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Not Your Average Terrorist: The Major Implications of Thriving Piracy in Somalia and the Global Response Required

“For hundreds of years, international law has treated the pirate as a *hostis humani generis* – an enemy of all mankind¹”

You are a hardworking business and family man, using your life earnings to fulfill your dream of purchasing a boat for you and your family to go on weekend excursions on the high seas. Your excitement level reaches its pinnacle as your family prepares to embark on their first trip aboard your newly acquired vessel. Your loving wife and nine year old daughter look on happily as you and your sixteen year old son navigate the open water. Starting as a speck on the distant blue watery canvas, a smaller boat rapidly approaches your position. Your boat is boarded by gun and machete wielding men. Your family is defenseless. Your fate is unknown, but the prospective outcomes include being held for ransom, robbed, raped, tortured, and murdered.

You are the CEO of a prominent shipping company and non-profit charitable organization. Your shipping company ships steel products throughout the world over the high seas. Your charitable organization seeks to provide aid, utilizing its vast shipping capabilities, to underprivileged and war-ridden countries. You are sending a large steel shipment to Saudi Arabia, accompanied by a smaller ship containing health-aid supplies to be delivered to Somalia. Both ships fail to reach their destination. Your steel shipment is held ransom for millions of dollars. Your well-intentioned supply ship is robbed and its supplies are never seen again.

You are the elected leader of a nation. One of your most essential duties as the leader of an entire populous is to protect your home soil. Tensions are high with a perceived enemy state. Negotiations for peace have intensified, with optimism for an agreement quickly dwindling. As talks expire, an attempted terrorist

¹ Edward Coke, 3 Institutes on the Laws of England 113 (1797); Lassa Oppenheim, International Law: A Treatise § 272, at 325-26 (1905); see also Restatement (Second) of Foreign Relations Law of the United States § 34 cmt. b (1965).

attack on your nation's soil seems imminent. You launch a full scale investigative and preventive agenda. You discover and thwart a planned attack by a terrorist group located within the enemy state. The enemy state is very poor and underprivileged, raising suspicion of funding being provided by an outside source. It is discovered that the private funding wasn't from a billionaire political extremist or terrorist group with similar intentions. Instead, the funding was from a major pirate organization.

I. Introduction

Acts of piracy are no longer limited to random attacks by small pirate groups against unsuspecting sea travelers, but rather now apply far more broadly, encompassing organized attacks against individual boat owners, large companies' shipping vessels, and potentially nations as a whole. The hypotheticals above illustrate the vast spectrum of piratical acts. While these illustrations detail acts of piracy worldwide, there is no place where these acts are more rampant and systematic than Somalia.

Somali pirates are intelligent, resourceful, brutal, relentless, and above all, terroristic. Modern pirates are armed with machine guns and rocket launchers and roam the seas in high-speed maneuverable skiffs that are supported by "mother ships," enabling them to launch attacks from a distance of up to 500 nautical miles.² The nature of piracy can be described as a "piracy cycle:"

Piracy is initially conducted by small and independent groups of individuals using their boats for piracy as desperation of poverty dictates or as the opportunity presents. Success in this venture equips the groups with more and larger vessels, and an organization can emerge to coordinate their activities, these changes making predation increasingly effective. With further success the pirates' strength becomes such as to make them a virtually independent power, when they may choose to enter into an alliance with some recognized state. At that point the pirates have become in effect a mercenary navy, paid by plunder. Success will legitimize their power; failure and defeat will lead to disintegration of the organization into the small, furtive outlaw groups from which the force

² Peter Chalk, *The Maritime Dimension of International Security: Terrorism, Piracy, and Challenges for the United States* 5-6 (RAND 2008)

originated.³

Somalia is a failed state with a weak, unstable government and no effective police force; thus, pirates are able to operate with impunity from Somali coastal towns.⁴ It is thus fertile ground for various forms of criminal activity, such as piracy.⁵ Somali pirates attack civilian ships carrying cargo through the Gulf of Aden, a body of water between Yemen and Somalia.⁶ Given the fact that the Gulf of Aden is a major shipping route and relatively narrow body of water, Somali pirates are able to cause hijacking chaos throughout the strip. The *modus operandi* seems simple: the Somali pirates sail out of Somali ports, equipped with potent weapons and fast ships, attack ships by firing at them, and then board them to overtake their crew members.⁷ Over the course of the last decade, as will be detailed in the sections that follow, attacks by Somali pirates have resulted in hundreds of millions of dollars in ransom payments and lost cargo, as well as lengthy hostage standoffs, resulting in the horrible experiences and even deaths of crew members.

This paper argues that a directed, global effort is required to address the increasing impact that the spread of piracy is creating throughout the world. Piracy is a global issue. The perpetual increase in global trade has necessitated a directly proportional increase in transportation of goods across the Earth's vast oceans.⁸ The Gulf of Aden, one of the world's most important and busiest shipping lanes,⁹ is approximately three-quarters the size of the United States, making it extremely difficult to patrol.¹⁰ With the growing success of piracy off the coast of Somalia, pirates are now becoming more brazen, entering territory they never have

³ J.L. Anderson, *Piracy and World History: An Economic Perspective on Maritime Predation*, 6 J. WORLD HISTORY 175, 184 (1995)

⁴ James Kraska & Brian Wilson, *Fighting Pirates: The Pen and the Sword*, 25 World Pol'y J. 41, 41

⁵ Jane G. Dalton et al., *Introductory Note to United Nations Security Council: Piracy and Armed Robbery at Sea - Resolutions 1816, 1846 & 1851*, 48 I.L.M. 129, 129 (2009)

⁶ *Suspected Pirates Rescued in Gulf of Aden*, CNN.com, Dec. 5, 2008, <http://www.cnn.com/2008/WORLD/africa/12/04/yemen.pirates/index.html>

⁷ *Id.*

⁸ *Shipping volumes to increase 8%*, Int'l Freight Wk., July 23, 2008, <http://www.internationalfreightweek.com/upl_images/news/>

⁹ Mary Kimani, *Tackling Piracy off African Shores*, United Nations Africa Renewal, Jan. 2009, <<http://www.un.org/ecosocdev/geninfo/afrec/vol22no4/224-piracy.html>>

¹⁰ Robert Murquand, *Will Kenya be the Next "Hague" of the High Seas?*, Tri-State Defender, Apr. 16, 2009, <<http://tristatedefenderonline.com/articlelive/articles/-3689/1/Will-Kenya-be-tapped-as-the-next-Hague-of-the-high-seas/Pagel.html>>

before and venturing further out to sea than before.¹¹ While it remains true that there are a number of preventive and prosecuting structures in place, a more global and definitive approach to combating piracy, specifically in Somalia, is needed in order to prevent the potentially catastrophic effects that the global spread of piracy could result in. Thus, this paper's focus on Somalia is appropriate, utilizing its perpetual increase of piracy to signify the broader, global consequences of a continued rise of organized piracy.

Specifically, this paper looks at the global implications that the increased intelligence and resources available to Somali pirates creates. With the increase of resources at its disposal, modern day pirate behavior is beginning to shockingly resemble that exemplified by terrorists. In addition, and perhaps more alarming, the increase in the power attained by Somali pirates could lead to direct affiliations with terrorist groups. In order to frustrate these realistic consequences of expanding piracy, the current international legal framework needs to be bolstered. Authors in previous articles have addressed the need for a strengthened international platform for combating piracy, but have limited their focus to what is wrong with the current platforms in place, and/or basing their recommendation for reform to the creation or strengthening of one specific source for prosecution. This Author's paper differs in that it suggests a globalized way of addressing the issue at hand. If this reformative initiative were adopted, it would allow states to combat piracy through the use of numerous measures. The purpose of this proposed initiative is to allow states who may currently lack incentive to capture and prosecute pirates, not yet recognizing piracy as a global issue, to have several prosecuting options available to them to utilize.

Part II of this paper will address the characteristics and systematic nature of Somali pirates. This section will glance at the current status of piracy in Somalia. It will briefly address the systematic character of piracy attacks, as well as the measures taken in carrying out their missions.

