the Coast Somalia noted “with concern” that Somali piracy “continues to pose a serious threat to international navigation,” expanding from the Gulf of Aden to the Indian Ocean.³⁴ Hijackings off the coast of Somalia accounted for 92 percent of all ship seizures in 2009, with 49 vessels hijacked and 1,016 crewmembers taken hostage.³⁵ The “red zone” of piracy now covers one million square miles of water and is becoming increasingly difficult for naval forces to patrol.³⁶

Professor Daniel Heller-Roazen noted that at the outset of the 20th Century

30. Eugene Kontorovich, “*A Guantanamo on the Sea*”: *The Difficulty of Prosecuting Pirates and Terrorists*, 98 CAL. L. REV. 243, 243 (2010) [hereafter “Kontorovich (Guantanamo)”].

31. Máximo Q. Mejia Jr. and Proshanto K. Mukherjee, *Selected Issues of Law and Ergonomics in Maritime Security*, 10 J. INT’L MAR. L. 316, 318 (2004) [hereafter “Mejia and Mukherjee”].

32. *Reports On Acts of Piracy and Armed Robbery Against Ships*, INTERNATIONAL MARITIME ORGANIZATION (2010). Note that by the time of publication the figure cited will undoubtedly be higher. The collected reports are available at <http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Pages/PirateReports.aspx>.

33. *IMB Reports Unprecedented Rise in Maritime Hijackings*, ICC INTERNATIONAL MARITIME BUREAU (2009), <http://www.icc-ccs.org/news/332-imb-reports-unprecedented-rise-in-maritime-hijackings>.

34. Sixth Plenary of the CGPCS, *supra* note 6.

35. IMB Annual Report, *supra* note 7.

36. *See Responding to the Scourge of Piracy - Circular Letter No. 3164*, INTERNATIONAL MARITIME ORGANIZATION 2 (2011) <http://www.imo.org/About/Events/WorldMaritimeDay/Documents/3164.pdf>. The letter states: “Notwithstanding the unprecedented effort, the vast sea area in which the pirates now operate makes it difficult to patrol and monitor effectively, particularly with the limited resources available. Member Governments are aware of the limitations of the resources presently available and of the need for more such resources.”

the issue of piracy appeared “academic.”³⁷ In 1932, the British historian Philip Gosse remarked that the age of piracy had “permanently” ended.³⁸ But piracy has firmly and obviously re-emerged.³⁹ This is due in part to the unfolding of globalization, which has provided greater economic opportunities for pirates as world trade intensifies.⁴⁰ It is also a byproduct of the political and economic insecurity in some regions that enables piracy to flourish. This is especially true of Somalia, where the absence of a coherent and authoritative political body results in lack of economic security for Somali citizens as well as an ineffective police and naval force to patrol its borders.⁴¹ As Mr. Justice David Steel explains: “Somalia is a failed state with no effective government or law enforcement. It is also one of the poorest countries in the world. This provides a fertile breeding ground for piracy conducted by fishermen living along the lengthy seaboard of Somalia.”⁴² The lack of an effective national administration in Somalia also complicates attempts to combat piracy by diplomatic means.⁴³

The modern pirate also differs from his historical counterpart in that piracy has adapted to modern technical, political, economic, and social developments. Indeed, “today’s pirates are considerably more sophisticated than their counterparts of yesteryear.”⁴⁴ It is arguable that many of today’s pirates are technologically savvy⁴⁵ individuals who strategically plan each attack with the

37. Heller-Roazen, *supra* note 2, at 24. Heller-Roazen advances three reasons to explain the assumption that piracy disappeared during this period. First, the later stages of the nineteenth century experienced a relative period of peace between maritime nations, which consequently undermined the importance of privateers at sea. Second, technological advances during this period reduced security risks associated with ocean travel. Third, maritime nations believed that the outlawing of the slave trade would also “cleanse[]” the oceans of piracy.

38. Philip Gosse, *THE HISTORY OF PIRACY* 297-98 (Longmans, Green & Co. eds., 1932). Not all contemporary writers, however, agreed with Gosse. See Edwin D. Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334, 334 (1925): “There have been recent events, however, which challenge the assumption that the law of piracy is chiefly of historical significance.”

39. Heller-Roazen, *supra* note 2, at 26.

40. See *PIRACY AND MARITIME CRIME*, *supra* note 16, at 2 (noting the positive correlation between increases in maritime trade and piracy events).

41. See UN SCOR, *Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy off the Coast of Somalia, the existing practice in establishing international and mixed tribunals, and the time and resources necessary to achieve and sustain substantive results*, 8 UN Doc. S/2010/394 (July 26, 2010) [hereinafter UN SCOR Report of the Secretary General] (“Acts of piracy and armed robbery at sea off the coast of Somalia are a symptom of the instability and lack of rule of law in Somalia.”).

42. *Masefield AG v. Amlin Corporate Member Ltd.* [2010] EWHC (Comm) 280 [12] [Eng.].

43. *Masefield*, EWHC 280, ¶ 13: “The absence of any national administration [in Somalia] means that any attempt to intervene by diplomatic means is fraught with difficulty.”

44. Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 TUL. MAR. L. J. 1, 6 (2008).

45. See Sullivan, *supra* note 4, at 231 (discussing pirates use of “the latest technology” to

help of publicly available information about their target.⁴⁶ They “often carry satellite phones, global positioning systems, automatic weapons, [and] antitank missiles.”⁴⁷ Some pirates now hijack “mother ships,”⁴⁸ which they use as bases from which to launch attacks against other vessels up to more than 1,000 miles from shore using “rocket-propelled grenade[s], ladders and extra barrels of fuel.”⁴⁹ This author hypothesizes that there may be unreported and illicit market activity by unknown actors providing pirates with vital insider information about cargo value, vessel layout and specific shipping routes. Further, *some* pirate networks may have access to legal expertise in order to better plan their operations. As Professor Peter Leeson observed, “pirates will manipulate the law,” just as the law acts on them.⁵⁰ The use of modern technical expertise and weaponry appears to have shifted piracy from a ‘hit and miss’ approach to more precise, effective operations. Therefore, the new shape of piracy requires new means for its suppression.⁵¹

B. *Quantifying the Impact of Modern Piracy*

Evidence demonstrates that piracy impacts global shipping, world trade, and the tourist industry.⁵² It is difficult, however, to precisely quantify the costs of international piracy. Studies calculating the global cost of piracy place the figure at one billion⁵³ to fifteen billion dollars,⁵⁴ with some estimates even up to

target high-value ships).

46. *Id.* at 241 (“Pirates thrive on the unsecure nature of the information posted on the Internet, using it in conjunction with satellite phones to select lucrative targets for attack. . . . Martintraffic.com and sailwx.info provide real time ship location information, vessel details and historical information and vesseltracker.com provides more detailed information like whether or not a ship is moored in a certain port.”).

47. Passman, *supra* note 44, at 6; Jack A. Gottschalk et al., *JOLLY ROGER WITH AN UZI: THE RISE AND THREAT OF MODERN PIRACY* 22 (U.S. Naval Institute Press, 2000).

48. See the International Chamber of Commerce’s Commercial Crime Service website, which maintains a section on Piracy Prone Areas and Warnings, and which is available at <http://www.icc-ccs.org/home/piracy-reporting-centre/prone-areas-and-warnings>. As of April 2010, the website warned that Somalis hijack ocean going fishing vessels for piracy operations, using these as mother ships from which to launch smaller boats to attack other vessels.

49. Gettleman, *supra* note 20.

50. Leeson, *supra* note 23; see also Jeffrey Gettleman, *Pirates Outmaneuver Warships off Somalia*, N.Y. TIMES, Dec. 15, 2008, <http://www.nytimes.com/2008/12/16/world/africa/16pirate.html> (recounting a pirate’s statement that they “know international law” and were not worried about being captured as they would be released shortly).

51. Patricia W. Birnie, *Piracy Past, Present and Future in PIRACY AT SEA* 131, 131-32 (Eric Ellen ed., 1989).

52. See also *ICC Condemns Piracy in the Gulf of Aden*, INTERNATIONAL CRIMINAL COURT (Sept. 22, 2008), <http://www.iccwbo.org/policy/transport/index.html?id=24056> [hereafter “ICC Condemns Piracy”] (noting “a tenfold increase in insurance premiums” for cargo shipments in the Gulf of Aden).

53. Peter Chalk, *Maritime Piracy: A Global Overview*, 12 JANE’S INTELLIGENCE REV. 47, 47, 50 (2000).

twenty-five billion dollars.⁵⁵ A recent study by the One Earth Future Foundation reports that maritime piracy drains between seven and twelve billion dollars per year from the international economy.⁵⁶ This overlaps with an early 2011 estimate by former French minister Jack Lang, an advisor to the United Nations on piracy issues. Lang estimates that the economic cost of piracy ranges from five to seven billion dollars annually.⁵⁷ The variations among these figures can be attributed to analysts' disagreements over what inputs to include under the rubric of "piracy costs." Factors considered include insurance premiums,⁵⁸ ransom payments, and rerouting expenses, among others.

In particular, the magnitude of piracy off the coast of Somalia presents a significant ongoing commercial risk. In the twelve months leading up to November 2008, Somali pirates seized approximately thirty vessels, which were released on payment of ransoms in excess of \$60 million.⁵⁹ Worryingly, ransom payments are increasing as pirates successfully manage to prey on larger carriers.⁶⁰

Piracy also has potential macroeconomic costs, such as the risk of reduced foreign investment revenue for countries located in affected regions.⁶¹ For example, one source estimated that Kenya loses approximately \$139 million in revenue per year because of piracy.⁶² From a commercial perspective, pirate attacks in the aggregate could cause the prices of commodities to rise, thus affecting countries that are not directly involved in shipping.⁶³

Oil is of central importance to the world economy, yet pirates threaten its

54. *The Maritime Security Market 2010-2020: Piracy, Shipping & Seaports*, VISIONGAIN, April 12, 2010, <http://www.visiongain.com/Report/467/The-Maritime-Security-Market-2010-2020-Piracy-Shipping-Seaports>.

55. Vijay Sakhujia, *Sea Piracy: India Boosts Countermeasures*, INST. PEACE & CONFLICT STUD., Mar. 15, 2003, <http://www.ipcs.org/article/military/sea-piracy-india-boosts-countermeasures-987.html>.

56. Anna Bowden, *The Economic Costs of Maritime Piracy* (One Earth Future, Working Paper, December 2010), available at http://www.oneearthfuture.org/index.php?id=120&pid=37&page=Cost_of_Piracy.

57. *See at Sea: Piracy off the Coast of Somalia is Getting Worse*, ECONOMIST, Feb. 3, 2011, <http://www.economist.com/node/18070160> [hereafter "Somali Piracy"].

58. *ICC Condemns Piracy*, *supra* note 52 (noting a "tenfold increase in insurance premiums" in the Gulf of Aden).

59. *Masefield*, EWHC 280, ¶ 13.

60. Peter Chalk, *Piracy Off the Horn of Somalia: Scope, Dimensions, Causes and Responses*, 16 BROWN J. WORLD AFF. 89, 93 (2010) (noting a positive increasing correlation between the size of the vessel seized and the size of hostage ransom payments).

61. Bowden, *supra* note 56, at 23 (hypothesizing that "instability and volatility" in piracy-prone regions will cause investors to look elsewhere).

62. *Multi-National Force Deployed To Combat Piracy Off East African Coast*, THE SOMALILAND TIMES, Jan. 29, 2006, <http://www.somalilandtimes.net/sl/2005/211/24.shtml>.

63. *See* Kontorovich (Guantanamo), *supra* note 30, at 252 n.64 (noting a global increase from fifty-seven to fifty-eight dollars a barrel following the November 200 hijacking of a Saudi Arabian oil tanker).

security. Ten percent of the world's daily oil supply passes through the pirate-prone region of the Gulf of Aden, which has the potential to affect oil prices in both direct and indirect ways.⁶⁴ On at least one occasion, a pirate hijacking of the oil supertanker the *Sirius Star* caused global oil prices to temporarily increase by over a dollar and then drop by a few dollars over the course of a day.⁶⁵ More generally, shipping and insurance companies shift the costs of piracy to consumers through protection and indemnity clauses and higher insurance premiums.⁶⁶ Further, piracy affects the interests of a number of countries simultaneously, since cargo ships are often owned by one nation; fly the flag of a second, often a "flag of convenience"; carry cargo destined for multiple countries; and operate with multinational crews.⁶⁷ Shipping activities also often involve transnational financing from multiple banking and financial institutions that have a vested interest in vessels and cargos.

Piracy also has a human dimension. *The Economist* reported that Somali pirates took 1,181 people hostage in 2010, of which 760 remained in captivity as of early 2011.⁶⁸ The average time in captivity to date for a hostage is six months.⁶⁹ In February 2011, in a shocking and unusual turn of events, pirates killed four American sailors that they had taken hostage days earlier, while the United States Navy was shadowing them.⁷⁰ Less than a week later, referencing the death of the American sailors, Somali pirates threatened to kill a Danish family of five if any rescue attempt were made.⁷¹ Whether the deaths of the Americans marks a game-changing event or a distressing anomaly, it is safe to say that piracy has an incalculable human cost for those unfortunate enough to be caught. Further, as news coverage of tourists taken captive by pirates becomes more ubiquitous, countries in areas affected by piracy may well see their attractiveness as tourist destinations decline.⁷² Finally, piracy also

64. See U.S. NAT'L SEC. COUNCIL, COUNTERING PIRACY OFF THE HORN OF AFRICA: PARTNERSHIP & ACTION PLAN, 4 (2008), http://www.marad.dot.gov/documents/Countering_Piracy_Off_The_Horn_of_Africa_Partnership_Action_Plan.pdf.

65. Kontorovich (Guantanamo), *supra* note 30.

66. Michael L. Baker, *Building African Partnerships to Defeat Piracy*, COUNCIL ON FOREIGN RELATIONS, Jun. 23, 2010, available at: http://www.cfr.org/publication/22465/building_african_partnerships_to_defeat_piracy.html.

67. Nat'l Sec. Council, *supra* note 64.

68. *Somali Piracy*, *supra* note 57.

69. Gettleman, *supra* note 20.

70. Adam Nagourney and Jeffrey Gettleman, *Pirates Brutally End Yachting Dream*, N.Y. TIMES, Feb. 22, 2011, http://www.nytimes.com/2011/02/23/world/africa/23pirates.html?_r=1&ref=weekinreview.

71. *Pirates Threaten to Kill Captive Danish family*, CBS NEWS, Mar. 1, 2011, <http://www.cbsnews.com/stories/2011/03/01/501364/main20037696.shtml>.

72. See John Bingham, *Paul and Rachel Chandler to be Taken Away for Foreign Office "Debriefing"*, TELEGRAPH, Nov. 15, 2010, <http://www.telegraph.co.uk/news/worldnews/piracy/8135239/Paul-and-Rachel-Chandler-to-be-taken-away-for-Foreign-Office-debriefing.html> (independent British travelers were captured by Somali pirates and released in return of an \$800,000 ransom payment).

threatens food aid to the Somali people,⁷³ which countries deliver under the protection of foreign naval forces.⁷⁴

Not all piracy scholars would agree that these facts reveal a need to rethink our global approach to piracy, as the author contends. Defense expert Bjørn Møller, for example, asserts that the risk of attack is “minuscule,” that most attacks are “minor,” and modern piracy’s impact on global shipping or world trade is not yet “significant.”⁷⁵ Additionally, some of the most effective IMB/IMO recommended antipiracy policies continue to be low-cost mechanisms. These include using barbed wire and high-pressure hoses, having the crew retreat to an inaccessible locked safe room, operating ships within patrolled corridors, and registering transit with multinational authorities.⁷⁶ Pirates, however, have already shown adaptability in response to stopgap measures like greater naval patrols and the use of designated shipping lanes by moving farther offshore and using larger ships as bases to launch attacks.⁷⁷ While there is no clear evidence that pirates have become sophisticated actors in the manner of Colombian or Mexican drug cartels, their technologies are improving. As a result, the cost of piracy is rising, and it should be cause for concern.

C. *The Response to Modern Piracy*

To a certain extent, modern nations experience geographic difficulties similar to those experienced by Britain and her colonies; however, the political and logistical barriers for addressing modern piracy are greater. No single country exercises geopolitical power equivalent to the British colonial system. Nor is there a global enforcement agency to police the high seas. The following paragraphs discuss various difficulties in policing piracy, including: the political-military perspective; the legal doctrine, legal institution, and legal evidentiary perspectives; and the development perspective.

Some states have surpassed the nation-state collective action problem by participating in coordinated regional efforts to address piracy. Such efforts include the Contact Group on Piracy off the Coast of Somalia (CGPCS), created pursuant to UN Security Council Resolution 1851.⁷⁸ They also include the

73. Passman, *supra* note 44 (citing a Washington Post article published May 22, 2007 on page A-10 titled *Piracy Threat Curbing Food Aid to Somalia*).