¹¹ Mary Kimani, *Stopping High Seas Piracy*, United Nations Africa Renewal, <<http://www.un.org/ecosocdev/geninfo/afrec/newrels/piracy-09.html>>

Part III of this paper will look at the current international legal framework for combating piracy, including a look at the various definitions used for piracy in international law. Moreover, this section will discuss the idea of universal jurisdiction and how it applies in customary international law, as well as a brief mention of the United Nations involvement in addressing the issue of piracy over the course of the last decade.

Part IV will discuss the striking similarities between pirates and terrorists, as well as the affiliations between pirate and terrorist groups that are likely to result if the lackluster fight against piracy continues. This section will look at the collapsed infrastructure of Somalia, arguing for a global initiative to reverse Somalia's continuously deteriorating economic and policing climate. In addition, it will detail the shocking statistics related to the increase in organized pirate attacks over the course of the last five years. Most importantly, this section will draw both current and prospective corollaries between terrorism and piracy, cognizant of the more profound global impact that terrorist groups have had around the world in recent years.

Lastly, Part V will look at the preventive and prosecuting options that must be made available to combat piracy. More specifically, this section will advocate the importance of expanding the definition of piracy, including piracy within the jurisdiction of the International Criminal Court ("ICC"), utilizing support systems such as international maritime organizations, and continuing the use of domestic prosecutions and regional partnerships.

This paper will conclude that piracy is escalating into its own form of terrorism. The increasing membership, resources, and weaponry garnered by Somali pirates in the Gulf of Aden are resulting in the formation of full-scale pirate organizations. The regulating procedures currently in place are not sufficient enough to prevent Somali pirates from creating potentially destructive relationships with known terrorist groups. In order to prevent such relationships, this paper argues that piracy needs to be treated as a global issue

of high priority, requiring immediate attention. Recognition of the issue is not enough. To defeat the spread of piracy, a collective international effort is necessary.

II. Piracy in Somalia – A Failed State as a Breeding Ground for Organized Piracy

As mentioned in the introduction, Somalia is a failed state. It has not had a stable government since 1991.¹² Somalia's condition as a failed state, lacking a stable government or law enforcement system, has created a foundation for piracy to flourish and the type of people who embody the status of "pirate" to vary.

The individual pirates who fill the ranks of Somali pirate crews are sometimes trained fighters who honed their skills during the last two decades of brutal conflict in their nation; other pirates are merely youths working their way up the ladder of a criminal organization, feeding portions of their ransom money to those above them.¹³ Somali pirates operate mostly in the Gulf of Aden, which is also a major global shipping route.¹⁴ Somalia has the longest coastline in Africa, making it difficult to patrol, and it is populated by coastal towns where pirates easily blend in with other insurgent groups.¹⁵

In the modern age, there are two types of pirates that are seen.¹⁶ While the first type, unorganized pirates that typically keep their activities within territorial and port waters¹⁷ still exist, the Somali pirates' tactical operations have evolved.¹⁸ The other type is more like international maritime crime syndicates that typically seek to steal entire vessels, rather than just the cash and other goods on board.¹⁹ Pirates have begun to

¹² Eugene Kontorovich, International Legal Responses to Piracy off the Coast of Somalia, ASIL Insights, Feb. 6, 2009, <<http://www.asil.org/insights090206.cfm>>

¹³ N.Y. Daily News, Apr. 23, 2008, available at <http://www.nydailynews.com/news/us_world/2008/04/23/2008-04-23_somali_pirates_find_booming_business_as_.html> [hereinafter "Booming Business"]

¹⁴ *Id.*

¹⁵ Todd Pitman, Ending Somali Piracy: Few Options for US Forces, ABC News, Apr. 14, 2009, <<http://abcnews.go.com/International/wireStory?id=7337114>>

¹⁶ Rebecca Fantauzzi, *Rascals, Scoundrels, Villains, and Knaves: The Evolution of the Law of Piracy from Ancient Times to the Present*, 39 Int'l. J. Legal Info. 346, 372 (2011)

¹⁷ Tina Garmon, *International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th*, 27 TUL. MAR. L. J. 257, 260 (2002)

¹⁸ Booming Business, *supra* note 20.

¹⁹ Garmon, at 262.

capture larger vessels, which they use as the “mother-ships” to launch their tiny skiffs throughout hundreds of miles in the Indian Ocean.²⁰ From this locus of control, smaller craft are dispersed in search of targets, ostensibly creating search quadrants with their GPS equipment and coordinating their attack with satellite telephones.²¹

Once they have overtaken the victim vessel, the pirates typically hijack the vessel’s cargo and kidnap the crewmembers.²² Most cargo ship crews are not equipped with defensive weapons and not trained to fight pirates.²³ The cargo is often resold to willing buyers or held for ransom.²⁴ While the amounts of ransom demanded are increasing, the average ranges from half a million to two million dollars.²⁵ In most cases, pirates and shipping companies negotiate the ransom, which is paid in cash.²⁶ Somali pirates appear to take ships purely for financial gain, resolving most hijackings with a ransom payment and treating captives well.²⁷ Normally, crewmembers are released unharmed.²⁸ However, there are a number of pirate hijackings that have resulted in the brutal deaths of those captured,²⁹ and those who have survived have described a horrific ordeal.³⁰

Piracy is a lucrative business: reports indicate that a single seizure of a ship can earn each individual pirate up to \$150,000.³¹ Poverty is rampant in Somalia.³² Yearly earnings average about \$600.³³ Thus, the

²⁰ Pittman, *supra* note 10

²¹ Audrey Gillan, *Guns, grenades and GPS: the brutal reality of Somalia's hi-tech pirates*, *The Guardian*, June 12, 2007 <<http://www.guardian.co.uk/world/2007/jun/12/audreygillan.international>>

²² Kontorovich, *supra* note 5

²³ *Id.*

²⁴ *Id.*

²⁵ Lauren Ploch et al., *Piracy off the Horn of Africa 4* (Cong. Research Serv., CRS Report for Congress Order Code RL 40528, Apr. 21, 2009)

²⁶ Workshop Commissioned by the Special Representative of the Secretary General of the UN to Somalia Ambassador Ahmedou Ould-Abdallah, Nairobi, Kenya, Nov. 10-21, 2008, *Piracy Off the Somali Coast, Final Report*, at 33-34 (Nov. 21, 2008)

²⁷ Joe Vacarello, *U.N. Passes Piracy Pursuit Powers*, *CNN.com*, Jun. 3, 2008, <<http://www.cnn.com/2008/AVORLD/africa/06/02/somalia.piracy/index.html>>

²⁸ Pittman, *supra* note 10

²⁹ See generally Fantauzzi

³⁰ Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 *Vand. J. Transnat'l L.* 1, 3 (2007)

³¹ Kontorovich, *supra* note 5

³² *Seychelles Coast Guard Arrests 9 Suspected Pirates*, *Orlando Sentinel*, Apr. 28, 2009, at A2

surge of piracy in Somalia seems to be driven by poverty and fueled by the lack of a government and criminal law enforcement mechanism.³⁴ Presenting employment as a pirate to a Somali civilian, currently earning \$600, with the potential of earning \$150,000 for a successfully completed attack, is a proposition that is difficult to refuse.

Although this paper argues that the current international framework is insufficient for combating the evolved, organized, and brutalized type of piracy detailed above, this Author recognizes that the international community has begun to take notice of this growing issue.

III. Current International Legal Framework for Combating Piracy

International law has recognized the importance of addressing piracy, providing definitions, jurisdictional guidelines, and procedures to follow in capturing and prosecuting pirates.

A. Piracy Defined

Although no authoritative definition exists, Paper 15 of the 1958 Convention on the High Seas and Paper 101 of the 1982 Nations Convention on the Law of the Sea (“UNCLOS”) both contain the most universally accepted definition of piracy.

- (1) Any illegal act of violence, detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (a) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (b) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.³⁵

³³ Rukmini Callimachi, Seychelles Coast Guard Arrests 9 Suspected Pirates, ABC News, Apr. 28, 2009, <<http://abcnews.go.com/International/wirestory?id=7446902&page=2>>

³⁴ Milena Sterio, *FIGHTING PIRACY IN SOMALIA (AND ELSEWHERE): WHY MORE IS NEEDED*, 33 Fordham Int’l L.J. 372, 384 (2010).

³⁵ United Nations Convention on the Law of the Sea art. 101, Oct. 7, 1982, 1833 U.N.T.S. 41-42 [hereinafter “UNCLOS”]

UNCLOS, while not ratified by all countries, including the United States, nonetheless represents “the best evidence of international law relating to the maritime regime, and is therefore binding on all nations.”³⁶ Under UNCLOS, an act must satisfy four criteria in order to constitute piracy: it must: (1) be committed on the high seas, (2) be of a violent nature, (3) include at least two vessels, and (4) be committed for solely private aims.³⁷ While it is undoubtedly recognized that the above definition reflects international custom as it stands today,³⁸ it is highly restrictive and will present hurdles if, as this paper argues, more stringent preventive and prosecutorial measures are adopted.

First, there is a fundamental issue with limiting the definition to the “high seas” and excluding areas inside territorial waters. If an attack occurs within territorial waters, that attack is exclusively under the jurisdiction of the coastal state who “owns” those waters.³⁹ Because the crime of piracy is closely linked to the idea of universal jurisdiction, if the scope of piracy extends into a state’s territorial waters, the universality of the crime collides with the territorial sovereignty of that state.⁴⁰ However, the limitation of pursuing piracy “on the high seas” creates a situation where any foreign vessel pursuing a suspected pirate boat must cease that pursuit as soon as the suspected boat crosses into those territorial waters, even if the pursuing boat knows there will be no further pursuit by the State who owns those territorial waters.⁴¹

The additional requirement of being committed for “private aims” also creates an issue of limitation regarding the scope of applicability of this definition of piracy. Scholars argue that this requirement disqualifies acts committed for political and ideological reasons from being considered piracy.⁴² If a piracy-act is

³⁶ Jon D. Peppetti, Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats, 55 *Naval L. Rev.* 73, 87 (2008)

³⁷ UNCLOS, *supra* note 35

³⁸ Peppetti, *supra* note 36

³⁹ Debra Doby, *Piracy Jure Gentium: The Jurisdictional Conflict of the High Seas and Territorial Waters*, 41 *J. MAR. L. & COM.* 561, 565-566 (2010)

⁴⁰ Michael Bahar, Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations, 40 *Vand. J. Transnat'l L.* 1, 3 (2007)

⁴¹ Fantauzzi, *supra* note 12

⁴² Peppetti, *supra* note 36, at 92

committed by a group with links to a specific state, the state action character of the act would defeat the wholly private aims requirement of UNCLOS because of the alleged link between piracy and state action.⁴³ This restriction is especially problematic if, as this Author believes they will, Somali pirates begin to form allegiances with terrorist groups who have political or ideological motivations. Any affiliation with a terrorist group that maintains a political or ideological agenda, whether sponsored or unsponsored by a nation state, will remove the piracy group from the prosecutorial grasp of UNCLOS.

Aware of the aforementioned issues, the international maritime community recognized the need to expand the definition of piracy and drafted the Suppression of Unlawful Acts against the Safety of Maritime Navigation Convention (“SUA Convention”).⁴⁴ While recognizing that its practical reach may prove limited because of its lack of universal acceptance and ratification,⁴⁵ as well as the fact that it is considered an anti-terrorist treaty,⁴⁶ it is important to acknowledge that the SUA Convention was enacted, at least in part, to ensure that politically motivated attacks on ships could be prosecuted by the international community as acts of piracy.⁴⁷ Under the SUA Convention, an act can qualify as “piracy” even though it is not committed on the high seas.⁴⁸ In addition, the SUA Convention does not have the private aims requirement of the Convention on the High Seas/UNCLOS treaties; thus, maritime terrorist acts driven by politics and ideology, and not simply private aims, would fall within the SUA Convention framework.⁴⁹ Although this definition has yet to attain the status of customary international law, the fact that the SUA convention expanded the definition of piracy, especially within the framework of an anti-terrorist treaty, is an important formational tool for expanding the scope of piracy moving forward.

⁴³ Id.

⁴⁴ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation art. 3, Mar. 10, 1988, S. Treaty Doc. No. 101-1 (1990), 1678 U.N.T.S. 221 [hereinafter SUA Convention]

⁴⁵ See Sterio, *supra* note 30

⁴⁶ Id.

⁴⁷ Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 Am J Intl L 269, 270-72 (1988)

⁴⁸ SUA Convention, *supra* note 44, art. 4; see also Peppetti, *supra* note 36, at 94

⁴⁹ Kontorovich, *supra* note 5

B. Universal Jurisdiction

For centuries, nations have deemed pirates to be *hostis humani generis* (enemies of all mankind), such that any nation may use its own domestic laws to try to punish those committing piracy, regardless of the pirates' nationalities or where the piratical acts took place.⁵⁰ Piracy is the original "universal jurisdiction" crime.⁵¹ Traditionally, to prosecute a person for a crime, a nation needs a nexus to the crime, the alleged offender, or the victim.⁵² Universal jurisdiction allows any nation to prosecute offenders for certain crimes even when the prosecuting nation lacks a traditional nexus.⁵³ The rationale for granting universal jurisdiction is that piracy is usually committed only aboard vessels on the high seas or any place outside a state's jurisdiction, and states, their rights being infringed by pirates acting outside the authority of any other state, therefore may patrol the high seas for pirates without violating any state's territorial sovereignty.⁵⁴ Thus, under traditional customary law, piracy is viewed as a heinous crime against all nations and any state, acting as a global agent on behalf of all nations, can choose to prosecute the offending pirate.⁵⁵ Unfortunately, customary law is only half of the authority taken into consideration when addressing jurisdiction under international law.

Treaty law and domestic laws curtail the customary law conception of piracy.⁵⁶ While UNCLOS specifically authorizes the capturing nation to prosecute pirates,⁵⁷ other states, such as a third-party state willing to accept the transfer of the captured pirate for prosecution in their state, are not authorized to.⁵⁸ Under UNCLOS, the legality of this type of transfer is dubious because only the capturing state holds jurisdiction over

⁵⁰ Edward Coke, *3 Institutes on the Laws of England* 113 (1797); Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 *Tex L Rev* 785, 791 (1988)

⁵¹ Kontorovich, *supra* note 5, at 184

⁵² Randall, *supra* note 50, at 785

⁵³ *Id.* at 785

⁵⁴ *Id.* at 792

⁵⁵ Kontorovich, *supra* note 5, at 184

⁵⁶ Peppetti, *supra* note 36, at 107

⁵⁷ UNCLOS, *supra* note 35, art. 105

⁵⁸ Kontorovich, *supra* note 5

captured pirates and receiving states do not.⁵⁹ Likewise, many domestic statutes limit the jurisdictional reach over pirates to acts committed against that nation. For example, the United States piracy statute limits the U.S. jurisdictional ability to prosecute pirates to situations where pirates somehow acted against U.S. interests.⁶⁰ Just as in its definitional scope, the SUA takes an expanded approach in the jurisdiction granted to member states. Specifically, member states to the SUA have an obligation to extradite or prosecute persons accused of behavior that qualifies as piracy.⁶¹ It is precisely this framework that the SUA adopts that must be universally recognized and adopted moving forward in order to foster jurisdictional assertions from states over captured pirates.

C. United Nations Involvement

There is little doubt of a heightened global awareness of the escalating issue of piracy. That notion is supported by the increased efforts taken by the United Nations in recent years. In 2008, the UN Security Council passed five resolutions (1816, 1838, 1846, and 1851).⁶² The Security Council passed these resolutions pursuant to their powers under Chapter VII of the Charter to address issues posing a threat to international peace and security.⁶³ The U.N. Security Resolutions (“the Resolutions”) expand the geographical area in which pirates can be effectively apprehended.⁶⁴ The Resolutions allow patrolling nations to penetrate the Somali mainland in their piracy-fighting operations, as well as to engage in the hot pursuit of pirates in Somali territory.⁶⁵ Resolution 1816 called on all members to use “all necessary means to repress acts of piracy and armed robbery.”⁶⁶ It authorizes warships to chase pirates into Somali territorial waters if necessary.⁶⁷ Resolution 1851 extended the authority of military force to land-based operations for the purpose of suppressing

⁵⁹ Id.