74. ICC *Condemns Piracy*, *supra* note 52 (noting a “tenfold increase in insurance premiums” in the Gulf of Aden).

75. Bjørn Møller, *Piracy, Maritime Terrorism and Naval Strategy*, Danish Institute for International Studies, DISS Report 2009:2, at 8.

76. E.U. NAVAL FORCE, MARITIME SECURITY CENTER HORN OF AFRICA (MSCHOA), *BMP3: Best Management Practices to Deter Piracy Off the Coast of Somalia and the Arabian Sea 27* (June 2010) http://www.mschoa.org/bmp3/Documents/BMP3%20Final_low.pdf.

77. Gettleman, *supra* note 20.

78. For information on the CGPCS, see *Contact Group on Piracy Off the Coast of Somalia*, U.S. DEP’T OF STATE, <http://www.state.gov/upm/ppa/piracy/contactgroup/index.htm> (last visited

Shared Awareness and Deconfliction (SHADE) meetings, which integrate various task forces and national missions.⁷⁹ Also, the European Union's Naval Force initiative (EU NAVFOR)⁸⁰ patrols the Gulf of Aden, the Red Sea, and the western part of the Indian Ocean, including the Seychelles, to deter, prevent, and repress acts of piracy and armed robbery.⁸¹

Such regional military efforts have had an important but limited effect.⁸² Naval patrols off the Horn of Africa and in the Gulf of Aden have reduced the success rate of piracy attacks, from 63 percent in 2007 to 34 percent in 2008 and 21 percent in 2009.⁸³ In the Gulf of Aden, adjacent to Somalia, around ten warships combat piracy in the region at any given time.⁸⁴ The region, however, extends over one million square miles of ocean through which 33,000 cargo vessels pass every year.⁸⁵ Pirates therefore may continue "[to] threaten to scare shipping away from a waterway that carries 7.5 percent of the world's seaborne trade and 30 percent of Europe's oil."⁸⁶ Military intervention alone is unlikely to be sustainable and effective in the long run.

Moreover, even if pirates are caught by military operations, they are afforded rights under international and human rights law. Despite occasional calls for patrolling warships to adopt more ruthless treatment of pirates, modern international human rights and humanitarian customary and conventional law prohibits extrajudicial killing of civilians except in self-defense.⁸⁷ International conventions exist to protect how any civilian, pirates included, is treated in times of war, capture, or arrest. Courts might, in rare circumstances, also apply certain provisions of the Geneva Conventions concerning the treatment of war prisoners to pirates.⁸⁸ The international legal framework limits the range of actions naval forces can take when confronting a pirate ship. Modern countries are legally restricted in their methods to combat piracy as compared to their predecessors.

From a legal-institutional perspective, modern countries also face difficulties because there is no centralized court to prosecute pirates. Instead, many states prosecute pirates within their own body of law when an act of

Mar. 13, 2011).

79. For an example of SHADE's coordinated efforts see *Seventh Plenary Meeting of the Contact Group on Piracy off the Coast of Somalia*, U.S. DEP'T OF STATE, Nov. 17, 2010, <http://www.state.gov/t/pm/rls/othr/misc/151795.htm>.

80. See the EU NAVFOR website for more information at <http://www.eunavfor.eu/about-us/mission/> (last visited April 9, 2011).

81. *Id.*

82. UN SCOR Report of the Secretary General, *supra* note 41, at 10, Part II(B)(8).

83. *Id.*

84. *Id.* at 10, Part II(B)(9).

85. Boot, *supra* note 14, at 95.

86. Kontorovich (Guantanamo), *supra* note 30, at 250.

87. *Id.*

88. See *Protection of War Victims: Prisoners of War*, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; see also Passman, *supra* note 44, at 20.

piracy occurs within their jurisdiction. This includes the United States, the United Kingdom, Italy, the Netherlands, Spain, South Korea, and India. But national and state laws, law enforcement agencies, and domestic court systems are often designed to operate only within their country's territorial limits.⁸⁹ In many instances, domestic prosecution is of limited effect given the states' lack of resources, experience, legal competency, and legal clarity regarding the issue of piracy.

An example of this arose in February 2011, when Madagascar captured a hijacked vessel flying under a Comoros flag. Twelve pirates had used the vessel as a mother ship from which to attack other vessels.⁹⁰ Madagascar and Comoros had trouble figuring out how to charge the pirates.⁹¹ As reported at the time:

While the prosecutor rifles through national and international maritime agreements to figure out whether the unknown foreigners can be charged with piracy laws last used in the 19th century, justice ministers from Comoros and Madagascar are also questioning who should try them, where they should be tried, and for what.⁹²

The news report continued to discuss other charges that the pirates might face if the piracy charge were unavailable to prosecutors, such as charging the foreign pirates for illegal detention of the ship's crew or for their lack of identification papers.⁹³

Kontorovich points out that one of the principal challenges to prosecution involves evidentiary issues. He notes, "[I]t can be difficult to prove that armed men in a boat on the high seas are pirates" because there is no proof that they have committed, or are about to commit, an act of piracy.⁹⁴ Many suspected Somali pirates captured at sea are stripped of their weapons and returned to shore because there is no conclusive evidence that they are pirates. This policy is known as "catch-and-release," and it is common among naval forces of many nations.⁹⁵

Further, there are legal and practical difficulties with keeping suspected pirates in detention for long periods of time in a warship for investigation purposes. In one reported case, Russia wished to prosecute Somali pirates but could not identify them conclusively because the twenty-three Russian

89. Hannah McNeish, *Madagascar Captures Somali Pirate "Mother Ship." Now what?*, CHRISTIAN SCI. MONITOR, Mar. 1, 2011, <http://www.csmonitor.com/World/Africa/2011/0301/Madagascar-captures-Somali-pirate-mother-ship.-Now-what>.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. Eugene Kontorovich, *Equipment Articles for the Prosecution of Maritime Piracy 1* (One Earth Future, Discussion Paper, 2010), http://www.oneearthfuture.org/index.php?id=121&pid=37&page=Equipment_Laws_for_the_Prosecution_of_Piracy [hereafter "Kontorovich (Equipment Articles for Prosecution)"].

95. Carrie Johnson, *Fighting Piracy At Sea And In Court*, NAT'L PUB. RADIO, Feb. 26, 2011, <http://m.npr.org/news/front/134063231>.

crewmembers had secured themselves in a safe-room during the attack and did not see the pirates' faces.⁹⁶ The suspected pirates then claimed that they had been hostages of the "real pirates."⁹⁷ In situations like these, some states must release suspected pirates because of the lack of evidence to successfully try them.

Bilateral agreements also exist to facilitate prosecution of pirates close to their region of operation. Such agreements exist between Kenya and the U.K., U.S., and EU. According to the agreements, the U.K., U.S., or EU turn suspected pirates over to Kenya. Although these bilateral agreements enabled prosecution of pirates for a time, Kenyan courts are now prosecuting over one hundred pirates and resist handling more.⁹⁸ This is probably because they lack sufficient resources to manage the increasing number of prosecutions.⁹⁹

In response to this situation, the UN Office on Drugs and Crime's Counter-Piracy Program built a high security courtroom in Mombasa, which opened in June 2010. Kenya's criminal justice system will use the courtroom to hear piracy cases and to try other serious criminal offenses.¹⁰⁰ It is too soon to ascertain whether the specialized court will be a success. Even if it is, the question still exists as to how Kenya will manage the imprisonment of convicted pirates, since convicted pirates become inmates in Kenyan jails.

Finally, for Somalia, piracy is as much a problem of the land as it is of the sea, given its status as a failed state.¹⁰¹ Dismantling piracy networks in Somalia depends on local capacity-building solutions, such as the development of good governance and economic and legal reform. Local institutions could then provide the on-going land-based compliment to sea-based operations. Without such land-based policing, any success in suppressing piracy is ephemeral. One way to develop local capacity might be through the imposition of international regency similar to the UN administration in Kosovo.¹⁰²

But land-based operations come into conflict with strongly held modern ideas regarding state sovereignty. These may undermine any attempt to reach agreement to both tackle piracy at sea and its networks on land. Further, the socio-political climate in many places where piracy flourishes can prevent foreign capacity-building efforts. Security concerns in Somalia, for example, expose land-based operations to unquantifiable security risks. This makes any land-based intervention unlikely, even under military protection.

96. *Pirates Seize Russian Tanker*, FAIRPLAY NEWS, May 05, 2010, <http://www.fairplay.co.uk>, as reported in *Dealing with Pirates – Russia Makes them Walk the Plank*, U.S. NAVAL INST. BLOG (May 2010), <http://blog.usni.org/2010/05/10/pirates-walk-the-plank/>.

97. *Id.*

98. *Id.*

99. Boot, *supra* note 14, at 106.

100. UN SCOR Report of the Secretary General, *supra* note 41.

101. Murphy, *supra* note 9, at 168.

102. Boot, *supra* note 14, at 107.

IV.

PIRACY LAW UNDER THE EXISTING LEGAL REGIME

Piracy's international and domestic legal development creates a fragmented set of laws with overlapping rules and principles that are difficult to reconcile. The following account provides the limitations of the law as it stands and proposes a number of recommendations. First, this section will explore the UNCLOS framework, the SUA convention, the UN resolutions, and regional agreements. Next, it will address domestic law aimed at piracy, focusing on statutory, contractual, and insurance issues. Throughout both sections, this article will highlight how dualism in the law frustrates existing efforts to address modern piracy. This sets the scene for Part V, which recommends a number of solutions to achieve greater uniformity in piracy law.

A. The Dual Nature of International Maritime Piracy Law

As will become clear in the following sections concerning UNCLOS, the SUA, the UN Security Council Resolutions, and domestic laws, a defining characteristic of modern piracy is that there is substantial dualism in the fabric of the law among states and the international regime. At the center of this dual development is the fundamental distinction between monist and dualist states. Whereas monist states, such as France, welcome international law without any further internal enactment, dualist states, like the United States, require national legislation to give effect to international law. To this end, dualist states inadvertently encourage divergent practices in the law as written and practiced because they insulate their national laws from external legal developments under international law (*piracy jure gentium*). They also inadvertently encourage dualist practices by enabling the proliferation of municipal laws that are sometimes inconsistent, not only with their international counterparts, but also inter se.

This divergence in piracy law was noted as early as 1932. In that year, a Harvard Research in International Law study concluded that “[p]iracy under the law of nations and piracy under domestic law are entirely different subject matters and . . . there is no necessary coincidence of fact-categories covered by the term in any two systems of law.”¹⁰³ The recent English case of *R. v. Margaret Jones* also recognized this distinction.¹⁰⁴ There, Lord Justice Cornhill noted that: “[A] distinction must be drawn between piracy under any municipal [a]ct of a particular country and piracy jure gentium.”¹⁰⁵ Municipal is best

103. *Harvard Research in International Law: Original Materials*, 26 AM. J. INT’L L. Spec. Supp. 281 app. at 749 (1932).

104. *R. v. Margaret Jones* [2006] UKHL 16, [2007] 1 AC 136 (appeal taken from England) (Cornhill, J., drawing a distinction between piracy under national law and piracy under international law).

105. *Id.*

understood as “domestic” for the purposes of this paper.

This distinction between piracy as defined under national law and piracy as defined by international law has also been made in the recent case of *United States v. Hasan*.¹⁰⁶ There the court noted: “[T]he *unique* dual characterization of piracy as an offense against both municipal and international law.”¹⁰⁷

Unsurprisingly, Alfred Rubin was able to identify six possible origins for definitions of the word “piracy,” three of which highlight the dual nature of piracy law. These are:

- (4) *An international law meaning* related to the private acts of foreigners against other foreigners in circumstances making criminal jurisdiction by a third state acceptable to the international community despite the absence of the usual territorial or national links that are normally required to justify the extension abroad of national criminal jurisdiction;
- (5) *Various special international law meanings* derived from particular treaty negotiations; and
- (6) *Various domestic (i.e., national, domestic) law meanings* defined by the statutes and practices of individual states.¹⁰⁸

Passman has also noted this multi-faceted characteristic of piracy law in the context of maritime law, where there are at least five interpretations of piracy. Passman found that “[p]iracy has one meaning in the insurance industry, another in the international shipping industry, another in international law, another in criminal law, and yet another in the ‘common law.’”¹⁰⁹ This leads Passman to note that “the *context* of the word may determine its meaning.”¹¹⁰

The fact that an identical act may be piracy or not depending on factual circumstances indirectly related to the act, such as whether it occurs in a geographic location governed by national or international law, or whether it occurs in the context of an insurance claim verses a shipping claim, inhibits the effective and consistent prosecution of pirates. Although “in law *context* is everything,”¹¹¹ the serious consequences of piracy require a more precise, principled definition of what constitutes an act of piracy. Such a definition should present no room for opportunistic behavior by pirate transgressors. As such, it would empower the international, and especially the commercial, community with a legal tool that is certain, coherent and uniform in both its interpretation and implementation.

106. *Hasan*, 2010 U.S. Dist. LEXIS 115746.

107. *Id.* at *36.

108. ALFRED P. RUBIN, *THE LAW OF PIRACY* 1 (University Press of the Pacific, 2nd ed. 1988).

109. Michael H. Passman, *Interpreting Sea Piracy Clauses in Marine Insurance Contracts*, 40 J. MAR. L. & COM. 59, 61-62 (2009).

110. *Id.* Author’s emphasis.

111. *Stack v. Dowden* [2007] UKHL 17, [2007] 2 AC 432 [69].

B. *International Piracy Law: UNCLOS and the SUA*

The United Nations Convention on the Law of the Sea (UNCLOS) defines piracy as an “extraterritorial crime” that targets “crews and vessels”¹¹² which the transgressor commits on the high seas.¹¹³ The high seas are collectively shared by all states such that no single state has a property interest therein.¹¹⁴ Thus, by its definition, piracy is an international crime, and it has long been recognized as such under public international law.¹¹⁵ But while the nature of the crime of piracy has “evolved dramatically” in recent decades, the international piracy law remains largely unchanged over the last two centuries.¹¹⁶

Of course, modern treaties and conventions now govern maritime law, along with a number of UN resolutions; however, the laws’ substance remains firmly rooted in the earlier legal treatment of piracy as recounted above. Two of the foundational treaties are the UNCLOS and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA).¹¹⁷ These agreements address piracy, and their substance shapes both the international legal and practical responses to piracy, as discussed below. But these agreements do not themselves create a body of piracy law. Indeed, Rubin even argues that piracy law does not exist as a body of law at the international level, but only in a national-domestic context insofar as states act against the crime of piracy when it suits their interests.¹¹⁸ Further, although there is no coherent, overarching body of piracy law in the international context, there are important advances in addition to the aforementioned treaties.¹¹⁹ These include

112. See *ICC Recommendations with regard to Piracy in the Indian Ocean*, INT’L CHAMBER OF COMMERCE (2010), http://www.iccwbo.org/uploadedFiles/ICC/policy/transport/statements/304_78%20ICC%20Recomms%20Piracy%2025_1_10.pdf.

113. United Nations Convention on the Law of the Sea art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter “UNCLOS”].

114. See *id.* art. 87 (“The high seas are open to all states, whether coastal or land-locked.”); see also HUGO GROTIUS, *MARE LIBERUM: THE FREEDOM OF THE SEAS, OR THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE* 28 (Oxford Univ. Press ed., 1916) (1608) (“The sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries.”)

115. Kontorovich (Guantanamo), *supra* note 30, at 5.

116. Mike Madden, *Trading the Shield of Sovereignty for the Scales of Justice: A Proposal for Reform of International Sea Piracy Laws*, 21 U.S.F. MAR. L. J. 139, 140 (2008-2009).

117. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 668 [hereinafter “SUA Convention”].

118. *Id.*

119. Part of the reason why international piracy law has not kept pace with the rise of modern piracy may be that a single act of piracy can trigger a number of legal fields simultaneously. These include but are not limited to maritime, shipping, contract, insurance, human rights, trade and criminal law, as well as the international law of war. This reflects international law’s diversification, fragmentation, and expansion in modern times. As Martti Koskenniemi notes, the field of international law is now fragmented into “specialist systems . . . each possessing their own principles and institutions.” Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising*

the IMO Djibouti Code Of Conduct Concerning the Repression Of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and The Gulf Of Aden (“Djibouti Code”) ¹²⁰ and agreements concretizing regional multinational operations, such as the EU’s NAVFOR Task Force.

1. The UNCLOS Framework

The preamble to UNCLOS states that the convention’s purpose is “to settle . . . all issues relating to the law of the sea” so as to maintain “peace, justice and progress for all peoples of the world.” UNCLOS addresses piracy within the framework of this ambitious goal, in addition to other issues like the rights of landlocked states, the execution of maritime research, and the legal status of different sea areas. Article 100 requires all signatory states¹²¹ to “cooperate . . . in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state.” Article 101 of UNCLOS defines piracy as “any illegal acts of violence or detention . . . committed for private ends by the crew or the passengers of a private ship or a private aircraft.” Piracy must also occur “on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft” and “against a ship, aircraft, persons or property in a place outside the jurisdiction of any state.” Article 105 allows that “every state may seize a pirate ship” on the high seas, and authorizes “[t]he courts of the state which carried out the seizure” to “decide upon the penalties to be imposed on” the alleged pirates. Under Article 106, which addresses seizure without adequate grounds, makes the state that executed the seizure liable to the state under which the seized ship was registered. Finally, Article 107 clarifies that pirates may only be seized by “warships or military aircraft” or another vessel “clearly marked and identifiable as being on government service and authorized to that effect.”