⁶⁰ 18 U.S.C. § 2280 (2006)

⁶¹ SUA Convention, *supra*, note 44, art. 10

⁶² Kontorovich, *supra* note 5

⁶³ Id.

⁶⁴ Milena Sterio, *TROUBLED WATERS: COMBATING MARITIME PIRACY WITH THE RULE OF LAW: ARTICLE: THE SOMALI PIRACY PROBLEM: A GLOBAL PUZZLE NECESSITATING A GLOBAL SOLUTION*, 59 *Am. U.L. Rev.* 1449, 1485 (2010)

⁶⁵ Id.

⁶⁶ S.C. Res. 1816 (2008), P7(b), S/RES/1816 (2008)

⁶⁷ Id.

acts of piracy and armed robbery for a one-year period.⁶⁸ Resolution 1838 asks “any nations with military capabilities in the area to ‘actively fight piracy’ on the high seas off Somalia.”⁶⁹ Resolution 1844 allows the freezing of accounts and the prevention of entry into state’s territories by anyone who has “engage[ed] in or provid[ed] support for acts that threaten the peace, security or stability of Somalia,” or anyone “obstructing the delivery of humanitarian assistance to Somalia.”⁷⁰ Lastly, Resolution 1846 grants states and regional organizations the right to use “all necessary means” to fight piracy off the coast of Somalia for one year.⁷¹

Collectively, the Resolutions are an important legal tool for piracy-fighting countries because they extend jurisdiction to capture pirates into an otherwise prohibited zone: the Somali territorial waters and mainland.⁷² It is recognized that the scope of the Resolutions were limited to Somalia on a six month to one-year basis and required the consent of Somalia’s transitional government. However, that does not minimize the importance of the Resolutions as tools to bring pirates to justice and as foundational guidelines for bodies of international law. The expansion of the fight against piracy into the Somali territorial waters and mainland is precisely the authoritative measures that must be adopted and universally supported in order to reach not only the lower level pirate, but the organizational masterminds taking refuge on shore.

The various bodies of international law have provided a framework and tolerance for expansion in recent years that can be used as momentum in creating a more successful global initiative against piracy. Before addressing what this global initiative is, however, it is important to understand the extreme conditions in Somalia and how those conditions have driven an exponential increase in piracy and potential for terrorist affiliations.

IV. Pirates taking on Terroristic Characteristics and Affiliations

⁶⁸ S.C. Res. 1851 (2008), S/RES/1851 (2008)

⁶⁹ S.C. Res. 1838 (2008), S/RES/1838 (2008)

⁷⁰ S.C. Res. 1844 (2008), S/RES/1844 (2008)

⁷¹ S.C. Res. 1846 (2008), S/RES/1844 (2008)

⁷² Sterio, *supra* note 63, at 1485

Somali pirates have always had characteristics that resemble those of terrorists. However, as time has evolved, so have the organizational structures and extreme measures taken by Somali pirates, resulting in an even closer resemblance to terrorist groups. The current political and economic state of Somalia assists in understanding why the country is a breeding ground for well-structured piracy organizations. In addition, the alarming statistics regarding the rise in piracy in the Gulf of Aden illustrates the necessity for the international community to take a more proactive approach in combating piracy.

A. Somalia's Failed Infrastructure Fostering an Alarming Rise in Piracy

Since the early 1990's, Somalia has not had a stable government, and its fragile government is currently battling warlords and militant Islamic groups for control of the country.⁷³ After the fall of its former leader (in 1991), Somali General Muhammad Siad Barre,⁷⁴ Somalia descended into anarchy and was considered by most of the developed world to be a failed state.⁷⁵ The local warlords who toppled the Barre regime began a constant conflict amongst themselves.⁷⁶ The cost of this infighting can be tallied in the hundreds of thousands of civilian lives lost and in the nationwide destruction of infrastructure.⁷⁷

Multiple attempts have been made by the international community to stabilize the region and all have been met with failure.⁷⁸ After the 1991 collapse of Somalia's government, the country was fractured into several different regions.⁷⁹ Control of each has depended largely upon military might.⁸⁰ Those individuals in

⁷³ Jane G. Dalton et al., Introductory Note to United Nations Security Council: Piracy and Armed Robbery at Sea - Resolutions 1816, 1846 & 1851, 48 Int'l Legal Matters 129, 129 (2009)

⁷⁴ Peter Lehr & Hendrick Lehmann, Somalia - Pirates' New Paradise, in *Violence at Sea: piracy in the age of global terrorism* 1, 8 (Peter Lehr ed., 2007).

⁷⁵ Brief for Keyse G. Jama as Amici Curiae supporting Petitioner, *Jama v. Immigration and Naturalization Service*, 535 U.S. 335 (2004) (No. 03-674)

⁷⁶ *Id.*

⁷⁷ See generally Gerald B. Helman & Steven R. Ratner, *Saving Failed States*, 89 For. Pol'y 3, 3, 8 (1992); Consolidated Appeal for Somalia 2007, United Nations Consolidated Appeal Process, Apr. 16, 2007, <<http://ochaonline.un.org/cap2005/webpage.asp?Page=1565>>

⁷⁸ Lehr & Lehmann, *supra* note 73, at 8-10

⁷⁹ *Id.* at 9

⁸⁰ See generally *The fragmentation of Somalia*, *The Economist*, Oct. 4, 2007, <http://www.economist.com/world/mideast-africa/displaystory.cfm?story_id=9914899>

power within these separate and distinct regions required a revenue stream to finance their militias on the ground.⁸¹ Piracy and fishing have each contributed to the funding of militia operations in Somalia.⁸²

In order for piracy to be lucrative and have a low potential for capture, there must be an “enabling environment.”⁸³ Somalia does not have a functional economy, and its official law enforcement operations are slim, with gangs of paramilitary groups and rebel forces controlling the streets.⁸⁴ In sum, the violent history of Somalia and its people, combined with a near limitless supply of military hardware and a lack of viable employment opportunities, has created an environment fraught with the desperation needed for fostering piracy.⁸⁵

The rise in piracy throughout the last five years is alarming. In 2008 alone, piracy attacks increased by 200%,⁸⁶ and the first few months of 2009 saw dozens of piracy attacks not only in the Gulf of Aden, but also farther out in the Indian Ocean.⁸⁷ In 2010, more hostages were taken at sea than any other year on record, with 1,181 total hostages taken, and eight killed.⁸⁸ Four-hundred forty-five ships (445) were attacked and 53 ships were hijacked in 2010, and Somalia was responsible for 92% of those seizures, accounting for 49 vessels hijacked and 1,016 crew members taken hostage.⁸⁹ They have netted hundreds of millions of dollars in ransom and have disrupted global trade.⁹⁰ Shipping companies using the Gulf of Aden, one of the world’s most

⁸¹ See generally Lehr & Lehmann, *supra* note 73, at 9-11

⁸² Daniel Wallis, Piracy ransoms funding Somalia insurgency, Reuters, Aug. 24, 2008, <<http://www.reuters.com/article/reutersEdge/idUSLO00572320080824>>

⁸³ See generally Bureau of Democracy, Human Rights and Labor, Country Report on Human Rights Practices, United States Department of State, Mar. 11, 2008, <<http://www.state.gov/g/drl/rls/hrrpt/2007/100504.htm>>

⁸⁴ Mohamed Ahmed, Pirate Stock Exchange Helps Fund Hijackings, Fin. Post (Canada), Dec. 1, 2009, <<http://www.financialpost.com/news-sectors/story.html?id=2289558>>

⁸⁵ *Id.* at 9

⁸⁶ Katharine Houreld, U.S.-Flagged Cargo Ship Has Run-in With Somali Pirates, Pittsburgh Post-Gazette, Apr. 9, 2009, at A1

⁸⁷ Pitman, *supra* note 10

⁸⁸ *Hostage Taking at Sea Rises to Record Levels, Says IMB*, ICC International Maritime Bureau, Jan. 17, 2011, available at <<http://www.icc-ccs.org/news/429-hostage-taking-at-sea-rises-to-record-levels-says-imb>>