These provisions may seem complete, but UNCLOS’ limitations are well documented. These limitations include: (i) restricting the definition of piracy to “private” ends; (ii) the geographical restriction of piracy to the high seas; (iii) issues of reverse hot pursuit; (iv) the “two ship” requirement that excludes internal seizure; and (v) the lack of a mandate for states to adopt domestic counter-piracy laws that implement their international commitments.¹²² The

from the *Diversification and Expansion of International Law*, REPORT OF THE STUDY GROUP OF THE INTERNATIONAL LAW COMMISSION ¶ 8, A/CN.4/L.682.

120. International Maritime Organization, Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, Jan. 29, 2009, C 102/14.

121. As of November 2010, 161 states had ratified UNCLOS, including Somalia. UN DIVISION FOR OCEAN AFFAIRS AND LAW OF THE SEA, CHRONOLOGICAL LISTS OF RATIFICATIONS OF, ACCESSIONS AND SUCCESSIONS TO THE CONVENTION AND THE RELATED AGREEMENTS, http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm.

122. Murphy, *supra* note 9, at 159.

brief analysis that follows of UNCLOS's deficiencies underscores why piracy law is in dire need of reform and, specifically, its own separate body of international law.

a. Piracy Must Be for Private Ends

The essence of piracy is that it must be committed for private ends,¹²³ which appears to arise from the distinction between piracy and state-sponsored privateering of the 16th and 17th centuries. UNCLOS, however, does not clarify who or how to determine what the true purpose was of an attack by one vessel against another.¹²⁴ It is also unclear whether the motivations behind an act of piracy must be exclusively for "private" ends or whether it can be a mix of private-public ends. Sometimes, however, it is difficult to ascertain precisely where the private boundary ends and the public one commences.

Although there is no recent example of the mixed motives problem, an historical example will suffice. In 1909, Brazilian rebels seized a Bolivian ship, *'the Labrea'*, in the Amazon River because of political disagreements with Bolivia. Bolivia, which had taken out piracy insurance on the ship, sued the insurer in an English court.¹²⁵ Bolivia argued that this type of attack was "piracy," and thus was an insured peril under the policy. Focusing on the political organization and motivations of the alleged pirates, and their lack of for-profit motivations, the court distinguished the seizure from a traditional act of piracy under international law and found for the insurer. As Justice Pickford wrote, a pirate "is a man who is plundering indiscriminately for his own ends, and not a man who is simply operating against the property of a particular State for a public end"¹²⁶

Like the definition of piracy that Justice Pickford advanced, modern piracy appears to be economically motivated. Commentators are in relative agreement that terrorism and piracy are not substantially related.¹²⁷ Some scholars, however, have speculated whether the Somali pirates might be susceptible to developing a political ideology or agenda that might provide mixed motivations for pirate attacks.¹²⁸ These could cause an "ends" issue for courts applying UNCLOS, since it defines piracy as occurring for private ends. Others have

123. MALCOLM N. SHAW, *INTERNATIONAL LAW* 549 (Cambridge University Press, 5th ed., 2005); UNCLOS, *supra* note 113, art. 101(a).

124. Samuel P. Menefee, *The Achille Lauro and Similar Incidents as Piracy: Two Arguments*, in *PIRACY AT SEA* 179, 179-80 (Eric Ellen ed., 1989).

125. *Republic of Bolivia v. Indemnity Mutual Marine Assurance Co.* (1909) 1 K.B. 785 (Eng. C.A.).

126. *Id.* at 791.

127. STEFAN EKLÖF, *PIRATES IN PARADISE: A MODERN HISTORY OF SOUTHEAST ASIA'S MARITIME MARAUDERS* 111 (2006).

128. JOHN S. BURNETT, *DANGEROUS WATERS: MODERN PIRACY AND TERROR ON THE HIGH SEAS* 310 (2003).

questioned whether terrorists might also use or piggyback on piracy as a fundraising tool.¹²⁹ The distinction between piracy and terrorism is particularly important for the purposes of insurance coverage, since protection and indemnity liabilities arising from acts of piracy are not an excluded risk whereas terrorism is concerned; rather, these would fall under a war risk.¹³⁰ As of now, however, no proven link exists between Somali piracy and terrorist groups.¹³¹

The private ends proviso excludes acts of terrorism that are politically motivated, such as hijacking and ones of internal seizure, as was the case in the *Achille Lauro* incident.¹³² There, members of the Palestinian Liberation Front boarded a cruise ship, seized it and demanded the release of fifty Palestinians detained in Israel.

The private ends requirement should be extended to encompass instances where piracy is used as a vehicle for non-private purposes, regardless of what those might be. As such, current legal analysis should shift its perspective from the motivations of the hijacker to the impact on the victim(s), namely, whether the perpetrators have deprived a lawful owner of property? This shift also has the benefit of serving as a bright line standard for piracy that national or international courts could easily apply. To this end, the act ought to be considered as piratical regardless of whether it has been committed for an alternative purpose, such as funding terrorist activities. Where the transgressors can also be charged under terrorism laws is a different matter to be treated as a separate offence.

b. Piracy Limited to the High Seas

UNCLOS geographically restricts piracy to the high seas and does not address acts that occur in the territorial, internal waters, or any other areas of the sea excluding the high seas, such as the exclusive economic zone, or the contiguous zone.¹³³ These acts could be identical to piracy in all ways except the location. Martin Murphy argues that this has also enabled the growth of

129. Mark J. Valencia, *The Politics and Anti-Piracy and Anti-Terrorism Responses in Southeast Asia*, in *PIRACY, MARITIME TERRORISM AND SECURING THE MALACCA STRAITS* 84, 87 (Graham Ong-Webb ed., 2006). For background information, also consult the websites of the Free Aceh Movement (GAM) at <http://www.asnlf.com/> (last visited Mar. 13, 2011) and the Moro Islamic Liberation Front at <http://www.globalsecurity.org/military/world/para/milf.htm> (last visited Mar. 13, 2011).

130. *Piracy: FAQs*, THE LONDON P&I CLUB (2009), http://www.londonpandi.com/_common/updateable/downloads/documents/IGroupPiracyFAQs.pdf.

131. Louise Butcher, *Shipping: Piracy*, BUSINESS AND TRANSPORT REPORT 7, SN/BT/3794.

132. See L. F. E. Goldie, *Legal Proceedings Arising from The Achille Lauro Incident in the United States of America*, in *MARITIME TERRORISM AND INTERNATIONAL LAW* 107 (Natalino Ronziti ed., 1990).

133. Article 3 of UNCLOS expanded the territorial seas to up to twelve miles from the coast. Internal waters are those bodies of water connected to the territorial seas but within a designated baseline, such as bays, mouths of rivers, etc. UNCLOS, *supra* note 113, art. 3.

piracy “by entrenching the sovereign rights of states over these territorial waters.”¹³⁴ This is because weak states leave a fertile ground for pirates, yet foreign states capable of repressing piracy must respect the weak state’s sovereign rights. As such, pirates can launch attacks from within the territorial and internal waters with relative impunity.

Some commentators describe this definition of piracy under UNCLOS as “very narrow.”¹³⁵ Indeed, between the years 1989-1993, almost 62 percent of attacks by pirates occurred in the territorial waters of a country, usually in territories with insufficient capability to control piracy.¹³⁶ This situation highlights how UNCLOS’ piracy provision is frequently ill suited to regulate a significant percentage of piracy incidents.

The Somali case helps illustrate how this works in practice. The Somali pirates’ response to increased antipiracy measures in the territorial waters, such as patrolled shipping corridors, has been to attack ships sailing on the high seas. But even then, UNCLOS has been insufficient to address piracy because pirates often reenter territorial waters where foreign actors cannot follow. The UN Security Council passed a resolution to resolve this problem by authorizing the international force patrolling the Gulf of Aden to “enter the territorial waters of Somalia for the purpose of repressing acts of piracy” and to use “all necessary means” for such repression.¹³⁷

But this is a local solution, and states still face the aforementioned sovereignty limitations in other parts of the world where piracy occurs, such as East Asia. A simple alternate solution might be to reform UNCLOS to allow foreign states to address piracy beyond the high seas. But the principle of *mare liberum*, or freedom of the high seas,¹³⁸ is central to UNCLOS, which guarantees that “[t]he high seas are open to all states, whether coastal or land-locked.”¹³⁹ In essence, freedom of the high seas means that no state may exercise sovereignty over waters more than two hundred nautical miles from shore; and conversely, all states must respect state sovereignty when entering foreign waters from the high seas.¹⁴⁰

It is thus understandable that UNCLOS limits itself to the high seas. Issues between state sovereignty and the doctrine of universal jurisdiction mean that limiting piracy to the high seas enables a state to exercise jurisdiction over pirates without interfering with the sovereignty of any other state. As Shaw put

134. Murphy, *supra* note 9, at 165.

135. Vijay Sakhuja, *Sea Piracy in South Asia*, in *VIOLENCE AT SEA: PIRACY IN THE AGE OF TERRORISM* 27 (Peter Lehr, ed., 2007).

136. Barry Hart Dubner, *Human Rights and Environmental Disaster – Two Problems that Defy the “Norms” of International Law of Sea Piracy*, 23 *SYRACUSE J. INT’L L. & COM.* 1, 25-26 (2007).

137. S.C. Res. 1816, ¶ 7, UN Doc. S/RES/1816 (Jun. 2, 2008) [hereinafter “S.C. Res. 1816”].

138. See Grotius, *supra* note 114.

139. UNCLOS, *supra* note 113, art. 87.

140. Shaw, *supra* note 123, at 543.

it, “the most formidable of the exceptions to the principle of the freedom of the high seas is the concept of piracy. The fact that every nation may arrest and try persons accused of piracy under the doctrine of universal jurisdiction makes that transgression quite exceptional in international law.”¹⁴¹ Perhaps because of this exceptionalism, the principle of universal jurisdiction has rarely been used in piracy cases. A recent study suggests that nations use universal jurisdiction in a “negligible fraction” of piracy cases.¹⁴²

c. Reverse Hot Pursuit

Hot pursuit occurs where a state ship pursues a pirate ship from within a state’s territorial waters onto the high seas. There are no problems with hot pursuit, given the freedom of the high seas. Reverse hot pursuit, however, is problematic because it involves the right of any ship pursuing pirates on the high seas to enter into or cross the territorial waters of another state.

The value of reverse hot pursuit is clear. It allows a foreign state to continue pursuing pirates that have committed an international crime in international waters, even after the pirates have entered territorial waters and where the foreign state would otherwise require authorization from the sovereign state. Without reverse hot pursuit, “territorial waters that are poorly monitored and patrolled are, in effect, pirate sanctuaries.”¹⁴³

For the reasons previously discussed, UNCLOS does not allow states the luxury of reverse hot pursuit.¹⁴⁴ Nor is it clear that that customary international law would provide a sufficient basis for engaging in reverse hot pursuit, since the UN Resolution 1816 permitting reverse hot pursuit in Somali territorial waters shall “not be considered as establishing customary international law.”¹⁴⁵

141. *Id.*

142. Eugene Kontorovich and Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy*, 104 *AM. J. INT’L L.* 436, 444 (2010).

143. Murphy, *supra* note 9, at 163.

144. The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) explicitly excludes reverse hot pursuit. Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, Nov. 11, 2004, art. 2(5), http://www.mofa.go.jp/mofaj/gaiko/kaiyo/pdfs/kyotei_s.pdf (“Nothing in this Agreement entitles a Contracting Party to undertake in the territory of another Contracting Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Contracting Party by its national law.”) [hereafter “ReCAAP”].

145. S.C. Res. 1816, *supra* note 136, ¶ 9; *c.f.*, U.S. Department of the Navy, *The Commander’s Handbook on the Law of Naval Operations*, NWP1-14M at 3.5.3.2 and 3.10.1.1, http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_%28Jul_2007%29_%28NWP%29:

If a pirate vessel or aircraft fleeing from pursuit by a warship or military aircraft proceeds from international waters or airspace into the territorial sea, archipelagic waters, or superjacent airspace of another country, every effort should be made to obtain the consent of the nation having sovereignty The inviolability of the territorial integrity of sovereign nations makes the decision of a warship or

Pirates already take advantage of these sanctuaries to operate with relative impunity within territorial waters. This failure creates a loophole that pirates may one day learn to manipulate, like a game of “cat and mouse.”¹⁴⁶

d. The Two-Ship Requirement

UNCLOS appears to adopt a “two ship requirement.”¹⁴⁷ With the exception of Article 102, which treats the mutinying crews of state-owned ships as pirates within the scope of Article 101, UNCLOS classifies an act as piracy where members of one ship attack another.¹⁴⁸ This can be seen from the phrasing of Article 101(a)(i), which states that piracy is an act committed “by the crew or the passengers of a private ship . . . directed . . . against another ship.”¹⁴⁹

Aside from mutinying crews of state-owned ships, the two-ship requirement does not appear to contemplate internal seizure of a ship, or those instances where one or more of a ship’s own crew or passengers take control, as was the case in the *Achille Lauro*. Although there have been no incidents of pirates infiltrating a ship to hijack it for economic purposes, such an event is within the realm of possibility. One might predict this occurring as naval operations reduce the effectiveness of external pirate attacks.

Regardless, both in legal and practical terms, it is not clear that internal seizure should remain classified separately from piracy. While the motivation may be different, the end result is the same; conversion or theft of property for the hijacker’s personal use, and, frequently, loss of life. The more compelling reason for this distinction is that a ship sails under the jurisdiction of its flag state, the state with which it is registered to operate. As such, any offense committed on board, or any act committed by the crew against the ship or its property, falls under the flag state’s national jurisdiction as opposed to

military aircraft to continue pursuit into these areas without such consent a serious matter. However, the international nature of the crime of piracy may allow continuation of pursuit if contact cannot be established in a timely manner with the coastal nation to obtain its consent.

Unlawful acts of violence directed against U.S. flag vessels and aircraft and U.S. nationals within and over the internal waters, archipelagic waters, or territorial seas of a foreign nation present special considerations . . . [W]hen that [coastal] nation is unable or unwilling to [protect vessels, aircraft, and persons] effectively or when the circumstances are such that immediate action is required to protect human life, international law recognizes the right of another nation to direct its warships and military aircraft to use proportionate force in or over those waters to protect its flag vessels, its flag aircraft, and its nationals.

146. Sandeep Gopalan and Stephanie Switzer, *Pirates of the Aden: A Tale of Law’s Impotence* (May 14, 2009), available at <http://ssrn.com/abstract=1404506>.

147. Murphy, *supra* note 9, at 159.

148. UNCLOS, *supra* note 113, art. 101(a)(i).

149. *Id.* (emphasis added)

international law.¹⁵⁰ Thus, the fact that piracy does not include cases of internal seizure, mutiny aboard non-state ships, and larceny further widens the divide between the international and domestic dimensions of piracy.

A hypothetical scenario helps exemplify this issue. Suppose ship *La Bella* is registered under the flag of *Narnia*. *Narnia* has an inefficient legal system that does not criminalize piracy and lacks an effective navy. A group of individuals ('*the Scarfaces*') board *La Bella* as crewmembers, seize the ship and, as pirates typically would, make demands for a ransom payment. Under international law, *Narnia* will have sole jurisdiction to prosecute *the Scarfaces*. However, given *Narnia*'s frail legal system, *the Scarfaces* may never be punished for an act that shares all the factual elements of piracy.

e. No Mandate to Adopt Domestic Counter-Piracy Laws

UNCLOS does not require that states enact domestic anti-piracy laws that align with the convention's provisions, nor does it provide model laws to enact if a state wished to adopt such legislation. Indeed, UNCLOS is based on the assumption that states have adequate domestic legislation to prosecute acts of piracy.¹⁵¹ But the divergence between domestic anti-piracy laws and UNCLOS has encouraged piracy and has created legal and jurisdictional challenges for law enforcement agencies.

The issue is further exacerbated by the fact that a number of states do not criminalize piracy,¹⁵² and some states have only begun to prosecute piracy more recently.¹⁵³ In 2010, UN Resolution 1918 called on states "to criminalize piracy under their respective domestic laws." The Resolution therefore was important in that it recognized the need for horizontal uniformity between domestic and international laws vis-à-vis piracy law. Unfortunately, the resolution failed to provide guidance for how to define and criminalize piracy. As such, it left the specifics of domestic laws to the discretion of individual states, which allows the dual framework of piracy law to perpetuate itself, thus undermining the Resolution's attempt for uniformity in this area of law.

150. *Id.* art. 92; Murphy, *supra* note 9, at 164; Shaw, *supra* note 123, at 549.