⁸⁹ *Id.*

⁹⁰ VOANews.com, *Somali Piracy Exposes Weakness in UN Law of the Sea*, Apr. 8, 2009, <<http://www1.voanews.com/english/news/a-13-2009-04-08-voa67-68785907.html?CFID=69485145&jsessionid=6630748508e6054c45606f45196854303316&CFID=295864252>>

important and busiest shipping lanes,⁹¹ have faced increasing insurance rates.⁹² In addition, the increase in attacks, high shipping costs and fewer cargo ships have resulted in restricted humanitarian aid.⁹³ Ships willing to bring food aid into the country have been cut in half, and World Food Program ships have not been immune from pirate attacks.⁹⁴ This is especially detrimental to the population of Somalia, where 80% of food assistance from the UN moves by sea.⁹⁵

The numbers are staggering. Even more staggering is the realization that given Somalia's collapsed infrastructure, piracy can spread elsewhere. Other African states, whether Somali neighbors or located further away, could fall prey to powerful pirate operations, especially if such operations become firmly rooted in Somalia and ruled by powerful warlords enjoying Somali government support.⁹⁶ Regional pirate networks could be created, posing a significant threat to global commerce and human safety.⁹⁷ Subsection B will look at these realistic global threats, specifically terrorism, and how a continued increase in strength and number of pirate organizations could result in terroristic affiliations.

B. Piracy's Link to Terrorism and its Global Implications

Due to the ever present threat of terrorism at home and abroad for many western nations, acts of piracy may quickly become synonymous with acts of terror.⁹⁸ From an organizational and operational point of view, the similarities are clear. First, terrorists and pirates thrive in lawless regions, with terrorists finding safe haven in the remote mountains of Afghanistan and Pakistan,⁹⁹ and pirates flourishing in war-torn Somalia.¹⁰⁰ Second,

⁹¹ Kimani, *supra* note 32

⁹² *Id.*

⁹³ Sana Aftab Khan, *Tackling Piracy in Somali Waters: Rising Attacks Impede Delivery of Humanitarian Assistance*, UN Chronicle Online, <http://www.un.org/-Pubs/chronicle/2007/webArticles/073107_somalia.htm>

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Sterio, *supra* note 63, at 1454-1455

⁹⁷ Kraska & Wilson, *supra* note 4, at 43

⁹⁸ Sam Bateman, Outlook: The New Threat of Maritime Terrorism, in *Violence at Sea: piracy in the age of global terrorism* 244 (Peter Lehr ed., 2007)

⁹⁹ Alan Cowell, Britain to Add 700 Troops to Fight in Afghanistan, N.Y. Times, Apr. 30, 2009, at A12

modern pirates function on a highly organized scale at a supranational level.¹⁰¹ Their executioners function privately, beyond the sponsorship of any particular state, and their targets come from a variety of different states.¹⁰² The Somali pirates have gone after ships of many different nationalities so far, and the taken hostages have come from a myriad of different countries.¹⁰³ Terrorists, likewise, have operated against many different nations and have harmed nationals of many different states.¹⁰⁴ Lastly, both piracy and terrorism are a form of organized crime, with powerful masterminds and entire rings of executioners.¹⁰⁵ In terms of fighting piracy and terrorism, going after the executioners may not do enough and instead, one may have to focus on the masterminds.¹⁰⁶

While recognizing that pirates and terrorists differ in one aspect, namely that the latter seems to function on the basis of a particular political or religious ideology, while the former, at least in Somalia, seems to be driven by purely financial gains,¹⁰⁷ outside Somalia, pirates have smuggled weapons and delivered them to terrorist groups and have financially contributed to such groups.¹⁰⁸ Most notably, during the 1990s and early 2000s, when piracy was thriving in the Malacca Straits of Southeast Asia, reports indicated that pirates operated off an Indonesian island where the Aceh separatist group was fighting for autonomy and independence from Indonesia.¹⁰⁹ It is widely believed piracy proceeded fueled the Aceh separatist movement by providing the group with the funds necessary to purchase weapons, train military groups, and engage in violent secessionist combat.¹¹⁰ Moreover, pirate ships routinely seize weapons from victim vessels, and may be involved in the

¹⁰⁰ Pentagon Looks to Move Battle Against Pirates Ashore, *supra* note 218

¹⁰¹ Sterio, *supra* note 63, at 1460

¹⁰² Douglas R. Burgess Jr., The Dread Pirate Bin Laden, *Legal Aff.*, July-Aug. 2005, at 32, 32-33

¹⁰³ Kontorovich, *supra* note 5

¹⁰⁴ Adam Roberts, The Changing Faces of Terrorism, *BBC*, Aug. 27, 2002,

<http://www.bbc.co.uk/history/recent/sept_11/changing_faces_01.shtml>

¹⁰⁵ Donald J. Puchala, Of Pirates and Terrorists: What Experience and History Teach, 26 *Contemp. Security Pol'y* 1, 19 (2005)

¹⁰⁶ Sterio, *supra* note 30

¹⁰⁷ Niclas Dahlvang, Thieves, Robbers, & Terrorists: Piracy in the 21st Century, 4 *Regent J. Int'l L.* 17, 17-18 (2006)

¹⁰⁸ *Id.* at 18

¹⁰⁹ Bahar, *supra* note 26, at 29

¹¹⁰ *Id.*

resale and smuggling of such weapons to terrorist groups.¹¹¹ For example, in 2002, the Israeli Navy seized a vessel carrying a significant amount of weapons intended for the Palestinian Authority.¹¹²

The “piratization of terrorism” could easily spread to Somalia, where militant factions linked to al-Qaida operate freely.¹¹³ Terrorism already has a foothold in the country; for example, authorities believe that a militant Islamist rebel group carried out a recent terrorist attack that lefty twenty-three people dead at a medical school graduation in Mogadishu, the capital of Somalia.¹¹⁴ This type of violence exemplifies Somalia’s volatility, vulnerability to militant Islamic groups, and the ability of terrorist groups to function with impunity.¹¹⁵ Reports on Somali piracy indicate that their operations are managed by powerful warlords who live on the Somali mainland; the attacks are executed by young men who are recruited from the poverty-stricken streets in coastal villages and towns.¹¹⁶ Similarly, powerful leaders, like Osama bin Laden, lead terrorist organizations, often hiding in lawless regions or geographically inhospitable areas, while terrorist attacks are virtually always executed by young men recruited in a systematic, carefully planned manner.¹¹⁷

There is little doubt that there exists a real threat that Somali pirates will begin to engage in and begin affiliating with terrorist organizations. Somali pirates are terroristic in nature and as their resources grow they will be powerful enough to be of sufficient importance to a terrorist group looking for a new source to obtain funds and weaponry. This overlap between piracy and terrorism could easily be capitalized upon by the international community.¹¹⁸ While cognizant of the care that must be taken when applying the “terrorist” label

¹¹¹ Pitman, *supra* note 10

¹¹² Philip Cornford & Sarah Crichton, *The Ships That Died of Shame*, *Sydney Morning Herald*, Jan. 14, 2003, at 13; Dahlvang, *supra* note 72, at 31

¹¹³ See generally Sterio, *supra* note 63, at 1459 (citing Bahar, *supra* note 26)

¹¹⁴ *Somalia Graduation Ceremony Blast Kills 23*, CNN.com, Dec. 4, 2009, <<http://www.cnn.com/2009/WORLD/africa/12/04/somalia.attacks/index.html>>

¹¹⁵ Sterio, *supra* note 63, at 1459

¹¹⁶ Ahmed, *supra* note 83; see also Bahar, *supra* note 26

¹¹⁷ See generally Thomas M. Sanderson, *Transnational Terror and Organized Crime: Blurring the Lines*, 24 *SAIS Rev.* 49 (2004)

¹¹⁸ Lehr & Lehmann, *supra* note 73, at 18

to piracy operations,¹¹⁹ this paper suggests that the connections between the two are more than just plausible. The aforementioned examples are direct proof of ties between piracy and terrorism in the past. When taking into consideration the exponential escalation in Somali piracy over the course of the last five years, there is little reason to believe that a terrorist and Somali piracy group affiliation is not imminent.