151. Murphy, *supra* note 9, at 166.

152. See UN S.C. Res. 1918, *supra* note 3, preamble ("Noting with concern at the same time . . . that the domestic law of a number of States lacks provisions criminalizing piracy and/or procedural provisions for effective criminal prosecution of suspected pirates.").

153. Japan has only recently begun prosecuting some Somali pirates. See *Japan to Try Suspects in Pirate Attack*, YOMIURI SHIMBUN, Mar. 9, 2011, <http://www.yomiuri.co.jp/dy/national/T110308006340.htm>; but see Murphy, *supra* note 9, at 166 (stating that Japan's older laws did not enable domestic prosecution of foreign pirates). Japan's shift in prosecutions also reflects its recent involvement in the Joint Task Force in the Gulf of Aden. See Hitoshi Nasu et al., *Law at Sea: Challenges Facing Japan's Anti-piracy Mission*, JURIST LEGAL NEWS & RES., Mar. 25, 2009, <http://jurist.law.pitt.edu/forumy/2009/03/law-at-sea-challenges-facing-japans.php> (in 2009 Japan changed its defense policies and dispatched two Maritime Self-Defense Force destroyers to participate in a counter-piracy task force).

f. UNCLOS's Other Limitations

UNCLOS only requires that its 161 signatories cooperate in anti-piracy measures on the high seas and does not require cooperation for acts of piracy elsewhere.¹⁵⁴ Nor does UNCLOS specify any mechanism for penalizing a state's failure to discharge its responsibilities in repressing piracy under Article 100. As a purely historical point, it is interesting to note that, with regard to Article 100, the Drafters' Commentary to UNCLOS stressed that "any State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law."¹⁵⁵ Although the consequences of such failure are not clear, any reform in this area of law must impose a duty to cooperate in all matters concerning piracy regardless of where at sea the piracy is committed. The lack of a dispute resolution mechanism under UNCLOS for piracy cases further highlights the need for a specialized tribunal in this area of law.

UNCLOS exhibits a number of other deficiencies. It is silent on inchoate offences, such as soliciting piracy and conspiracy to commit piracy. The treaty also fails to provide for acts of attempted piracy. This is problematic because under UNCLOS, navies can only capture pirates "in the act." Acts of attempted piracy fall outside the scope of Article 101. Further, UNCLOS does not address the issue of ransom payments in piracy cases.

As a final point, Article 110 of UNCLOS gives permission to foreign military ships to board any ship that is suspected of piracy on "reasonable grounds." There is, however, no guidance for what constitutes reasonable grounds. Domestic courts could therefore diverge in their interpretations of what grounds are sufficiently reasonable for a foreign military ship to board and arrest pirates. This void also highlights the need for a coherent body of jurisprudence to provide definitive interpretations of flexible words such as "reasonable" in this context.

g. UNCLOS as an Impediment to the Development of Piracy Law

In summary, it is clear that UNCLOS is ineffective to combat modern piracy. It should therefore be replaced. The requirements under UNCLOS have proved to be "anachronistic in a world of reduced ship manning and cheap high-speed rubber boats, and where the high seas have been pushed 200 nautical miles away from land."¹⁵⁶ The UNCLOS regime is a product of the past,

154. See UNCLOS, *supra* note 113, art. 100 (providing only that "All states shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state.").

155. See Yvonne M. Dutton, *Bringing Pirates to Justice, A Case for Including Piracy within the Jurisdiction of the International Criminal Court* 7 n. 33 (One Earth Future, Discussion Paper, 2010), available at http://www.oneearthfuture.org/siteadmin/images/files/file_52.pdf.

156. Mejia and Mukherjee, *supra* note 31, at 324.

intended for a world whose geopolitics and technology have since dramatically changed. As a consequence, the development of piracy law in the international realm has been handicapped by a treaty that was never, *ab initio*, intended to combat international piracy in its current form.

Specifically, UNCLOS's definition of piracy is too restrictive to help the present fight against maritime piracy. As compared to UNCLOS, the IMB has defined piracy more broadly as "an act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act."¹⁵⁷ This definition should be a stepping-stone toward creating a specialized body of international piracy law that encapsulates the crime's particular nature, while also addressing the problematic bifurcation between territorial waters and the high seas.¹⁵⁸ Further, the IMB definition does not require piracy to be committed for private ends.

2. The SUA Framework

The abovementioned *Achille Lauro* incident demonstrated the inadequacy of the international regime governing piracy under UNCLOS because it excluded cases of internal seizure and was silent as to prosecuting pirates.¹⁵⁹ Consequently, the SUA Convention was adopted by 156 states¹⁶⁰ and, importantly, by the United States, Kenya, and the Seychelles. However, the SUA was not adopted by coastal states heavily affected by piracy, such as Somalia, Malaysia, and Indonesia.¹⁶¹

While in theory the SUA seemed like a promising solution, in practice it has been an ineffective legal tool for dealing with piracy. The SUA authorized

157. International Chamber of Commerce, International Maritime Bureau (ICC-IMB), *Piracy and Armed Robbery Against Ships Report*, Annual Report (2007), <http://www.southchinasea.org/docs/ICC-IMB-PRC-2007.pdf>. Contrast this with the IMO definition: "Piracy must be committed on the high seas or in a place outside the jurisdiction of any state. A criminal attack with weapons on ships within territorial waters is an act of armed robbery and not piracy." DEREK JOHNSON AND MARK VALENCIA, *PIRACY IN SOUTHEAST ASIA: STATUS, ISSUES AND RESPONSES* xi (ISEAS Publications, 2005).

158. Some have also proposed a limited right to pursue pirates into territorial waters. See *Harvard Research in International Law, Draft Convention on Piracy*, 26 AM. J. INT'L L. Spec. Supp. 281 app. at 744, 833 (1932).

159. Article 105 of UNCLOS speaks of sentencing but not prosecution. Thus, it effectively skips a vital part of the sentencing process, as prosecution is arguably a *sine qua non* for a trial (and thus for the sentencing process). UNCLOS, *supra* note 113, art. 105 ("[T]he courts of the State which carried out the seizure may decide upon the penalties to be imposed.").

160. SUA Convention, *supra* note 117.

161. Martin Murphy, *Contemporary Piracy and Maritime Terrorism: The Threat to International Security* 14 (The International Institute for Strategic Studies, Adelphi Paper 388, 2007) ("[M]any of the states in Asia where the piracy problem is most acute are not signatories [to the SUA]. The result has been that – apart from in one minor case in U.S. waters – SUA has never been invoked.")

any signatory state to prosecute anyone who “seizes or exercises control over a ship by force or threat of force or any other form of intimidation.”¹⁶² In this way, the SUA enjoys an advantage over UNCLOS because it covers acts in territorial waters.¹⁶³ It also encompasses instances of internal seizure and is not bound by a private ends proviso, unlike UNCLOS. In some circumstances, the SUA actually *requires* states to either prosecute or extradite those who commit acts that encompass piracy.¹⁶⁴ It is important to note that the SUA does not *explicitly* criminalize piracy. In fact, nowhere in the SUA is the word piracy mentioned. The SUA only spells out acts that fall under the rubric of piracy, such as the “seizure of a ship by force.”¹⁶⁵

Despite criminalizing numerous offenses, the SUA is not sufficiently specific regarding sanctions.¹⁶⁶ To the extent that signatory states have followed through with this criminalization provision, there is a lack of penal uniformity among their laws.¹⁶⁷ If comparative leniency were to develop in some states, and if pirates were to become sophisticated actors with a *strong* understanding of international law, such leniency might lead pirates to forum shop in order to manage operational risk.

Further, states have been reluctant to use the SUA as a basis for prosecution.¹⁶⁸ England’s Aviation and Maritime Security Act of 1990 incorporated the SUA into English law but, to the author’s knowledge, no English case has relied on the SUA. Reluctance to use the SUA may be partially attributable to a lack of guidance about the treaty’s application in the treaty itself.¹⁶⁹ Additionally, the SUA does not enable, through recognition or authorization, “preventive constabulary activity at sea.”¹⁷⁰

Given that the SUA’s purpose was to enable prosecution of pirates, these absent constabulary provisions do not surprise. However, these missing provisions deprive the SUA of its potential prophylactic strength. This consequentially undermines prosecution, which requires effective policing mechanisms to ensure that perpetrators are arrested properly, sufficient evidence is collected, and criminals are brought to trial. In the context of sea piracy, the SUA therefore relies on the discretion of regional law enforcement efforts, state law enforcement agencies, or naval forces to capture pirates. As piracy typically

162. SUA Convention, *supra* note 117, art. 3(1).

163. *Id.* art. 4.

164. *See id.* arts. 5, 7(1).

165. *Id.* art. 3(1).

166. *See id.* art. 5 (“Each State Party shall make the offences set forth in Article 3 punishable by appropriate penalties which take into account the grave nature of those offences.”).

167. Proshanto K. Mukherjee, *Piracy, Unlawful Acts and Maritime Violence*, 10 J. INT’L MAR. L. 301, 302 (2004).

168. Kontorovich (Guantanamo), *supra* note 30.

169. *Id.*

170. Murphy, *supra* note 9, at 165.

occurs in relatively poor areas of the world, it is inevitable that poor states will be reluctant or unable to proactively police their borders and deploy the necessary resources to capture pirates.

C. Regional Frameworks for Piracy

Piracy has prompted the proliferation of a number of regional codes, bilateral agreements, and localized UN Resolutions. This section will provide an overview of some of these frameworks and evaluate their provisions.

1. Regional Cooperation Agreement on Combating Piracy and Armed Robbery

Launched in 2006, the Regional Cooperation Agreement on Combating Piracy and Armed Robbery (ReCAAP) is the first multilateral government-to-government anti-piracy effort in Asia. This cooperation agreement has three main objectives: information sharing,¹⁷¹ capacity building¹⁷² and cooperative arrangements.¹⁷³ ReCAAP marks an important step towards greater cooperation between states in an area of the world that is greatly affected by piracy. Seventeen countries, including China, Japan, and Norway, have signed the agreement.¹⁷⁴ ReCAAP requires signatories to prevent and suppress piracy and armed robbery against ships “to the fullest extent possible.”¹⁷⁵ The agreement established an information center and various focal points to help signatories share information about piracy incidents. ReCAAP also requires contracting parties to “make every effort to take effective measures . . . to arrest pirates or persons who have committed armed robbery against ships.”¹⁷⁶ The agreement nonetheless suffers from a restrictive definition of piracy, as it limits acts of piracy to acts committed on the high seas.¹⁷⁷ A separate offence of “armed robbery” is provided for acts committed inside the jurisdiction of a signatory state.¹⁷⁸ It is not clear why the agreement draws a distinction between the two offences, particularly when the elements are essentially the same, save the geographical distinction.

171. ReCAAP, *supra* note 143, Part II.

172. *Id.* art. 14.

173. *Id.* arts. 12, 15.

174. *Contact Details of the ReCAAP Focal Points and ReCAAP Contact Point*, RECAAP INFORMATION SHARING CENTER (2011), http://www.recaap.org/Portals/0/docs/About%20ReCAAP%20ISC/ReCAAP_Poster_050111.pdf (the other members of ReCAAP are: Bangladesh, the Philippines, Brunei, South Korea, Singapore, Cambodia, Sri Lanka, Lao, Thailand, Myanmar, Denmark, the Netherlands, Vietnam, and India).

175. *See* ReCAAP, *supra* note 143, art. 2(1).

176. *Id.* art. 3(1)(b).

177. *Id.* art. 1(1).

178. *See id.* art. 1(2)(a).

2. *International Maritime Organization's Djibouti Code of Conduct*

The IMO Djibouti Code of Conduct is worth particular mention because it departs in significant ways from UNCLOS and the SUA. The Code is also important because, although it only focuses on the Western Indian Ocean and the Gulf of Aden, it represents a positive step toward a uniform system of governance for international piracy.¹⁷⁹ The Code is particularly noteworthy because it commits signatories to cooperate to the fullest extent possible in the repression of piracy and armed robbery against ships.¹⁸⁰ It also facilitates sharing relevant information through a system of national information centers.¹⁸¹ Each signatory state commits to criminalizing piracy and armed robbery against ships at the domestic level.¹⁸² Signatory states also agree to ensure that there are adequate guidelines for exercising jurisdiction, procedures for investigations, and prosecutions of alleged offenders. Article 4(5) allows reverse hot pursuit as long as the coast state grants authorization.¹⁸³ Finally, Article 2 of the Code also seeks to ensure that persons committing or attempting to commit piracy or armed robbery against ships are apprehended and prosecuted. These provisions are a definitive improvement from the UNCLOS regime, which is silent on these matters.

But, as a regional agreement, the Code's international scope and influence are geographically limited and do not create an international body of piracy law. Further, the Code is a non-binding document and accordingly only carries persuasive force.¹⁸⁴ Like the ReCAAP, it still locates the crime of piracy on the high seas.¹⁸⁵

3. *UN Resolutions: Somali Piracy*

The UN has passed a number of resolutions to tackle maritime piracy in Somalia,¹⁸⁶ which give wide berth to foreign and international actors seeking to

179. See S.C. Res. 1918, *supra* note 3, ¶ 3 (calling upon participants to implement the resolution in full and "as soon as possible").

180. See The Djibouti Code Of Conduct Concerning The Repression Of Piracy And Armed Robbery Against Ships In The Western Indian Ocean And The Gulf Of Aden, Jan. 29, 2009, art. 2 [hereinafter "Djibouti Code"].

181. *Id.*

182. *Id.* art. 11.

183. *Id.* art 4(5) ("Any pursuit of a ship, where there are reasonable grounds to suspect that the ship is engaged in piracy, extending in and over the territorial sea of a Participant is subject to the authority of that Participant. No Participant should pursue such a ship in or over the territory or territorial sea of any coastal State without the permission of that State.").

184. Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20 *EUR. J. INT. L.* 399, 405 (2009).

185. Djibouti Code, *supra* note 179, art. 1(1)(a)(i).

186. See S.C. Res. 1816, *supra* note 136; S.C. Res. 1838, UN Doc. S/RES/1838 (Oct. 7, 2008); S.C. Res. 1844, UN Doc. S/RES/1844 (Nov. 20, 2008); S.C. Res. 1846, UN Doc. S/RES/1846 (Dec. 2, 2008); S.C. Res. 1851, UN Doc. S/RES/1851 (Dec. 16, 2008); S.C. Res. 1918, *supra* note 3; S.C.

address piracy in Somalia's territorial waters. If the resolutions were permanent and extended worldwide, they might help form the foundation of a sustainable and uniform body of international piracy law. However, the resolutions are limited by their geographic focus and short shelf-life, which is appropriate given concern that the Security Council not act as a legislative body.¹⁸⁷ The resolutions are nevertheless worth reviewing here because of their potential discursive and reactionary effect. The content, successes, and failures of the Security Council's Somali resolutions can provide insight into developing an effective body of international piracy law.

The first important resolution passed by the UN Security Council regarding Somali piracy was Resolution 1816.¹⁸⁸ Under the resolution's terms, states cooperating with Somalia's Transitional Federal Government (TFG) may enter Somalia's territorial waters and use "all necessary means" to repress acts of piracy and armed robbery, for up to six months.¹⁸⁹ Resolution 1950 of November 23, 2010 extended this legal framework for one year.¹⁹⁰ The resolution requires that states entering Somalia's territorial waters act consistently with applicable international law.¹⁹¹

The Security Council also passed Resolution 733 in 1992, which was an arms embargo against Somalia.¹⁹² The embargo, however, denies the TFG the means to successfully impose law and order on the country and may ultimately be counterproductive.¹⁹³ If the arms embargo is not lifted, Peter Lehr argues that third parties will be forced to deal with piracy through continuous patrolling and monitoring activities.¹⁹⁴ Regardless, third party monitoring has already become necessary. Take, for example, the European Union's Naval Force initiative.¹⁹⁵ However, in the long run, ad hoc third party patrolling and monitoring is likely to become costly¹⁹⁶ and possibly ineffective.

In 2010, the Security Council passed Resolution 1918.¹⁹⁷ This called on all

Res. 1950, UN Doc. S/RES/1950 (Nov. 23, 2010).

187. See generally Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 175 (2005).

188. S.C. Res. 1816, *supra* note 136.

189. *Id.*

190. S.C. Res. 1950, *supra* note 185.

191. S.C. Res. 1816, *supra* note 136, ¶ 7(a).

192. S.C. Res. 733, UN Doc. S/RES/733 ¶ 5 (1992) (implementing a "general and complete embargo on all deliveries of weapons and military equipment to Somalia" until further notice).

193. Lehr, *supra* note 9, at 7.

194. *Id.*

195. See EU NAVFOR, *supra* note 80.

196. See EUNAVFOR/27, *EU Naval Operations Against Somalia*, COMMON SECURITY AND DEFENSE POLICY (January 2011), http://www.consilium.europa.eu/uedocs/cms_data/docs/mission_Press/files/110118%20Factsheet%20EU%20NAVFOR%20Somalia%20-%20version%2027_EN.pdf (estimating the cost of NAVFOR's operations in its first year at \$11.3m).

197. S.C. Res. 1918, *supra* note 3.

states to criminalize piracy, to prosecute suspected Somali pirates, and to imprison convicted Somali pirates, in accordance with international human rights law.¹⁹⁸ Resolution 1918 is interesting in that it addresses Somali piracy by seeking a level of international legal and procedural uniformity at the domestic level. However, it does not specify the contents of such domestic laws and thus fails to promote a unified body of piracy law.

D. Treatment of Piracy Under Domestic Law

As the previous sections make clear, international laws that address piracy rely heavily on corresponding domestic law. The analysis in this section covers statutory, insurance, and commercial-contractual frameworks that address piracy issues in the domestic legal context. This overview presents a short examination of each of these frameworks as they operate in English law. As a common law system, English law presents formidable examples of both statute based and judicial developments in this area of law. Indeed, the common law tradition provides an opportunity for scholars to examine the law in often-detailed judicial interpretations, an opportunity that may not be otherwise available under civil law traditions. This, coupled with the author's background as an English lawyer, make English law a suitable case study for this article.

1. The Statutory Framework

From a statutory perspective, maritime piracy occupies a unique place in international law. This is because, under UNCLOS, pirates are arrested and captured on the high seas for committing a crime that is international by nature, but they are then punished and prosecuted by domestic laws and courts.¹⁹⁹ Unlike other international crimes, such as war crimes, which may be referred to international courts like the International Criminal Court or specialized regional courts such as the International Criminal Tribunal for Rwanda, crimes of piracy have no specialized international forum.

The fact that the global legal regime gives such broad discretion to states to enact domestic piracy legislation means "there is no uniformity of definition in the domestic legislation of different states."²⁰⁰ Some governments have adopted more inclusive definitions of piracy in their domestic laws. For instance, under the Kenya Penal Code of 1967, piracy occurs "in territorial waters or upon the high seas."²⁰¹ By contrast, the Philippine criminal laws only recognize piracy in the state's territorial waters.²⁰² United States law, on the other hand, only

198. *Id.*

199. Lawrence J. Khan, *Pirates, Rovers, and Thieves: New Problems with an Old Enemy*, 20 TULANE MAR. L. J. 293, 306 (1996).

200. Dubner, *supra* note 135, at 40.

201. Penal Code (1967) Cap. 63 § 69 (Kenya).

202. *See* Pres. Dec. No. 532 (1974) (Phil.) ("Any attack upon or seizure of any vessel, or the

recognizes piracy occurring on the high seas, like UNCLOS.²⁰³ Scottish case law suggests that any geographic distinction under piracy law is only relevant for the purposes of establishing jurisdiction but indicates that wherever it occurs, piracy is piracy because it involves the “same acts” with the “same consequences.”²⁰⁴

Similar variance is found with regards to piracy and motivations. English courts continue to recognize piracy only as an act committed for private ends, whereas courts in other countries, such as Belgium, have recognized as piracy acts committed for other ends as well.²⁰⁵ The recent 2009 Japanese Law on Punishment of and Measures against Acts of Piracy criminalizes as piracy²⁰⁶ acts committed for private ends in the high seas, territorial sea, and internal waters.²⁰⁷ Finally, some jurisdictions, like Spain, fail to characterize or codify piracy as a crime.²⁰⁸

There are a number of political and procedural issues that inhibit states from prosecuting pirates that are worth mention. First, there is the possibility that a pirate may seek and receive asylum if prosecuted in certain states.²⁰⁹ This is something states do not want to occur because it would carry far too many political costs. Indeed, granting asylum to pirates would promote the message that “piracy pays” and could thus encourage individuals to participate in acts of piracy.²¹⁰ For example, in January 2009, five Somali pirates were brought to

taking away of the whole or part thereof . . . by means of violence against or intimidation . . . committed by any person, including a passenger or member of the complement of said vessel, in Philippine waters, shall be considered as piracy.”)

203. 18 U.S.C. § 1651 (2000) (“Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United states, shall be imprisoned for life.”)

204. *Cameron v. H. M. Advocate* [1971] J.C. 50.

It was argued that piracy could take place only on the high seas, and that the actions in this case which were said to constitute piracy had all taken place within territorial waters . . . [This] difference relates simply to the basis of jurisdiction and nothing else. The same acts are involved and the same consequences. The same offence has been committed. If it is committed within territorial waters, there is automatic jurisdiction. If it takes place on the high seas, then jurisdiction is assumed if the qualifying conditions are satisfied.

Id.

205. See *Castle John v. NV Mabeco* [Court of Cassation] 77 ILR 537 (1986) (Belg.).

206. Jun Tsuruta, *The Japanese Act on the Punishment of and Measures Against Piracy*, AEGEAN REV. L. SEA & MAR. L. (2010).

207. Art. 2 of Law on Punishment of and Measures against Acts of Piracy (Japan).

208. See James Kraska and Brian Wilson, *Fighting Piracy*, ARMED FORCES JOURNAL (2009), <http://www.armedforcesjournal.com/2009/02/3928962>.

209. See Marie Woolf, *Pirates Can Claim Asylum*, SUNDAY TIMES, Apr. 13 2008, <http://www.timesonline.co.uk/tol/news/uk/article3736239.ece>.

210. See Bruno Waterfield, *Somalia Pirates Embrace Capture as Route to Europe*, TELEGRAPH, May 19, 2009, <http://www.telegraph.co.uk/news/worldnews/piracy/5350183/Somali-pirates-embrace-capture-as-route-to-Europe.html> (granting asylum to pirates might encourage pirates to surrender for that purpose).

trial in the Netherlands and two of them have expressed an intention to claim asylum.²¹¹ Second, there is a fear that detained pirates may invoke basic human rights law,²¹² which would complicate trials and could make prosecutions more expensive. Third, there is a particular procedural flaw insofar as gaps in domestic legislation constrain national courts from handling the prosecution of expatriated pirates.²¹³

This last point causes nations to be wary of receiving pirates because their efforts at capturing pirates may be in vain, as prosecutions become problematic,²¹⁴ if not impossible. For instance, in 2010 Danish naval forces freed ten pirates because there was no “option of having them tried.”²¹⁵ As Denmark is a signatory to the European Convention on Human Rights (ECHR), the Danish authorities could not hand the pirates over to the Somali authorities because the ECHR prohibits countries from delivering suspects to states “where they risk the death penalty or being tortured.”²¹⁶ Further, the Danish authorities also feared that no legal basis existed for extraditing pirates to Denmark for trial.²¹⁷

Some differences among international and domestic laws are inevitable. Moreover, practical and political issues will always arise. However, the world would benefit from a uniform body of international piracy law. This would provide a firm foundation on which states and private actors could rely, and which would encourage greater uniformity at the domestic level over time.²¹⁸ These differences, which can ultimately be attributed to the existence of universal jurisdiction over acts of piracy,²¹⁹ make the role of international law all the more important²²⁰ in influencing national laws to achieve uniformity both

211. *Id.*

212. See Passman, *supra* note 44, at 37.

213. See Tilde Kjær and Brendan Sweeney, *What to do with captured Pirates?*, DANISH INST. HUM. RTS., <http://www.humanrights.dk/news/archive/news+2010/what+to+do+with+captured+pirates>.

214. See *Why Do Naval Patrols Keep Releasing Somali Pirates?* LLOYDS LIST, Mar. 21, 2011, <http://www.lloydslist.com/ll/sector/regulation/article358854.ece>.

215. Kjær and Sweeney, *supra* note 212.

216. See *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 312 U.N.T.S. 221, art. 3 (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”).

217. Kjær and Sweeney, *supra* note 212.

218. See UN SCOR Report of the Secretary General, *supra* note 41, at 13, Part III(C)(17) (“The elements that are needed within the national jurisdiction for successful prosecutions are criminal offenses of piracy and armed robbery at sea; criminal responsibility of those who participate in, or attempt to commit, such offenses; provisions establishing national criminal jurisdiction over piracy offenses committed on the high seas; and the necessary evidentiary and procedural provisions to conduct prosecutions.”). See also MODEL NATIONAL LAW ON ACTS OF PIRACY AND MARITIME VIOLENCE, COMITÉ MARITIME INTERNATIONAL (Feb. 11-17, 2001) http://www.comitemaritime.org/Uploads/Yearbooks/YBK_2001.pdf.

219. UN SCOR Report of the Secretary General, *supra* note 41, at 14, Part III(C)(18).

220. See Passman, *supra* note 44.

vertically, between international and domestic laws, and horizontally, between domestic laws themselves.

2. The Insurance Framework

The insurance industry has developed special coverage that insures the shipping industry against the risk of piracy.²²¹ This coverage can be easily obtained in the market. Insurance coverage for piracy is standard in Institute Clauses for hulls, freight, fishing vessels, yachts, voyage, and port provisions.²²² For a number of specific clauses, such as those dealing with bulk oil and coal, piracy insurance may be negotiated on an individual basis.²²³ In modern markets, piracy is designated as a marine peril, but historically piracy has fluctuated between being treated as a marine peril and as a war peril.²²⁴ The latter arguably reflects an uncertainty as to how to precisely categorize ‘piracy’ as an insured peril.²²⁵

Piracy’s meaning in the insurance context must be distinguished from its meaning as utilized in international law or national legislation, or even its construction in a charter party or bill of lading.²²⁶ In contrast to cases dealing with carriage of goods, in marine insurance it is necessary to engage in “microscopic analysis of whether a particular activity is piratical, war-like, terrorist, malicious, or merely violent.”²²⁷ Consequently, conduct that might generally be regarded as piratical, but which is not strictly within the policy definition, will not be covered by the express inclusion of the piracy peril.²²⁸ A clear and uniform legal definition of ‘piracy’ would benefit all stakeholders, both legal and commercial, by limiting lawsuits over contractual obligations. This would then reduce the probability that contracting parties wind up in court.

In a purely finance-centric world, insurance coverage would provide a formidable mechanism to deal with the piracy problem. At the outset, it appears that a *win-win* situation emerges: companies are able to cover their losses and pirates are able to maximize their gains. This analysis does not, however, factor in the aggregate impact of insurance claims on prices, which may be passed on

221. See D. Rhidian Thomas, *Insuring the Risk of Maritime Piracy*, 10 J. INT’L MAR. L. 355, 371 (2004).

222. Institute Time Clauses Hulls 1/11/95, cl. 6.1.5; Institute Voyage Clauses Hulls cl.4.1.5.; Institute Time Clauses Freight 1/11/95, cl. 7.1.5.; Institute Voyage Clauses Freight 1/11/95, cl. 5.1.5.; Institute Fishing Vessels Clauses 7/20//87, cl. 6.1.5.; Institute Yacht Clauses 1/11/85, cl. 9.1.4.; Institute Time Clauses Hull Port Risks, 7/20/87, cl. 4.1.5.

223. Institute Bulk Oil Clauses 1/2/83; Institute Coal Clauses, 1/10/82.

224. See MICHAEL D. MILLER, *MARINE WAR RISKS* 1-9 (2d. ed., 1994).

225. Thomas, *supra* note 220, at 359.

226. *Id.* at 361.

227. Richard Williams, *The Effect of Maritime Violence on Contracts of Carriage by Sea*, 10 J. INT’L MAR. L. 343, 344 (2004).

228. Thomas, *supra* note 220, at 368.

to consumers via higher premiums.²²⁹ Further, as a *compensatory* device, insurance coverage lacks the prophylactic capabilities of other legal and political solutions. Indeed, insurance cannot prevent piracy from occurring. A singular focus on addressing the piracy issue through private sector insurance also fails to consider the human cost of piracy. Nor does it account for the emotional frustration experienced from a pirate attack and its impact on commercial relationships in the long run.

3. *The Commercial Contractual Framework*

From a commercial perspective, all of the principal actors of maritime industry, the shippers, cargo carriers, banks, and insurers of the ships and cargoes, are strongly affected by maritime piracy.²³⁰ While the statutory framework provides for the criminalization of piracy, the contractual framework allows private parties to define their obligations to one another and how loss should be allocated in the event a ship falls victim to piracy.²³¹ This often helps private parties limit their exposure to risk. Thus, whether a ship-owner or a charterer (a commercial leaseholder of a vessel) may rely on a specific contractual provision in a charter party (a contract between a ship-owner and merchant) following a piracy incident depends on the circumstances of the incident as it relates to the charter party.²³²

It is interesting to note that commercial contracts define piracy broadly as compared to the more restrictive definitions found in international law. For example, where UNCLOS restricts piracy to the high seas, commercial contracts tend to embrace all violent theft or attempted theft as piracy regardless of where it occurs.²³³ In the context of contracts of carriage, terms such as piracy are not to be construed in accordance with the tests and definitions of international or public law, but in accordance with the business and commercial meaning which a reasonable man would give to the term in their commercial context.²³⁴

Prior to the up swell of piracy in the Gulf of Aden, existing clauses dealing with piracy largely accomplished their function. But more recently, private parties have questioned their rights and obligations under existing clauses,

229. *ICC Condemns Piracy*, *supra* note 52 (noting a “tenfold increase in insurance premiums” in the Gulf of Aden).

230. See Dana Dillon, *Maritime Piracy: Defining the Problem*, XXV SAIS REV. 155, 157 (2005).

231. See Julian Clark, *Charter Terms Develop to Address Increased Piracy Risks*, HFW BULLETIN: COMMODITIES (Apr. 2, 2009), <http://www.mondaq.com/article.asp?articleid=76858>.

232. Baltic & Int’l Mar. Council (BIMCO), *Piracy: Where Do You Stand Contractually?*, General News (Dec. 15, 2008).

233. See *Athens Mar. Enters. Corp. v. Hellenic Mut. War Risks Ass’n* (“The Andreas Lemos”), [1983] Q.B. 647 (Bermuda) (giving an example of a marine insurance policy contract).

234. See *Kawasaki Kisen Kabushiki Kaisha v. Bantam Steamship Co.* (No. 2), [1939] 2 KB 544; *Republic of Bolivia v. Indemnity Mutual Mar Ass Co.* [1909] 1 K.B. 785, 790.

which have proved of limited assistance in certain circumstances.²³⁵ This emerging tendency fails to uphold certainty in the law as it generates competing interpretations of similar terminologies drafted solely for the purposes of advancing private, as opposed to public, legal interests. This interpretive nature of contractual development, leading to varying interpretations in court cases, has further undermined the consistency in interpretation and implementation of piracy law. In addition, the contractual development of legal constructs, such as piracy, lacks the democratic legitimacy and coherence found in a centralized legislator.

4. Case Study: England

In dualist states such as the United Kingdom, the courts regard international and domestic law as separate legal systems, and international law does not automatically apply within the English legal system. Usually Parliament must enact a statute adopting international law for that law to apply domestically.²³⁶ This is, of course, different from customary international law, which is applicable as general practice accepted by law.²³⁷ UNCLOS was incorporated into English law by the Merchant Shipping and Maritime Security Act 1997 (MSMSA).²³⁸ SUA was incorporated into English law by the Aviation and Maritime Security Act 1990 (AMSA).²³⁹ The Piracy Act of 1837²⁴⁰ at one time specifically criminalized piracy under English law but was effectively superseded by the MSMSA. The latter, however, inherited all the deficiencies of the UNCLOS regime, including its limitation of piracy to the high seas. Piracy in British territorial waters is therefore treated as a domestic offence, such as robbery, pursuant Section 2 of the Territorial Waters Jurisdiction Act 1878.

In the commercial-contractual context, English courts have restricted the freedom to contract vis-à-vis piracy to some degree. An example of this occurs with the courts' interpretation of liberty clauses, which are contractual provisions enabling the vessel to deviate course under specific grounds. When

235. Anna Wollin Ellevsen, *A Contractual View on Piracy*, 9 SHIPPING & TRADE L. 1, 1-3 (2009).

236. See generally Philip Sales and Joanne Clement, *International Law in Domestic Courts: the Developing Framework*, 124 L.Q. REV. 388 (2008).

237. In the context of customary international law, see *Trendtex Trading Corporation Corp. v. Central Bank of Nigeria*, 2 [1977] 2 W.L.R. 356 1977 (C.A.), 365 ("Seeing that the rules of international law have changed—and do change—and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law.")

238. Merchant Shipping and Maritime Security Act, 1997, c. 28 (U.K.), available at <http://www.legislation.gov.uk/ukpga/1997/28/contents>.

239. Aviation and Maritime Security Act, 1990, c. 31 (U.K.), available at <http://www.legislation.gov.uk/ukpga/1990/31/contents>.

240. Piracy Act, 1837, 7 Will. 4 & 1 Vict., c. 88, § 2 (U.K.), available at <http://www.legislation.gov.uk/ukpga/Will4and1Vict/7/88/introduction?view=extent>.

interpreting liberty clauses, English courts prefer clauses that are specific rather than general. The courts are therefore willing to enforce liberty clauses in cases of piracy if “piracy” is stated as a specific ground.²⁴¹ This provides a solution for those cases where a ship deviates course to avoid an unforeseen act of piracy, thereby incurring added costs it wishes to recover from its insurer.