As a result, this paper suggests that a global initiative must be adopted in order to combat the Somali pirates as well as a preventive measure to stop the escalation of piracy into the realm of terrorism. Part V will delve into this proposed initiative, highlighting the importance expanding the scope of the definition of piracy, the ICC adopting piracy within their jurisdiction, the option for domestic prosecution remaining available, continued regional partnerships, and heightened participation from maritime organizations and contact groups.

V. Global Initiative to Combat Piracy and Prevent Pirate Affiliations with Terrorist Groups

In order to prevent the destructive global impact that will ensue if the world allows piracy to continue to grow at a frightening rate, the international community must adopt an agenda that not only deters pirates from committing heinous acts, but also provides nations with the ability to successfully capture and prosecute. Specifically, the international community must adopt a definition that expands the scope of what constitutes an act of piracy. Additionally, piracy must be adopted within the jurisdiction of the ICC. Moreover, there needs to be an increased willingness by nations to prosecute domestically. Lastly, a continued use of regional partnerships will provide a supplemental venue for prosecution. These venues, with the support of international maritime organizations, will change the landscape of piracy captures and prosecution. It will create a global, cooperative procedure for combating piracy, allowing nations to have an abundance of capturing and prosecutorial measures to employ.

¹¹⁹ Id.

A. Expanding the Scope of the Definition of Piracy

There have been countless definitions for piracy throughout the course of history, both on a domestic and international level. Domestically, each State has its own definition of the term “piracy,” which can often influence the way in which suspected pirates are charged and convicted in domestic courts.¹²⁰ As mentioned above, many domestic statutes limit jurisdiction to acts of piracy against that nation’s interests. On an international level, the most universally accepted definition of piracy was adopted by UNCLOS. However, this definition, as well as the definitions adopted domestically by nations, is far too restrictive. In order to create a platform that will allow for the successful capture and prosecution of pirates, a uniform definition must be adopted that encompasses acts of *modern day* piracy.

This paper argues that the definition adopted by the SUA convention become universally recognized, both by States individually in their domestic statutes, as well as the international community as a whole. The SUA Convention does away with the restrictive elements of the Convention on the High Seas/UNLOS definition of piracy.¹²¹ First, the SUA Convention does not have the private aims requirement of the UNCLOS treaty; thus, maritime terrorist acts driven by politics and ideology, and not simply private aims, would fall within the SUA Convention framework.¹²² Second, the SUA Convention authorizes states to pursue maritime aggressors not only on the high seas, but anytime the victim vessel is in some form of international transit.¹²³

While the SUA Convention attempts to eliminate the restrictive elements of the UNCLOS definition of piracy, the former has not been as widely ratified and is not generally considered a part of customary international law.¹²⁴ Regrettably, a number of countries most affected by piracy, such as Somalia, have not

¹²⁰ Fauntauzzi, *supra* note 16, at 356

¹²¹ Sterio, *supra* note 64, at 1470

¹²² Kontorovich, *supra* note 12

¹²³ SUA Convention, *supra* note 44

¹²⁴ Lawrence Azubuike, *International Law Regime Against Piracy*, 15 *Ann. Surv. Int'l & Comp. L.* 43, 55 (2009)

ratified, the SUA Convention.¹²⁵ Despite the absence of global ratification of the SUA Convention, this Author argues for the global ratification of its definition of piracy. Its definition encompasses all the factors prevalent in modern day piracy. In order to successfully battle modern day piracy, a definition that will include acts committed by pirates, regardless of their location or source of motivation, must be adopted.

Additionally, the SUA definition solidifies the link between piracy and terrorism, by treating piracy as a form of maritime terrorism.¹²⁶ Mindful of terrorists' politically and/or religiously motivated agendas, the SUA definition expands the scope of the UNCLOS definition to include acts committed for both private and public aims. Additionally, the Somali pirate organizations' now operate as structured organizations. As detailed above, the masterminds direct their attacks from inside Somali's territorial waters and take refuge on Somalia's land. The SUA definition recognizes this problem and allows an act to qualify as "piracy" even though it is not committed on the high seas.¹²⁷

If adopted universally, it will provide the definitional foundation needed for States to successfully capture and prosecute pirates. The definition allows for the acts of a pirate organization, conducted in affiliation with a terrorist group, to fit within its scope. The following arguments, especially those for an increase in domestic prosecution and including piracy within the jurisdiction of the ICC, are premised on a definition of piracy that expands the scope of what constitutes a piratical act. Part B addresses the importance of the ICC adopting piracy as a crime within its jurisdiction. This expansive definition is critical to the successful implementation of piracy as a crime that can be prosecuted by the ICC.

B. The ICC Must Adopt Piracy as a Crime Within its Jurisdiction

¹²⁵ Bahar, *supra* note 30, at 26

¹²⁶ Sterio, *supra* note 34, at 389.

¹²⁷ SUA Convention, *supra* note 44, art. 4

This paper argues that the ICC includes piracy as a crime within its jurisdiction. The ICC came into existence in 2002, when the required number of states ratified the Rome Statute, thereby creating the court.¹²⁸ As of January 2010, 110 countries are states parties to the ICC.¹²⁹ The crimes over which the court presently has jurisdiction are genocide, crimes against humanity, and war crimes.¹³⁰ When the Rome Statute was negotiated, piracy seemed to have vanished and certainly did not represent the issue of global magnitude that it does today.¹³¹ Thus, the ICC drafters may not have had enough of an interest or incentive to include the crime of piracy in the Rome Statute.¹³² Because piracy is a universal jurisdiction crime, it is logical that pirates would be prosecuted in the only universal criminal court.¹³³ In fact, some scholars have already expressed regret that the ICC statute as originally drafted did not contemplate the crime of piracy.¹³⁴ This Author is cognizant of the fact that the ICC was created with the aim of ending impunity for the perpetrators of “the most serious crimes of concern to the international community as a whole.”¹³⁵ While it may be argued that acts of piracy, standing alone, may not amount to “the most serious crimes of concern” within the meaning of the ICC, it is this Author’s position that when acts of piracy begin to embody a terroristic personality, it breaks the “most serious crime” threshold and should be considered within the jurisdiction of the ICC.

On its face, the idea of prosecuting pirates within the framework of the ICC seems counterproductive, using valuable international judicial resources and expenditures to fight random acts of financially motivated violence. However, that vision no longer represents the true nature of a Somali pirate. Pirate attacks are characterized by increasing cruelty and violence which will certainly not cease until pirates are brought to

¹²⁸ William Schabas, *An Introduction to the International Criminal Court* (Cambridge 3d ed 2007)

¹²⁹ International Criminal Court, *The States Parties to the Rome Statute* (July 21, 2009)

¹³⁰ Rome Statute of the International Criminal Court (“Rome Statute”), July 17, 1998, UN Doc A/CONF.183/9 (1998), reprinted in 37 ILM 999, Preamble, P 5 (“Rome Statute”)

¹³¹ Sterio, *supra* note 64, at 1488

¹³² *Id.* at 1488-1489

¹³³ *Id.* at 1488

¹³⁴ *Id.*

¹³⁵ Rome Statute, *supra* note 130, at Preamble P 4

justice.¹³⁶ In fact, pirates are committing some of the very acts that are included within the definition of acts that can constitute crimes against humanity when committed as part of an attack against a civilian population: namely murder, torture, and rape.¹³⁷ When considering the organized structure of the evolving Somali pirate organization, coupled with a history of pirate ties with terrorist groups, it is clear that action must be taken by the ICC. The potentially catastrophic destruction that these organizations acting alone, as well as in connection with terrorists could cause, both humanely and structurally, brings piracy well within the realm of the ICC drafters' scope.