Additionally, the international Hague-Visby Rules further restrain freedom of contract.²⁴² These provide that “neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . . perils, dangers and accidents of the sea or other navigable waters [or a]ny other cause arising without the actual fault or privity of the carrier”²⁴³

In the context of cases arising over insurance claims, English courts have considered both the geopolitical and commercial issues that arise in modern piracy when reaching their judgments.²⁴⁴ In so doing, they have sought to provide a degree of certainty to the shipping industry, whose business arrangements have been affected by foreseen and unforeseen acts of piracy.²⁴⁵

Ironically, in seeking certainty, the English courts have introduced uncertainty into the picture. The leading English case that considered the scope of an alleged act of piracy under a marine insurance policy concerned the vessel *Andreas Lemos*.²⁴⁶ In *The Andreas Lemos*,²⁴⁷ the court considered a marine insurance claim arising from an incident where a vessel owned by the plaintiff was attacked by armed men while anchored in the Chittagong Roads within the territorial waters of Bangladesh. The officers and crew of the vessel successfully repelled the attackers by firing pistols and rockets. The vessel owners claimed against the insurers for loss of materials and equipment by piracy. The insurers denied liability as the attack occurred in territorial waters and could not, they argued, constitute piracy. The court disagreed with the insurers’ argument and established that *in the context of a marine insurance policy*, a private contract, there was no reason to limit acts of piracy to acts committed on the high seas.²⁴⁸ The court reasoned:

[I]n the context of an insurance policy, if a ship is, in the ordinary meaning of the phrase ‘at sea’ . . . or if the attack upon her can be described as a ‘maritime

241. Williams, *supra* note 226, at 344.

242. Protocol To Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading Signed In Brussels on 25 August 1924, Brussels, Feb. 23, 1968, 51 Stat. 233, 1412 U.N.T.S. 128 [hereinafter “Hague-Visby Rules”].

243. *Id.* art. IV, rule 2 ¶¶ (c), (f), (q); *see also* STEPHEN D. GIRVIN, CARRIAGE OF GOODS BY SEA, 272, n. 100 (Oxford University Press, 2007) (“Seagoing pirates have been held to be a ‘peril of the seas.’”).

244. Keith Michel, *War, Piracy and Terror: the High Seas in the 21st Century*, 12 J. INT’L MAR. L. 313, 317 (2006).

245. *Id.* at 316-18.

246. *Athens Mar. Enters. Corp.*, [1983] Q.B. 647 (Bermuda).

247. *Id.*

248. *Id.* at 490 (Staughton, J.).

offence' . . . then for the business purposes of a policy of insurance she is . . . in a place where piracy can be committed.²⁴⁹

In the insurance context then, the court broadened the definition of piracy given under UNCLOS and enacted into English law by the MSMSA to beyond the high seas. Thus, in following *The Andreas Lemos*, it appears that English common law might recognize piracy against vessels in ports, docks, estuaries, and rivers.²⁵⁰ The key would be proving that the attack was a "maritime offense." There is no clarity, however, as to what constitutes a maritime offense. The *Andreas Lemos*²⁵¹ also established further common law rules about the nature of piracy, holding that "theft without force or threat of force" is not piracy for the purposes of marine insurance policies.²⁵²

The decision in *The Andreas Lemos*,²⁵³ however, cannot be easily reconciled with the decision in *The Republic of Bolivia*.²⁵⁴ The effect of the Court of Appeal's decision in *The Republic of Bolivia*²⁵⁵ is that piracy under a marine insurance policy is to be construed as piracy under what is now prescribed under UNCLOS, and thus does not include robbery on a river.²⁵⁶ Indeed, the court confined piracy to incidents occurring in "the ocean." On closer analysis, however, it appears that the *ratione decidendi* in *The Republic of Bolivia*²⁵⁷ was that piracy must be committed for private ends. In other words, it was the "private ends" proviso that was the decisive factor in the case. Thus, the Court of Appeal's confinement of piracy to "the ocean" was arguably decided *obiter*, given Lord Justice Vaughan Williams' admission that he wished to make the point only for himself, as the court did not need to decide the question of where the piracy was committed.²⁵⁸

Lord Justice Vaughan Williams further emphasized the distinction between piracy under international law and piracy under a marine insurance policy. The latter, His Lordship argued, must bear "a popular or business meaning."²⁵⁹

249. *Id.*

250. *See also* Bayswater Carriers Pte. Ltd. v QBE Insurance (International) Pte. Ltd., [2005] SGHC 185 (Singapore) (holding that an act of piracy can occur within territorial waters *or* on the high seas).

251. [1983] Q.B. 647.

252. *Id.* at 659. (Staughton, J.).

253. *Id.*

254. [1909] 1 K.B. 785.

255. *Id.*

256. Thomas, *supra* note 220, at 366.

257. [1909] 1 K.B. 785.

258. *Id.*

259. *Id.* at 791-92 (Vaughan Williams L.J.) ("Such an act may be piracy by international law, but it is not, I think, piracy within the meaning of a policy of insurance; because, as I have already said, I think you have to attach to piracy a popular or business meaning, and I do not think, therefore, that this was a loss by piracy." (quoting Pickford, J.)); *see also id.* at 790 (Pickford, J.) (noting the first instance in *The Republic of Bolivia* that "[O]ne has to look at what is the natural and clear meaning of the word 'pirate' in a document used by businessmen for business purposes; one must

Kennedy L.J. echoed the distinction in the same case, where His Lordship noted:

The authorities show that the word “piracy” is one capable of various shades of meaning, and that, even when used strictly as a legal term, it may be held to cover *different subject-matters* according as it is considered from the *point of view of international or that of municipal lawyers*.²⁶⁰

In conclusion, it appears that English courts will construe piracy on a case-by-case basis. Precedent, however, indicates that courts are willing to give piracy a broader definition than provided under international law, as was the case in *The Andreas Lemos*.

Readers should be mindful that U.K. courts have construed piracy more liberally than their international counterparts. To give an example, the Privy Council decided in 1934 in *In re Piracy Jure Gentium* that “a frustrated attempt to commit pirate robbery is equally piracy jure gentium.”²⁶¹ By contrast, the U.S. District Court for the Eastern District of Virginia decided that “actual robbery” is an essential element of piracy under U.S. law, and it refused to consider attempted robbery as piracy.²⁶² By comparison, as previously noted, UNCLOS does not explicitly mention attempted piracy in any of the articles in which piracy is considered. This demonstrates, once again, the dualistic nature of piracy law between international and national realms,²⁶³ as well as between states themselves, highlighting the need for greater synergy in the fabric of the law.

V.

PROBLEM-SOLVING: AFFIRMATIVE PROPOSALS FOR ACHIEVING LEGAL UNIFORMITY

The absence of a uniform and holistic approach to combat piracy on an international level has resulted in a lack of harmony, coherence, and effectiveness between and among the international and domestic legal orders. As this article has shown, often international and domestic laws work at cross-purposes to one another in the area of piracy, so that it is extremely difficult for countries to actually bring pirates to justice. This potpourri of laws therefore enables piracy to thrive. This in turn detrimentally affects the shipping and

attach to it a more popular meaning, the meaning that was given to it by ordinary persons, *rather than the meaning to which it may be extended by writers on international law*”) (emphasis added).

260. *Id.* at 802 (Kennedy L.J.) (emphasis added).

261. [1934] A.C. 586 (P.C.) 586.

262. *United States v. Said*, No. 2:10cr57, 2010 WL 3893761, at *2047 (E.D. Va, Aug. 17, 2010) at 11; *but see Hasan*, 2010 U.S. Dist. LEXIS 115746, at *99 (noting that “[a]s of April 1, 2010, the law of nations, also known as customary international law, defined piracy to *include* acts of violence committed on the high seas for private ends *without an actual taking*”) (second emphasis added).

263. See Eugene Kontorovich, *The “Define and Punish” Clause and the Limits of Universal Jurisdiction*, 103 N.W. L. REV. 149, 166 (2009) (“[I]n addition to piracy under the law of nations, different nations made diverse offenses ‘municipal’ or ‘statutory piracies.’”).

tourism industries, has the potential to increase the cost of commodities and insurance premiums, and occasionally has a devastating impact on people's lives. Uniformity allows commercial entities to adequately plan their business strategy, insurance providers to properly devise their policies, and law enforcement agencies to synchronize their activities. The issue then is, what is the best way to encourage uniformity in piracy law.

One alternative for encouraging uniformity might be expanding the use of universal jurisdiction. Universal jurisdiction allows any state to prosecute and try international crimes "without any territorial, personal, or national-interest link to the crime in question."²⁶⁴ But universal jurisdiction in this sense typically applies to "core international crimes" such as crimes against humanity, genocide, torture, and war crimes.²⁶⁵ Nor is universal jurisdiction universally recognized. Some states have passed legislation authorizing their courts to employ universal jurisdiction.²⁶⁶ But a recent survey by Máximo Langer of the use of universal jurisdiction for the core international crimes since 1961 indicates that of 1,051 possible defendants, "only 32 have been brought to trial."²⁶⁷ Piracy was not included in the study.

The doctrine of universal jurisdiction provides that any nation *can* try pirates it captures *on the high seas*.²⁶⁸ As this article has shown, a system of law governing piracy *solely* in the high seas is of limited value.²⁶⁹ In the absence of uniform municipal antipiracy laws, it is arguable that the doctrine of universal jurisdiction actually inhibits the development of uniform principles of law as it grants the arresting nation the freedom to try the pirate according to their domestic laws.²⁷⁰

Another alternative for encouraging uniformity would be through the development of customary international law, which consists of "general practice accepted as law" by all states.²⁷¹ But there are legitimacy problems associated with relying on customary international law because there can be disagreement among states about what exactly the custom is, since custom is continually evolving and is not a codified body of law.²⁷² An international convention such

264. Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT'L L. 1, 1 (2011).

265. *Id.*

266. *Id.* at 2.

267. *Id.* at 7.

268. Kontorovich (Guantanamo), *supra* note 30.

269. *See* Kontorovich and Art, *supra* note 141.

270. UN SCOR Report of the Secretary General *supra* note 41, Part III (A)(12) ("Universal jurisdiction is 'permissive', which means that States are entitled to exercise jurisdiction, but are not obliged to do so.")

271. *See generally* Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 1060 (1945).

272. At least one court has argued that UNCLOS embodies international customary law. *Hasan*, 2010 U.S. Dist. LEXIS 115746, at *99.

as a treaty, however, would be hard evidence demonstrating states' consent to submit to new developments in international piracy law. Further, a number of scholars argue that customary international law is secondary to "international conventions . . . establishing rules expressly recognized by the contesting states."²⁷³ Thus, wherever existing international law such as UNCLOS or the SUA conflict with emerging custom, the former should be controlling. This would impede any attempt by customary international law to extend UNCLOS' geographic restriction of piracy to the high seas.

A third alternative for encouraging uniformity in international piracy law would be to create a protocol for piracy law, or a treaty supplementing an existing treaty like UNCLOS or SUA. The problem with creating a protocol rather than a treaty is that protocols typically amend or add provisions to a parent agreement. The scope of a protocol is thus limited by the original purview of the parent agreement. Signatories to the parent agreement would not, under international law, be bound by the protocol. Finally, a protocol on piracy law would indicate that the problem is not serious enough to merit a new treaty, thus undermining the impact of the instrument *ab initio*.

The best alternative for encouraging uniformity is to develop a comprehensive body of international piracy by way of a treaty. The author argues that the Treaty's central objective could be stated as follows:

To reform the international legal order by creating a body of international maritime piracy law *sui generis*,²⁷⁴ capable of enforcement under the aegis of a specialized Court, which reflects the international nature of modern piracy and the need to achieve legal uniformity across States, whilst promoting regional and international co-operation to accomplish those objectives.

A treaty would clearly communicate that piracy is a problem that states take seriously and it would clarify which laws states wanted to submit to for governing this problem. A treaty could also close the legal loopholes, fill the legal voids, and encourage harmonization between and among international and domestic piracy laws. Moreover, aside from including provisions that specifically encourage harmonization, a treaty could provide a new model for states to follow in their domestic treatment of piracy. Other advantages of treaties are that they articulate specific global norms, promote a framework to

273. Statute of the International Court of Justice, *supra* note 270, art. 38, ch. 2; see M.E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES, A STUDY OF THEIR INTERACTIONS AND INTERRELATIONS WITH SPECIAL CONSIDERATION OF THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 35 (1985) ("[S]ome authorities maintain that Art. 38, by mentioning treaties before customary law, embodies at least the *lex specialis* rule, or it established a sequence of the factual importance of the sources, and of the relative ease of the ascertainment of the respective rules.").

274. See *SS Lotus (Fr. v. Turk.)* 1927 P.C.I.J. (ser. A) No. 10, at 70 (Sept. 7) ("Piracy . . . in its jurisdictional aspects, is *sui generis*. Though statutes may provide for its punishment, it is an offense against the law of nations; and as the scene of the pirate's operations is the high seas, which is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind - *hostis humani generis* - whom any nation may in the interest of all capture and punish.").

recognize compliance with such norms, establish enforcement mechanisms, provide a benchmark for measurement of progress, and provide criteria to guide contracting parties' activities and legislation.²⁷⁵

Although this article will neither attempt to embellish nor particularize the form of such a treaty, it will set out a general framework, providing a basis on which further work can be carried out. Specifically, the treaty should address potential legal and practical reforms. Legal reforms are needed in two particular areas: (a) the substantive law (the legal definition of piracy) and (b) judicial mechanisms for handling piracy (such as the creation of specialized regional judicial forums).²⁷⁶ In terms of practical reforms, the convention should address three issues: (a) regional cooperation; (b) Somalia-based support; and (c) shipping industry best practices.

To date there has been "no unified pressure from national governments for a new *international* convention on the subject."²⁷⁷ This may be because achieving uniformity in international piracy law is an ambitious project. It would most certainly engender initial disagreements over the proper balance between more latitude for apprehending pirates and notions of state sovereignty, as well as preferences for flexibility in local policy. Additionally, the fact that piracy is a crime²⁷⁸ complicates the standardization of domestic laws in this area, as criminal law tends to reflect the social, religious, institutional,²⁷⁹ and political norms of a state.²⁸⁰ States may have been reluctant to negotiate a new agreement because they do not yet perceive current piracy incidents as sufficiently serious to create momentum for a new international convention.²⁸¹ Finally, negotiating a new international treaty is time-consuming.²⁸²

Nevertheless, piracy incidents are sufficiently serious to merit the consideration of a new treaty, and one that is solely focused on sea piracy and is capable of encompassing the contemporary characteristics of the crime. The significant cost to the world economy and human life outweighs concerns about time, expense, and other hurdles inherent in the international legal process.

275. This situation may be compared to that of the non-proliferation of nuclear weapons. *C.f.* NICOLE DELLER ET AL., *RULE OF POWER OR RULE OF LAW? XIII* (2003).

276. See UN SCOR Report of the Secretary General, *supra* note 41.

277. Frank Wiswall et al., *Report of the Joint International Working Group: Piracy*, COMITÉ MARITIME INTERNATIONAL, 209 Yearbook 2001 Annuaire, http://www.comitemaritime.org/Uploads/Yearbooks/YBK_2001.pdf.

278. S.C. Res. 1918, *supra* note 3 (calling on states to criminalize piracy under domestic law).

279. See UN SCOR Report of the Secretary General, *supra* note 41, Part III(C) ¶ 18 (noting that national courts sentence pirates according to their "own traditions"); and see Kontorovich (Equipment Articles for Prosecution), *supra* note 94, at 6 ("[I]nternational law leaves much of the secondary aspect of criminal law – rules about conspiracy, attempts, evidence and rules of procedure – to the discretion of national legislation.")

280. *But see* UN SCOR Report of the Secretary General, *supra* note 41, Part III(C) ¶ 18 (affirming that legal systems tend to accord an appropriately serious penalty to the crime of piracy).

281. Murphy, *supra* note 9, at 179.

282. See, e.g., Mejjia and Mukherjee, *supra* note 31, at 322.

Indeed, the international maritime community has recognized that, at the very least, UNCLOS's piracy provisions require reform.²⁸³ Further, the European Union's Committee on Legal Affairs and Human Rights has noted that: "the international law framework needs to be modified if it is to serve modern needs effectively."²⁸⁴ To the extent that piracy incidents continue to increase in frequency and severity, as with the recent deaths of American sailors, this may place more pressure on states to negotiate a new agreement pertaining to piracy. In order to save time and build momentum, the treaty should be promoted by an established international organization such as the UN's IMO.

A. Legal Reform

1. Substantive Aspects of an International Maritime Piracy Treaty

First, the proposed treaty (hereby called the United Nations Treaty Against Maritime Piracy, or 'UNTAMP') should create a new definition of piracy that is broader and more inclusive than the existing definition under UNCLOS. To this end, the new definition of piracy must focus on the act of conversion or theft of a vessel (or of its cargo), and not motivations for that theft. This would clarify that any conversion or theft is an act of piracy, whether conducted for private, political, or ideological ends. The new definition should also broaden the geographic range in which piracy may be committed to include those acts occurring in territorial waters.²⁸⁵ If this is too broad, it should be recognized in at least those territorial waters that are common international shipping lanes, as specified in the treaty. Alternatively, piracy might be recognized in territorial waters under a limited set of conditions. Similarly, UNCLOS's implicit two-ship requirement should be clearly abolished so that a ship's internal seizure also constitutes piracy.