Today, in light of the changed climate in Somalia and the dangers posed by piracy, major super powers may have sufficient political incentive to come together and to redraft the Rome Statute to include the crime of piracy.¹³⁸ However, this process may only occur upon adoption by two-thirds of the states parties, which must then be ratified by seven-eighths of the states parties in order to take effect.¹³⁹ Despite this paper's assertions that the fight on piracy be a global measure, connoting the required amendment amounts being met, this paper is aware that these measures will take time to be ratified globally. As a result, this paper does not argue that the Rome Statute be amended, but that an optional protocol ("the Protocol") be adopted. The Protocol will come into effect for those states that sign it,¹⁴⁰ allowing those states who already recognize the global impact of the rise in piracy to sign on immediately, while affording those states that realize this issue down the road to sign at

¹³⁶ International Chamber of Commerce, International Maritime Bureau, *Piracy and Armed Robbery Against Ships, Report For The Period 1 January-30 September 2009 ("IMB October 2009 Report")* 6-7 (Oct 2009)

¹³⁷ Rome Statute, supra note 130, at Art 7(1)

¹³⁸ Sterio, supra note 64, at 1488

¹³⁹ Yvonne M. Dutton, *Bringing Parties to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court*, 11 *Chi. J. Int'l L.* 197, 231 (2010)

¹⁴⁰ According to the UN Treaty Collections Definition of Key Terms, an optional protocol is an instrument that contains additional rights and obligations to a treaty. However, an optional protocol is independent of the main treaty and subject to independent ratification, meaning that not all parties of the main treaty need consent to it. See UN, Definitions (2010)

a later date. The Protocol should create a separate chamber within the ICC to handle piracy cases specifically.¹⁴¹

Handling piracy within the framework of an optional protocol to the Rome Statute would deem questions of which states had or had not ratified certain treaties irrelevant.¹⁴² Piracy would be defined in connection with the Protocol.¹⁴³ The crime of piracy can be readily defined. This paper proposes that the definition to be used in connection with the Protocol be that adopted by the SUA, providing the ICC with a definition that allows all modern piratical acts to fit within its jurisdictional grasp. One might expect that states would be very willing to ratify a protocol giving the ICC authority to prosecute piracy offenses.¹⁴⁴ As will be discussed below, States are already turning pirates over to Kenya for prosecution, making it unlikely they would raise sovereignty concerns in connection with relinquishing suspected pirates to an international tribunal.¹⁴⁵ Also, many state representatives have already expressed support for an international tribunal to try piracy cases.¹⁴⁶

Additionally, the ICC is well-equipped with significant resources and personnel to handle the burden imposed by including piracy within its jurisdiction.¹⁴⁷ This is not a situation where national courts have the resources and expertise to inexpensively and expeditiously try piracy cases.¹⁴⁸ If a separate chamber is created to adjudicate piracy offenses, it will not distract the court from its other duties.¹⁴⁹ The foundation is already in place, unlike in the situation of an *ad hoc tribunal*, which involves the formation of an entirely new tribunal.

¹⁴¹ The idea of potentially creating a separate chamber to handle piracy cases was raised and discussed at the October 16-17, 2009 Workshop entitled "Suppressing Maritime Piracy: Exploring the Options in International Law."

¹⁴² See generally Dutton, *supra* note 139

¹⁴³ *Id.* at 239

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See, for example, UN SCOR 63rd Sess, 6046th mtg at 28 (statement of Representative Jolle, from Denmark) (suggesting that in the long term states might need to examine the possibility of bringing pirates before an international tribunal for prosecution)

¹⁴⁷ See generally Dutton, *supra* note 139

¹⁴⁸ See *Proposed Programme Budget for 2010 of the International Criminal Court*, International Criminal Court ("2010 ICC Proposed Budget"), Assembly of States Parties, ICC-ASP 8/10 (July 17, 2009). According to Annex V(a) of the 2010 ICC Proposed Budget, the court expects a total staff of approximately 781

¹⁴⁹ See generally Dutton, *supra* note 139.

The ICC already has a venue, governing statute, and personnel equipped to handle the addition of piracy as a crime within its jurisdiction.

Because it is the duty of each state to exercise jurisdiction over those responsible for international crimes, the jurisdiction of the ICC was created to be complementary to national criminal jurisdiction: it will only investigate and prosecute where a national state with jurisdiction over a case is “unwilling or unable to genuinely carry out the investigation or prosecution.”¹⁵⁰ Under the Rome Statute, “unwillingness” includes instances where national proceedings are a sham or are inconsistent with an intention to bring the person to justice, either because such proceedings are unjustifiably delayed or are inconsistent with an intention to bring the person to justice, either because such proceedings are unjustifiably delayed or are not being conducted independently or impartially.¹⁵¹ A nation’s “inability” to prosecute includes instances where, because of the collapse or unavailability of its national judicial system, the nation cannot obtain the accused or the necessary evidence, or is otherwise unable to carry out the proceedings.¹⁵²

Thus, nations may, and are encouraged to prosecute offenses nationally, but the ICC’s complementary regime provides another forum in which perpetrators can be brought to justice where national jurisdictions are either unwilling or unable to fight impunity.¹⁵³ This criterion fits well within this Author’s proposed global initiative. It is this initiative’s goal to promote domestic prosecution, but allowing a State with some form of hardship to have other methods of prosecution available.

C. Increase Domestic Prosecutions

Until recently, most states have had little incentive to spend the time and money associated with prosecuting pirates. While acts of piracy affect a host of nations, it admittedly may affect each particular nation

¹⁵⁰ Rome Statute, *supra* note 130, at Preamble P 10, Art 17(1)(a)

¹⁵¹ *Id.* at Art 17(2)

¹⁵² *Id.* at Art 17(3)

¹⁵³ Duttin, *supra* note 137, at 235

minimally. However, with the increase in organized piracy and the realistic potential of affiliations with terrorist groups, this paper argues that the incentive should now be considered a global one, warranting an increase in the willingness to prosecute domestically.

States have used universal jurisdiction as a basis for prosecuting acts of piracy only in very few instances.¹⁵⁴ Even more rarely used have been the UNCLOS and SUA Convention provisions.¹⁵⁵ Despite the recognition that pirates are not being brought to justice and punished for their crimes, few nations are stepping up to prosecute suspected pirates.¹⁵⁶ According to one report, between August 2008 and September 2009, some 343 suspected pirates were caught by naval forces and disarmed and released, while only 212 were sent somewhere to be prosecuted.¹⁵⁷ Failing to utilize universal jurisdiction and treaty provisions aside, some states do not even have national laws that criminalize piracy; and where states have such laws, they are not uniform in how they operate or the conduct they prohibit.¹⁵⁸ As mentioned earlier, many domestic laws only allow for domestic criminal prosecution of pirates if they somehow threatened the national interests of the prosecuting state.¹⁵⁹ Domestic statutes aside, States have demonstrated varying reasons for failing to prosecute pirates; namely because of the cost (may be cheaper to pay the ransom), little incentive in dealing with the piracy threat (do not have highly developed shipping industry), or simply want to avoid the hassle associated with prosecuting pirates (lengthy, burdensome on the nation's judiciary).¹⁶⁰ Despite these excuses, the most likely response to the piracy threat involves prosecution of captured pirates in the domestic courts of the capturing state.¹⁶¹

¹⁵⁴ Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 Harv Intl LJ 183, 192 (2004)

¹⁵⁵ Id.

¹⁵⁶ *Resolution 1851*, UN Security Council, P6 (Dec 16, 2008)

¹⁵⁷ Id.

¹⁵⁸ *Report: The Role of the European Union in Combating Piracy*, PP 11-12, ESDA Doc No A/2037 (June 4, 2009)

¹⁵⁹ See supra note 60

¹⁶⁰ See generally Sterio, supra note 34, at 394

¹⁶¹ Peppetti, supra note 36, at 108-10

This Author's proposal addresses all of the aforementioned issues asserted regarding the lack of domestic prosecution. First, the definition to be adopted by States is a universal one. It does not limit jurisdiction to acts against that particular State's interests. To the contrary, piracy was the first universal jurisdiction crime. Consistent with that theme, domestic States should allow universal jurisdiction to fit within the realm of their piracy statutes. Secondly, there is little doubt that the prosecution of pirates may incorporate significant costs and be burdensome on the nation's judiciary. This is precisely why this global initiative provides an assortment of venues for prosecution. If a financial hardship truly exists, limiting the State's ability to prosecute efficiently, other options remain available; such as the ICC or a regional partnership. Lastly, this paper argues that the "little incentive" argument is moot. Due to the expansion of Somali piracy and its imminent affiliation with terrorist groups, a global incentive is present. Every nation now has an incentive to prosecute piracy domestically in order to create the perception of a coordinated global against piracy.