Second, other aspects of piracy should be criminalized. Thus, UNTAMP should contemplate a framework for criminalizing inchoate offenses, such as the solicitation to commit an act of piracy and conspiracy to commit piracy. This would provide a stronger net for effectively prosecuting pirates, and it might give wider berth for apprehending would-be pirates floating on the high seas or in territorial waters waiting for a target. Similarly, UNTAMP should recognize the offense of attempted piracy. That way pirates that are repelled can be pursued and apprehended. Finally, the treaty should suggest that courts consider aggravating factors when sentencing, such as kidnapping for ransom, injury to

283. *Id.*

284. *The Necessity to Take Additional International Legal Steps to Deal with Sea Piracy*, Report of the Committee on Legal Affairs and Human Rights, COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY (Apr. 6, 2010), <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12194.htm> [hereafter "Necessity of Additional Steps"].

285. Madden, *supra* note 116, at 141.

crew or passengers, and property damage to the vessel and cargo.

Third, UNTAMP should provide states with better tools to apprehend, prosecute and imprison pirates. To this end, the treaty should authorize reverse hot pursuit such that states pursuing pirates on the high seas may enter the contiguous zone, Exclusive Economic Zone, and territorial waters of the coastal state for the purpose of apprehension.²⁸⁶ Requiring prior consent from the coastal state is unadvised, as this would weaken the flexibility of navies and their ability to act decisively when capturing pirates. Correspondingly, the state that enters the territorial waters of another country to apprehend pirates should be authorized to assert jurisdiction over the crime in domestic courts, thereby retaining and extending UNCLOS's grant of universal jurisdiction to states for the crime of piracy. For those states that do not have the capacity to prosecute the pirates they have apprehended, UNTAMP could establish a specialized regional or international judicial forum for such prosecutions, as argued below. This would require a corresponding provision for the imprisonment of pirates convicted by the regional or international judicial forum, for example by mandating that states enter regional agreements for this purpose.

To the extent that piracy is prosecuted in domestic courts, the treaty should leave sentencing to the discretion of states. But to the extent that states rely on regional or international forums to prosecute pirates, the treaty should set forth sentencing guidelines for such forums. These might also act in a dual capacity as suggested guidelines for states adopting or reforming sentencing guidelines. Of course, UNTAMP should recognize that piracy is also subject to international human rights law, such as a right to a fair hearing. This would encourage states to guarantee pirates' basic human rights anywhere in the world.²⁸⁷ If possible, the treaty should permit states to refuse asylum status to convicted pirates. This would resolve a current problem faced by some countries, such as Denmark and the Netherlands, and would eliminate any incentives for individuals to utilize piracy as a fast track to asylum status.

Fourth, the treaty ought to establish or direct that states establish information centers to coordinate and streamline global incident reporting and other data relevant to the suppression of piracy. UNTAMP could absorb current regional efforts at creating information centers and provide for a central coordination of information, thereby maximizing the availability of data to all participating states. Such data is important for developing an accurate understanding of the magnitude of the piracy problem. This could in turn facilitate the design of constabulary strategies that are more efficient and can be rolled out faster in response to pirates' shifting tactics.

286. See *Necessity of Additional Steps*, *supra* note 283, ¶ 93 ("Adoption of a new treaty on policing at sea, based on agreed mechanisms for obtaining any necessary flag or coastal state consent, is a possibility.").

287. The human rights suggested herein would be narrow, e.g., the right to a fair trial, since a broad construction of human rights would include rights like freedom from the death penalty, which would challenge many jurisdictions.

Finally, UNTAMP could render ransom payments illegal under international law. This point is supported by Professor John Norton Moore, of the Virginia University School of Law, who suggested that the IMO develop a new treaty requiring countries to make the practice of payment of ransom illegal.²⁸⁸ As Kraska notes, “although this would not stop all payment of ransom, it would make it easier for ship owners to decline payment for hostages, reducing the benefits that pirates expect for their crimes.”²⁸⁹ The logic here is to eliminate the fundamental motivations of the crime by removing the *economic incentive* to commit piracy.

2. An International Piracy Court

Successful investigation and prosecution not only requires a statutory basis for effective prosecution, enforcement, and, if necessary, extradition procedures, but also functioning judicial institutions. In a number of critical cases concerning Somali pirates, such procedures have been found lacking.²⁹⁰ For this reason, UNTAMP should seriously consider establishing a new court, imbued with investigative powers, to try pirates.

The idea for such a court has already been debated in the Somali context,²⁹¹ and so it makes sense to discuss the conversation in brief here.²⁹² In particular, Russian President Dmitry Medvedev has called for creating an international court to try Somali pirates.²⁹³ But there has been strong opposition from the U.S., U.K., and other states that are active in counter-piracy efforts.²⁹⁴ This is because such tribunals take a long time to set up, are very expensive to run, and their trials often last for years.²⁹⁵ Given the high cost of piracy, reaching into the billions,²⁹⁶ including increasing ransom payments, it would be cheaper to “pool funds for a common cause once than to continue to suffer huge

288. John Norton Moore, Toward a More Effective Counter-Piracy Policy, at the Booz Allen Hamilton Maritime Piracy/Counter Piracy Workshop (Jun. 12, 2009) in James Kraska, *Coalition Strategy and the Pirates of the Gulf of Aden and the Red Sea*, 28 COMP. STRATEGY 197, 216 n. 76 (2009).

289. Kraska, *supra* note 287.

290. Michel, *supra* note 243, at 317.

291. See Waterfield, *supra* note 209.

292. Spain proposed this solution. *Somali Pirates Will Be Prosecuted by an International Anti-piracy Tribunal*, SPANISH REVIEW, Dec. 9, 2010, <http://www.spainreview.net/index.php/2010/12/09/somali-pirates-will-be-prosecuted-by-an-international-anti-piracy-tribunal/>.

293. *Medvedev Calls for Creating International Court for Sea Pirates*, MARITIME CONNECTOR, Jul. 14, 2009, <http://www.maritime-connector.com/NewsDetails/4255/lang/English/Medvedev-calls-for-creating-international-court-for-sea-pirates.whtml>.

294. The United States opposes an international court of maritime piracy. Andrei Ptashnikov, *USA Is Against International Piracy Court*, THE VOICE OF RUSSIA, Dec. 8, 2010, <http://english.ruvr.ru/2010/12/08/36456887.html>.

295. John Knott, *Somalia, the Gulf of Aden, and Piracy: An Overview, and Recent Developments*, HOLMAN FENWICK WILLAN (2009), www.hfw.com/articles.

296. See Bowden, *supra* note 56.

losses every year.”²⁹⁷

The UN Secretary General also appears to support the idea of a better forum or forums for handling Somali pirates. In July 2010, it produced a report (hereafter “the Report”) on “options to further the aim of prosecuting and imprisoning [Somali pirates].”²⁹⁸ The Report produced seven options for the Security Council’s consideration, which are as follows.

The first option of the Report recommends the enhancement of United Nations assistance to build capacity of regional states to prosecute and imprison persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia. This is already in progress, as the UN Office on Drugs and Crime has provided concrete assistance to both Kenya and the Seychelles for exactly this purpose.²⁹⁹ The second option proposes the establishment of a Somali court sitting in the territory of a third state in the region (like in the Gulf of Aden),³⁰⁰ either with or without the assistance of the United Nations.³⁰¹ However, identifying a regional state willing and able to provide the facilities for hosting a Somali court may present challenges because assistance to the Somali court under this option would not benefit the host state’s criminal justice system. On a positive note, this option may enable Somalia to play a role in the solution to the problem of piracy and engineer the capacity building of the Somali judicial system, thereby contributing to strengthening the rule of law in that country.³⁰² Alternatively, the Report suggested, as its third and fourth option, the establishment of a special chamber within the national jurisdiction of a state or states in the region, with³⁰³ or without³⁰⁴ United Nations participation.

297. Ptashnikov, *supra* note 293.

298. See S.C. Res. 1918, *supra* note 3, ¶ 4 (providing a legal basis for this argument insofar as it:

Requests the Secretary-General to present to the Security Council within 3 months a report on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the CGPCS, the existing practice in establishing international and mixed tribunals, and the time and the resources necessary to achieve and sustain substantive results.)

299. See COUNTER PIRACY PROGRAMME: SUPPORT TO THE TRIAL AND RELATED TREATMENT OF PIRACY SUSPECTS, UNITED NATIONS OFFICE ON DRUGS AND CRIME (Feb. 2011) http://www.unodc.org/documents/easternafrika/piracy/20110209.UNODC_Counter_Piracy_February_Issue.pdf.

300. See also Butcher, *supra* note 130, at 10 (calling for “a specialized international anti-piracy . . . preferably in Africa and associated with the African Union”).

301. Sixth Plenary of the CGPCS, *supra* note 6, at 3 (noting that France proposed locating “a special Somali Court relocated [in] a State in the region, with international support”).

302. UN SCOR Report of the Secretary General, *supra* note 41, at 3.

303. See *id.* (Option 3).

304. *Id.* (Option 4).

The fifth, sixth, and seventh options are more in line with this author's argument. The fifth option considers the establishment of a regional tribunal on the basis of a multilateral agreement among regional states, with United Nations participation. This option would require a multilateral treaty to be negotiated among regional states, ideally Somalia. The UN would assist the creation of the tribunal with input and advice by UN judges, prosecutors, and staff. The benefit of this option includes capacity building for the participating regional states, proximity for the purpose of the transfer of suspects by patrolling naval states and the transfer of those convicted to third states for imprisonment. The drawbacks include the need to establish the jurisdiction of a new tribunal, time, and costs.³⁰⁵

The sixth option suggests the establishment of an international tribunal on the basis of an agreement between a state in the region and the United Nations. This option would require an agreement between the United Nations and the state concerned to establish an international tribunal with both UN and national components. As the Report notes, "the practice has been to establish such tribunals with United Nations selected judges in the majority."³⁰⁶ However, there may be challenges associated with the establishment of a tribunal with Somalia at present as the latter's institutional standards³⁰⁷ are likely inadequate. If the host state were Kenya or Seychelles, the tribunal would benefit from the host State's growing and existing expertise and resources. The costs and benefits mirror those of the fifth option.³⁰⁸

While all of these would be positive steps, none of these options is equivalent to a truly international court, which would enable the prosecution of any pirate no matter where the act of piracy occurred. An international court for all incidents of piracy is valuable because piracy occurs in places other than the Gulf of Aden and the Indian Ocean. Indeed, as briefly discussed above, piracy is becoming a serious problem in South Asia too.³⁰⁹

Thus, the seventh and last option recommends the establishment of an international tribunal by Security Council resolution under Chapter VII of the Charter of the United Nations. Such a tribunal would consist of entirely United Nations selected judges, prosecutors and staff, and may be located in a region other than the Gulf of Aden. The tribunal could nonetheless incorporate a regional component by including judges from the region, including Somalia.

The benefits of this option are that it: (1) holds greater capacity than a special chamber within a national jurisdiction and (2) the Security Council is

305. *Id.*

306. *Id.*

307. See S.C. Res. 1918, *supra* note 3 (the Preamble states: "Stressing the need to address the problems caused by the limited capacity of the judicial system of Somalia and other States in the region to effectively prosecute suspected pirates.").

308. UN SCOR Report of the Secretary General, *supra* note 41, at 4-5.

309. See Sakhuja, *supra* note 134.

able to require the cooperation of third states with the tribunal through its resolution under Chapter VII. The shortcomings of this final option include higher costs, especially if the tribunal is not located in the region. Costs might be incurred if a suspect was apprehended far from the tribunal, and then again, if the convicted pirate were transferred back to a prison in the region where the act of piracy was committed. A possible solution to the proximity issue is to establish different branches of the international tribunal in the most piracy prone areas of the world, under the auspices of the United Nations.

The establishment of an international tribunal raises a number of issues, a detailed treatment of which is beyond the scope of this paper. The following few paragraphs will discuss these issues in brief, however, to give the reader an idea of what these issues are and how they might be resolved. The issues primarily include sovereignty and funding issues.

With regards to the sovereignty issue, an international tribunal impinges on the “primacy-complementarity” dilemma. The principle of primacy dictates that an international court has supremacy over domestic courts, whereas the principle of complementarity allows that state courts complement international law by providing for domestic prosecution of international law crimes.³¹⁰ Primacy would be valuable because it is the best way to ensure uniform common law development and standardization in the application of the new body of piracy law as codified in the treaty. But complementarity provides a more realistic platform in the present international legal order. One way around this problem might be to grant the international piracy court “primacy over national jurisdictions” on the issue of piracy broadly or for a specified subset of piracy incidents.³¹¹ Another way around it might be for countries to be allowed to unilaterally grant or revoke their acceptance of the international court’s primacy. But in light of national sovereignty concerns and the current trend in international criminal law, complementarity may be the only available option.³¹² As such, the new tribunal would have jurisdiction only if there were no state willing and able to investigate and prosecute.³¹³

With regards to funding issues, an international court would depend on financing from a number of states and/or organizations. The issue is a complex one because some states may argue that as they are rarely affected by piracy they should not be required to make disproportional contributions to funding a court from which it will seldom derive benefit. Such an argument is flawed,

310. Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the Int’l Criminal Court*, 167 MIL. L. REV. 20, 23, 26 (2001).

311. UN SCOR Report of the Secretary General, *supra* note 41.

312. See Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998). Article 1: “An International Criminal Court (“the Court”) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and *shall be complementary to national criminal jurisdiction.*” (emphasis added).

313. UN SCOR Report of the Secretary General, *supra* note 41.

however, because a state cannot predict with precision whether it, or its citizens, will be affected by piracy. Further, as an international crime, piracy is likely to affect a number of states simultaneously. Accordingly, a specially designated fund should be created with contributions required from all signatory states to UNTAMP, as well as voluntary contributions from industries and organizations with a vested interest in suppressing piracy (e.g., protection and indemnification clubs, shipping associations, oil companies).

B. *Practical Reform: Promoting Security*

At the practical level, solutions should essentially focus on the promotion of three aspects of security: (a) regional cooperation, (b) Somali-based support, and (c) shipping industry best practices. Cooperation between states is crucial to resolving the piracy problem, particularly in the areas of crime investigation, constabulary action, and punishment. Somali piracy is unique because it is rooted in a country that lacks any effective national administration. To this end, the suppression of piracy off the coast of Somalia ultimately depends on the country's political reform.³¹⁴ In the meantime, ship owners can also employ a number of mechanisms to protect their vessels from piratical attacks. This section of the paper will accordingly provide an overview of how UNTAMP might facilitate the implementation of shipping industry best practices.

1. *Regional Cooperation*

The enhancement of international and regional cooperation is fundamental to achieving global maritime security.³¹⁵ As John Knott, a consultant on piracy law at Holman Fenwick Willan LLP argues, “[T]he benefits of international cooperation are becoming visible in some parts of the world and with increasing evidence of the willingness of naval forces to intervene when piracy occurs.”³¹⁶ However, a key obstacle to regional cooperation is that “the desire for change, particularly if it requires the reordering of national priorities, has to be driven internally. Defeating [piracy] requires an honest, effective, and determined police and criminal justice system.”³¹⁷ To this end, in its Sixth Plenary Meeting the members of the CGPCS have agreed that: “It is . . . of paramount importance to continue to enhance international cooperation in finding ways and means to

314. I do not explore the point in great detail here, but an alternative to accelerate political reform in Somalia would be to categorically accept that it is an invariably failed state and thus recognize Somaliland and Puntland as independent states.

315. Maurizio Moreno, President, International Institute of Humanitarian Law, *Introductory Address at the Addressing the Resurgence of Sea Piracy: Legal, Political and Security Aspects Conference* (June 16, 2009), available at <http://www.iihl.org/iihl/Documents/Ambassador%20Speech%20PIRACY.pdf>.

316. John Knott & Toby Stephens, *Piracy and Terrorism at Sea*, HOLMAN FENWICK WILLAN (2008), <http://www.hfw.com/articles>.