Instead of bringing pirates to justice, a culture of impunity reigns, with captured pirates being released and permitted to continue their illegal activities.¹⁶² There must be a reversal to this culture of impunity. In order to have any realistic hope of deterring pirates from engaging in the types of globally destructive acts that this Author fears are imminent, pirates must have a fear of being prosecuted if captured. A global definition of piracy, adopted within the statute of each State, provides the foundation for an increase in domestic prosecution. As mentioned above, if a State has a true hardship that prevents efficient prosecution, other venues including a regional partnership, remain available.

D. Continued Use of Regional Partnerships

Although states have generally refused to prosecute captures pirates in their own domestic courts with any regularity, they have not totally given up on the idea of bringing pirates to justice.¹⁶³ Many nations instead

¹⁶² Dutton, *supra* note 139, at 216

¹⁶³ Dutton, *supra* note 139, at 220

have recently turned to Kenya and its courts as a venue for prosecuting pirates captured off the coast of Africa.¹⁶⁴ This paper proposes that these regional partnerships remain intact and continue to be utilized in appropriate circumstances.

Numerous countries, including the United States, United Kingdom, and the European Union, among many others, have signed “Memorandums of Understanding” (“MOU’s”) with Kenya to prosecute captured pirates.¹⁶⁵ These agreements are usually made in exchange for money and the promise to modernize Kenya’s court system.¹⁶⁶ In return, these MOU’s provide that any pirates captured could be transferred to Kenya for prosecution.¹⁶⁷

While such prosecutions have yet to be utilized regularly,¹⁶⁸ regional partnerships provide a number of significant advantages. Trying pirates at a court in Kenya is seen as an alternative to trying pirates in Somalia’s courts, where there is no effective central government or legal system, as well as trying pirates in the capturing state’s courts, where finding translators, witnesses, or evidence is a sometime insurmountable difficulty.¹⁶⁹ The prosecution in Kenyan courts provides a regional response to acts of piracy being committed in close proximity to its location. As a result, regional partnerships present a method of prosecution to combat a localized crime that has a potentially global impact.

Moving forward, while it is proposed that domestic prosecutions be favored over those conducted by regional partnerships, regional partnerships should remain an available option to a capturing nation. If domestic prosecution is not feasible, prosecution in a Kenyan court is undoubtedly a viable solution on a case by case basis. Regional trials may send a stronger deterrent message to existing pirates, who may hear and know more

¹⁶⁴ Id.

¹⁶⁵ VOANews.com, supra note 90

¹⁶⁶ Jeffrey Gettleman, *The West Turns to Kenya as Piracy Criminal Court*, N.Y. TIMES, Apr. 24, 2009, at A4

¹⁶⁷ Gerry J. Gilmore, Kenyan Government Agrees to Try Pirates Seized by U.S. Forces, Am. Forces Press Serv., Jan. 29, 2009, <<http://www.defense.gov/news/newsarticle.aspx?id=52871>>

¹⁶⁸ See generally Sterio, supra note 34, at 397

¹⁶⁹ Gettleman, supra note 166, at A8

about a Kenyan trial than an American or British proceeding.¹⁷⁰ What better way to send a message that acts of piracy will no longer go unpunished than to prosecute offenders in a venue close to the waters that the acts are occurring on. One of the primary purposes of executing a global initiative is to create a fear of imminent prosecution into the psyche of a Somali pirate. In order to instill this fear and create a deterrent effect, regional partnerships should continually be utilized when the circumstances warrant.

In addition to the various venues of prosecution, international maritime organizations need to be utilized as supplemental tools of combating piracy. While this global agenda will create the necessary jurisdiction for capturing and prosecuting pirates, it remains imperative that the international community have supporting information to locate these piracy organizations.

E. Maritime Organizations as Support Groups

International maritime organizations can be utilized as essential support groups in the proposed global initiative against piracy. These organizations can provide critical data to be utilized by nations in their search, capture, and prosecution of piracy law offenders. Two main maritime bodies involved in anticipatory efforts include the International Maritime Organization (“IMO”) and the International Maritime Bureau (“IMB”).¹⁷¹

The IMO is described as “a specialized UN agency which is responsible for measures to improve the safety of international shipping and to prevent marine pollution from ships.”¹⁷² The IMO administers several international agreements, some of which are aimed at combating piracy.¹⁷³ Moreover, the IMO has helped to

¹⁷⁰ Sterio, *supra* note 64, at 1489

¹⁷¹ See generally International Maritime Organization [IMO], <<http://www.imo.org>>; ICC, International Maritime Bureau, <http://www.icc-ccs.org/index.php?option=com_content&id=27&itemid=16>

¹⁷² Niclas Dahlvang, *Thieves, Robbers, & Terrorists: Piracy in the 21st Century*, 4 *Regent J. Int'l L.* 17, 17-18 (2006)

¹⁷³ IMO, IMO Conventions, <http://www.imo.org/Conventions/mainframe.asp?topic_id=148#5>

raise security requirements for ships in ports, by enacting new, stricter regulations for port safety.¹⁷⁴ Finally, the IMO manages routing schemes for international shipping; these schemes can help to prevent piracy by rerouting smaller vessels from pirate-infested waters or by providing security to all ships sailing through such dangers waters.¹⁷⁵

The IMB, on the other hand, is a branch of the International Chamber of Commerce and established a Piracy Reporting Centre in Malaysia in 1992.¹⁷⁶ The centre collects piracy reports and broadcasts them to ships at sea; coast guards thus learn about piracy incidents quickly.¹⁷⁷ Moreover, the centre is involved in locating hijacked ships and has made significant achievement in such efforts.¹⁷⁸

Collectively, these two maritime organizations possess information that is essential in the world's fight against piracy. With the use of these support groups, the international community will be able to communicate with each other, locating areas of potential pirate activity, as well as known locations of hijacked ships. It is precisely this type of information sharing that the international community must utilize in order to locate the masterminds of pirate organizations and take a proactive approach in combating piracy.

VI. Conclusion

As exemplified above, piracy is a serious crime of international concern that is only increasing in frequency and severity despite the unique ways in which the international community has been working together recently in an effort to repress and combat piracy.¹⁷⁹ While acts of piracy in Somalia are limited to the Gulf of Aden and the surrounding Indian Ocean, its impact is global. The nature of Somali pirates and the way in which they conduct their attacks have become more brutal and systematic. Somali pirates no longer function

¹⁷⁴ The IMO's International Ship and Port Facility Security Code entered into force in July 2004. See *Eradicating Piracy Together*, Malaysian Bus., Jan. 16, 2004, at 45

¹⁷⁵ R.R. Churchill & A.V. Lowe, *The Law of the Sea* 212-14 (2d ed. 1988); Dahlvang, *supra* note 172, at 36

¹⁷⁶ ICC, IMB Piracy Reporting Centre, <http://www.icc-ccs.org/index.php?option=com_content&id=30&itemid=12>

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Dutton, *supra* note 139, at 240-241

on an individual agenda, but rather possess the characteristics of carefully calculated criminal organizations. Allowing piracy to escalate even further will continue to be detrimental on a global level, but create the potential for destruction on a larger scale. This Author believes that affiliations between piracy organizations and terrorist groups are imminent. The impact of the international community allowing piracy to become a contributing member to terrorist groups, through the distribution of weapons and funding, would be devastating.

As a result, this paper argues for the implementation of a cooperative, global initiative by the international community to combat piracy. Through the use of a universal definition of piracy, universal jurisdiction, the adoption of piracy as a crime within the jurisdiction of the ICC, an increase in domestic prosecution and regional partnerships, and the supplemental data and information provided by international maritime organizations, the international community can prevent merging of pirate and terrorist group affairs. More than that, this agenda will finally provide the platform for pirates to be captured, prosecuted, and convicted successfully.