317. Murphy, *supra* note 9, at 174.

address piracy attacks in an effective manner.”³¹⁸ Cooperation will need to continue in three main areas: piracy investigations, constabulary enforcement, and prosecution and sentencing of pirates.³¹⁹ UNTAMP could set out a framework for states to cooperate in these respects.

a. Investigatory Efforts

There is a need for stronger investigations into pirate activities. In order to assist domestic criminal agencies in the detection of piracy activity, including the identification of land-based networks, states must share information about pirates and their organizations, if any, centralize the reporting of piracy incidents, and investigate pirates’ funding sources. In this context, “tracing of funds used to finance piracy attacks including the tracking of ransom payments continues to remain a significant part of a broad anti-piracy strategy.”³²⁰ In its Sixth Plenary Meeting, the CGPCS encouraged nations and international organizations to tackle this problem “in a proactive way” and urged “close cooperation among competent national authorities of Participating States and INTERPOL in fulfilling this task.”³²¹ In January 2010, the IMO issued a Code of Practice urging states to investigate all acts of piracy and armed robbery against ships under their jurisdiction, as well as to report to the IMO pertinent information on all investigations and prosecutions relating to these acts.³²² In a similar vein, the Djibouti Code of Conduct established a center for gathering information on pirate incidents. Thirteen nations have signed the Code, including Somalia, Yemen, Kenya, and the Seychelles.³²³ As noted earlier, ReCAAP also provides for information sharing between Asian states. However, a one-stop international reporting center is needed to enable states to fully understand the global nature of piracy.³²⁴

b. Constabulary Action

Signatories to UNTAMP will have to promote constabulary action at both domestic and international levels. To this end, the current ad hoc naval operation in the Gulf of Aden and Indian Ocean will have to continue until states adopt a definitive legal framework to combat piracy or, in the case of Somalia, an

318. Sixth Plenary of the CGPCS, *supra* note 6, at 1.

319. See IMO, *Code Of Practice For The Investigation Of Crimes Of Piracy And Armed Robbery Against Ships*, A 26/Res.1025, 18 January 2010 [hereafter “IMO Code of Practice”].

320. Sixth Plenary of the CGPCS, *supra* note 6, at 5.

321. *Id.*

322. IMO Code of Practice, *supra* note 318, at 2.

323. *Saudia Arabia Signs Djibouti Anti-Piracy Code*, MARITIME EXECUTIVE, Mar. 11, 2011, <http://www.maritime-executive.com/article/saudi-arabia-signs-djibouti-anti-piracy-code/>

324. See the International Maritime Bureau’s twenty-four hour piracy reporting center as a potential model at <http://www.icc-ccs.org/home/piracy-reporting-centre>.

effective land-based solution emerges in the country. Further, major maritime states should promote cooperation for training local coast guards and providing of patrol craft, thus shifting responsibility for counter-piracy to the states of the neighborhood.³²⁵

Another possible constabulary action is for a coalition of states to adopt an “ink blot strategy” for pirate-generating regions.³²⁶ The British in Malaya first successfully used this strategy against communism.³²⁷ There, the British enhanced the living conditions in communist regions, such that the locals no longer wished to fight against the British troops. They then expanded the areas of wellbeing out “like ink blots.”³²⁸ In Somalia, the inkblot strategy might combine social improvement projects in local towns with the capture and detention of pirates by local law enforcement.³²⁹ Unfortunately, the inkblot strategy might be difficult to effectuate given the Somali state’s ineffectiveness.

c. Prosecutorial and Sentencing Cooperation

In the absence of an international piracy tribunal, bilateral or multilateral agreements with states like Kenya to prosecute regionally captured pirates provide a temporary workable solution in the implementation of international legal norms.³³⁰ The country’s limited resources in this area preclude it from providing a permanent solution to the piracy problem in the region. Kenya’s institutions are currently burdened by a plethora of cases, which will inevitably cause an overload, backlog, and inefficiencies in the Kenyan legal system, hindering piracy trials.

Denmark, Oman and other countries have stated: “[D]eveloping standard rules for arrest, detention and criminal prosecution of pirates is the most pressing issue for suppressing piracy.”³³¹ This concern was also expressed in the Preamble to UN Security Council 1918, which affirmed “that the failure to prosecute persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia undermine[s] international anti-piracy efforts.”³³² UNTAMP should therefore provide for a general framework for the arrest, expatriation, prosecution, and imprisonment of pirates.

325. Kraska, *supra* note 287, at 142.

326. Butcher, *supra* note 130, at 10.

327. *Id.*

328. *Id.*

329. *Id.*

330. Gopalan and Switzer, *supra* note 145.

331. Kraska and Wilson, *supra* note 207.

332. S.C. Res. 1918, *supra* note 3, Preamble.

2. Somalia-Based Support

Law cannot be divorced from politics.³³³ Historical analysis demonstrates how “the surest way to create peace at sea is to impose the rule of law on the lands where the pirates hid.”³³⁴ This requires the sufficient galvanization of political will and capital to engineer a land-based operation. Somalia’s permissive political environment and under-resourced law enforcement exacerbates the problem and provides a platform whereby pirates can operate almost risk-free.

Jon Mak reiterates the long-held argument that as a long-term solution, Somalia would need to alleviate poverty³³⁵ and employ good governance measures in order to deal with piracy effectively.³³⁶ In the absence of structured employment opportunities, piracy is an attractive alternative profession. Indeed, piracy is a “logical way out of misery, since waiting for the nonexistent government to step in would be equal to starving to death.”³³⁷ If international actors could develop international legal instruments to address factors such as poverty and unemployment in coastal communities,³³⁸ it would reduce the incentives for piracy.

The underlying solution to Somali piracy can only be achieved by the national reconstruction of the country. To this end, there is a strong need “for well-coordinated efforts in the field of regional capacity-building by all international players involved, in close cooperation with the Transitional Federal Government of Somalia and regional authorities.”³³⁹ In particular, a sustainable solution requires the establishment of effective governance, the rule of law, reliable security agencies, and alternative employment opportunities for the Somali people.³⁴⁰ Further, education may also play a vital role in preparing the next generations of Somalis, particularly the youth, to raise awareness of the risks associated with involvement in piracy and other criminal activities.³⁴¹

333. Shaw, *supra* note 123, at 75.

334. Boot, *supra* note 14, at 102.

335. See Robert R. Frump, *Poverty and Political Instability in Somalia Foster Growth of Piracy*, SHIPPING DIGEST, Jan. 12, 2009, at 11.

336. Joon Num Mak, *Going on the Offensive: Taking the Fight to Pirates and Terrorists*, Presentation at the Institute of Southeast Asian Studies’ Public Seminar, Securing the Malacca Straits: Developments, Challenges and Opportunities held by the Institute of Southeast Asian Studies (Aug. 23, 2004), in Lehr, *supra* note 9, at 93.

337. Peter Lehr and Hendrick Lehmann, *Somalia – Pirates’ New Paradise*, in Lehr, *supra* note 9, at 14.

338. Lehr, *supra* note 9, at xi.

339. Sixth Plenary of the CGPCS, *supra* note 6.

340. UN SCOR Report of the Secretary General, *supra* note 41, Part II (A)(6).

341. See *id.* at 54 (“The International Trust Fund to Support Initiatives of states Countering Piracy off the Coast of Somalia was established on 27 January 2010 [and has helped raise funds for a number of activities including helping] the Transitional Federal Government to raise awareness among Somali populations in general, and young people in particular, of the risks associated with

Such investment would take decades to materialize.

To this end, UNTAMP could accelerate and centralize the development of these solutions by setting out a legal framework whereby states agree to mobilize resources to combat the root causes of piracy in all states that are unable to deal with piracy. The treaty would commit signatories to cooperate and assist such states in three areas: poverty alleviation, political and legal capacity building, and education.

3. *Shipping Industry Best Practices*

As the technology available to pirates improves, the shipping industry is often accused of not doing enough to protect its own assets. This is not an entirely fair assessment. While a number of technological developments have enhanced security on ships, financial, regulatory and practical considerations pose a challenge to vessel-based security. For instance, the International Ship and Port Facility Security Code (ISPS) seeks to assemble “an international framework involving . . . government agencies, local administration and the shipping and port industries to detect/access security threats and take preventive measures against security incidents affecting ships or port facilities used in international trade.”³⁴²

An advantage of the ISPS Code, in contrast with UNCLOS and SUA, is that it deals with ergonomics. That is, “it attempts to influence the behavior of seafarers and port managers through elaborate regulatory procedures as preventive measures” to combat “criminal offenses that pose a threat to maritime security.”³⁴³ In this context, an important area where improvements can be made is in the way in which Ships Security Alert Systems operate.³⁴⁴

Max Boot argues that most ship-owners have been reluctant to spend what it takes to defend their ships because this may affect their profit margins.³⁴⁵ However, best management practice guidance issued by the IMO and the Maritime Security Center Horn of Africa (MSCHOA) suggests that ships may protect themselves by taking a number of relatively cheap steps, such as deploying razor wire as a barrier to prevent pirates from hooking on their boarding ladder to the ship’s structure.³⁴⁶ Other basic precautions include standing extra watches, priming fire hoses so they are ready to be used to repel small suspicious boats if they come too close, and fitting locks to doors to create

involvement in piracy and other criminal activities.”).

342. INTERNATIONAL SHIP AND PORT SECURITY SHIPPING CODE, INTERNATIONAL MARITIME ORGANIZATION iii (2003).

343. Mejia and Mukherjee, *supra* note 31, at 323.

344. Knott, *supra* note 315 (noting that ship security alert systems normally send warning messages to the flag state and ship owners office, but sending “more detailed warning messages” to coastal states would be more efficient as they could and would react more quickly).

345. Boot, *supra* note 14, at 101.

346. MSCHOA, *supra* note 76.

self-contained “mazes” where the crew can expel attackers from the ship.³⁴⁷ However, other equipment, such as electronic tracking systems and high voltage fences can be far too expensive for those smaller ships that are typically attacked.³⁴⁸ Technical defensive measures also include the use of long-range acoustic devices that generate a beam of highly painful sound with an intensity of up to 150 Db.³⁴⁹ Finally, ship-owners are reluctant to arm crews or hire armed guards, as this could lead to an escalation of violence.³⁵⁰ In any event, many states place restrictions on what arms, if any, can be carried at sea, and the ISPS demands that ships declare any arms on board on entering a port.

Despite the diversity of techniques available, greater education and dissemination of the types, indicative costs and likely practical and legal consequences of these self-help tools should be promoted by international organizations such as the IMO. The latter has already committed to “making industry-development best management practice guidance” one of its priorities.³⁵¹ UNTAMP could promote cooperation between states and organizations to implement best management practice by, for instance, providing that signatories incorporate these into domestic health and safety legislation. At the very least, the treaty should provide that signatories impose a duty on certain carriers to comply with best management practice or explain failures to do so.

VI.

CONCLUSION

This article has considered the dual nature of maritime piracy law, and how the divergence among international and domestic legal frameworks frustrates efforts to suppress piracy. The need for uniformity in this area of law is of paramount importance to maritime security. The shipping industry would undoubtedly benefit from a single definition that encompasses the modern characteristics of piracy. Indeed, “there is considerable uneasiness in the industry about the absence of a single definition.”³⁵²

347. *Id.*

348. Murphy, *supra* note 160.

349. Knott and Stephens, *supra* note 315. Note that a 150 dB is a noise comparable to a 12-gauge gunshot or fireworks, see the *Decibel Exposure Time Guidelines* at <http://www.dangerousdecibels.org/education/information-center/decibel-exposure-time-guidelines/>. *But see* Sullivan, *supra* note 4, at 240 (arguing there is no clear evidence that “loud, uncomfortable noises” deter pirates).

350. Boot, *supra* note 14, at 103; *see also* Stephen Jones, *Armed Action*, MAR. SEC. REV., Mar. 21, 2011, <http://www.marsecreview.com/2011/03/armed-action/> (calling for a code of conduct for armed guards).

351. *Piracy: Orchestrating the Response Action Plan*, INTERNATIONAL MARITIME ORGANIZATION (2011), <http://www.imo.org/About/Events/WorldMaritimeDay/Documents/2011%20WMD%20theme%20Action%20Plan%20handout.doc>.

352. *See* Trans. Comm. Report, *supra* note 5, ¶ 26.

The duality of uncoordinated responses to piracy, in their domestic and international guises, further frustrates efforts toward uniformity in piracy laws. The international nature of commerce requires a centralized and coordinated³⁵³ prophylactic solution to the problem as opposed to scattered and divergent domestic criminal provisions. Indeed, as piracy is an international crime, it merits an equally international legal response. An uncoordinated approach to the development of this area of law will only exacerbate the issue by further entrenching the dualism in the fabric of the law. Legal intervention at the international level would help engineer the dissemination of more effective anti-piracy laws. This article has argued for a new law of piracy in the form of a new treaty, as well as a new tribunal with jurisdiction over piracy cases. It has also made a number of practical recommendations in the areas of cooperation, political development, and vessel security.

In the final analysis, maritime piracy not only presents a number of challenges to international law *per se*, but also, perhaps more worryingly, provides a rational and empirical basis for questioning the credibility and effectiveness of some key aspects of the international legal system. As Kontorovich argues, “the abject failure of the international response to piracy is a cautionary tale about the limits of international law.”³⁵⁴ He also notes that the piracy problem illustrates how the liberal international legal regime is poorly suited to deal with organized and violent transnational criminal networks.³⁵⁵

The problem is not so much one of liberalism, however, but of perspective. International law has chronically suffered from its atypical nature: there is no central legislative, executive, or judicial mechanism. Enforcement is complex and often impossible. To borrow a term from the study of economics, the current international legal order suffers from the “tyranny of small decisions,” which essentially means that people lack the ability to foresee the wider consequences of their decisions.³⁵⁶

Despite its potential, the development of international law remains at the mercy of the political interests of individual sovereign states. Naturally, the conflict of interests inherent in this development creates the right political environment in which international and domestic laws develop with a lesser degree of uniformity than they should. However, the creation of an international legal order that is competent *per se*, with its own institutions and legal capacity,

353. See Robert G. Edmonson and Peter T. Leach, *Facing Down Piracy*, J. COMMERCE MAGAZINE, Apr. 26, 2009 (“With a growing threat to global shipping, commercial carriers believe common strategies and a *coordinated response* are needed.”) (emphasis added).

354. Eugene Kontorovich, *Piracy and International Law*, GLOBAL LAW FORUM (Feb. 8, 2009), <http://www.globallawforum.org/ViewPublication.aspx?ArticleId=96>.

355. Kontorovich (Guantanamo), *supra* note 30, at 275.

356. Alfred E. Kahn, *The Tyranny of Small Decisions: Market Failures, Imperfections, and the Limits of Economics*, 19 KYKLOS 23, 28 (1966). The contrary argument, of course, is that state sovereignty is of such critical importance that it must be supported even if there are negative implications for international law solutions.

capable of developing laws and interpreting them in its own right, subject only to the principle of complementarity, may be a real possibility in the context of maritime piracy.³⁵⁷ The latter provides an unrivalled legal laboratory where international law can capitalize on its strengths and demonstrate its potential as a system of law *sui generis*, independent from the participation of states in its formulation, observance, and even enforcement. This, however, will ultimately depend on a shift in perspective in how sovereign states position themselves in the international legal order and in the sphere of international relations.³⁵⁸ Thus, solutions to international problems like piracy must not only focus on reforming legal and practical tools but must also stimulate new perspectives in the development of international law.

A case in point that exemplifies such potential a shift in perspective of international law can be found in the development of European Union law. The eminent English judge Lord Denning characterized the incorporation of European Union law – and its correspondent supranational legal order³⁵⁹ – into English law as a “tide” which would enter all English rivers and engulf its legal system:

But when we come to matters with a European element, the [European Community] treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back In future, in transactions that cross the frontiers, we must no longer speak or think of English law as something on its own. We must speak and think of [European] Community law, of [European] Community rights and obligations, and we must give effect to them. This means a great effort for the lawyers. We have to learn a new system *We must get down to it.*³⁶⁰

Having explored the dual and amorphous nature of piracy law it is possible to analogize that public international law and domestic law frequently run in estuaries of the same river. The incoming tide of international law cannot be held back.³⁶¹ This may pose great challenges to politicians and lawyers around the world in accepting an autonomous system of piracy law *sui generis* to combat maritime piracy. Despite such difficulties, “we must get down to it.” If the fate of international law is to reestablish hope for the human species,³⁶² we must first deal with the problems that challenge the very essence of its existence; to this end, piracy has rocked the boat in which the international legal order is

357. *Cf.* Frank J. Lechner, *Religion, Law and Global Order*, in *RELIGION AND GLOBAL ORDER*, 263, 268 (Roland Robertson and William Garret, eds., 1991) (“commercial law has become an intricate, autonomous legal order on a transnational scale, developed over many centuries by participants in a truly international community.”).

358. *See generally* DONALD W. GREIG, *INTERNATIONAL LAW* (Butterworths, 2d ed., 1976).

359. *See* Van Gend en Loos v. Nederlandse Administratie der Belastingen [1963] ECR I.

360. *H.P. Bulmer v. J. Bollinger*, [1974] 2 All ER 1226 at 1230. Author’s emphasis.

361. *See Trendtex*, 2 W.L.R. at 365 (Lord Denning gave another characterization of international law as a dynamic legal order: “I would use of international law the words which Galileo used of the earth: ‘But it does move.’”).

362. *See* Koskeniemi, *supra* note 119, at 30.

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contained – it is now time for the latter to tame the “salt-water thieves”³⁶³ and re-establish order at sea.

363. WILLIAM SHAKESPEARE, *TWELFTH NIGHT OR WHAT YOU WILL*, act 5, sc. 1, l. 63 (“Notable pirate! Thou salt-water thief!”).