

# An Examination of the Bases for Criminal Jurisdiction over Pirates Under International Law\*

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I. INTRODUCTION

Using the example of Somali piracy,<sup>1</sup> this Article investigates bases for international criminal jurisdiction over pirates for the seizing states (arresting states), nonarresting states (third states), other affected and interested states, and nonstate entities.

In a bid to combat piracy, international efforts attempted to establish a link between the offense, the suspects, and the third states willing to accept and prosecute the suspects. This attempt has exposed a fault line in the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and international law regarding this link, a problem solved only through multilateral transfer agreements between arresting and third states. These agreements enable arresting states to apprehend and transfer suspects to third states for investigation and/or prosecution. However, other affected and interested states and nonstate entities remain without remedy. These fundamental complications, overlooked by UNCLOS, have significant bearings on the jurisdiction over pirates under international law.

This Article argues that there is a need for a connection between the suspects, the arresting states, and the third states. In doing so, this Article revisits the linkage issue against the background of traditional jurisdictional principles before turning to jurisdiction under transfer agreements and, in the process, raises a new inquiry: whether other affected and interested states<sup>2</sup> and nonstate entities, which bear the brunt of piracy, could have a basis for jurisdiction or redress under international

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1. “Somali piracy” refers to piracy off the Somali coast in the Gulf of Aden and the Western Indian Ocean. For background coverage, see Ademun Ademun-Odeke, *Somali Piracy—Underlying Causes and New Challenges to International Law and World Order*, SELECTED WORKS (Dec. 2009), [http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=ademun\\_ademun\\_odeke](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=ademun_ademun_odeke).

2. For example, flag states, labor-supplying states, and states operating international waterways. See *infra* Part VI.A-B.

law. This Article also provides a brief discussion on the status of stateless and underage pirates. The Article concludes that the failure to learn from, and resolve the causes of, Somali piracy, combined with UNCLOS's jurisdictional shortcomings, may have a catastrophic effect on the future of piracy prosecutions under international criminal jurisdiction.

## II. PRINCIPLES OF INTERNATIONAL CRIMINAL JURISDICTION UNDER PUBLIC INTERNATIONAL LAW

Jurisdiction is the capacity of a state to prescribe and enforce a rule of law, i.e., its authority or power over persons, property, or events within its purview to prescribe, adjudicate, and enforce norms. Piracy is an offense punishable in any qualifying jurisdiction. Thus, the key issue is which states have jurisdiction to prosecute international pirates, an issue that leads to many interrelated questions. To what extent is the ongoing prosecution of pirates in third states in accordance with the internationally accepted norms, principles, and grounds for international criminal jurisdiction, which require a link between the accused and/or the crime and the jurisdiction? How do these third-state prosecutions relate to the general principles of international criminal jurisdiction? Do transfer agreements constitute additional bases for international criminal jurisdiction, providing the missing link between the pirates and third states? What is the position of other affected and interested states who are not parties to the transfer agreements? Until now, only arresting states seemed to have direct jurisdictional links to pirate suspects under UNCLOS article 105. This Part will explore these questions in the context of prosecuting Somali pirates under the general principles of international criminal jurisdiction.

### A. *The Nationality Principle*

#### 1. The Nationality Principle and Stateless Pirates

A state has primary jurisdiction over its nationals and corporations.<sup>3</sup> Pirates, as natural persons, can be prosecuted by the state of their nationality regardless of where the offense is committed. Under this principle, Somalia would, in theory, be the natural forum for the prosecution of Somali pirate suspects. However, following the 1991 government collapse, the judicial system and penal administration also

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3. For a detailed application, see JAMES CRAWFORD, *BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 459-60 (8th ed. 2012).

collapsed, and Somalia became a failed state. Its successor, the Transitional Federal Government (TFG), is ineffective and helpless, although relevant United Nations Security Council resolutions on piracy have been implemented in Somalia with its consent.<sup>4</sup> Were it not for the fact that the TFG controls only central Somalia around the capital Mogadishu, it would appear to be the obvious forum. However, because the TGF is currently unable, someone else must prosecute Somali pirates. Apart from the TFG in central Somalia, the north is comprised of the semiautonomous regions of Puntland and Somaliland, while the south is under al-Shabaab militia control. What is the status of pirate prosecutions in those semiautonomous regions?

There are currently no piracy prosecutions in either the central TFG-controlled or the southern militia-controlled regions of Somalia. Puntland and Somaliland have fared better: a 2011-2012 U.N. study revealed over 100 prosecutions in Somaliland, 20 of which resulted from arrests by patrolling naval states and 80 from arrests by their own forces, and 208 prosecutions in Puntland, 60 from arrests by patrolling naval states and 148 from arrests by their own forces.<sup>5</sup> These numbers have risen since then and are far in excess of even Kenya and the Seychelles' combined totals of 123 and 31 prosecutions, respectively.<sup>6</sup> The arresting state will always derive a jurisdictional link through UNCLOS and the universality principle.<sup>7</sup> On the other hand, third states—such as Kenya, Mauritius, and the Seychelles—only derive this link through their transfer agreements with arresting states.<sup>8</sup> Although the current lack of law and order in Somalia complicates jurisdiction under the nationality principle, its sovereignty and territorial boundaries, including its ports and harbors, should still be respected by all states and international law.<sup>9</sup>

Further complicating jurisdiction under the nationality principle is that Somali piracy is not restricted to Somalian Somalis, but includes Middle Easterners and probably Djiboutian, Ethiopian, Kenyan, and diasporan Somalis. In theory, these pirates could be prosecuted in the arresting states or transferred to their states of nationality. However, it is

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4. See S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008); S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008); S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008); S.C. Res. 2125, U.N. Doc. S/RES/2125 (Nov. 18, 2013).

5. U.N. Secretary-General, *Report on the 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*, ¶ 19, U.N. Doc. S/2010/394 (July 26, 2010).

6. See *id.*

7. United Nations Convention on the Law of the Sea art. 105, concluded Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

8. See *infra* Part IV.

9. See S.C. Res. 1851, *supra* note 4, pmbl.

difficult to determine the nationality of pirate suspects for many reasons. Among them is the difficulty in distinguishing a Somali from an Omani, a Yemeni, or a Qatari. Furthermore, in general, pirates do not carry identification, are of the same complexion as their neighbors, and largely speak Arabic. There is also evidence that al-Shabaab provides military training and logistical support to some pirates,<sup>10</sup> which would also favor internationalism over national identities.<sup>11</sup> Accordingly, pirate suspects will often deny their nationality, claim other nationalities, or claim statelessness. Pirates caught red-handed invariably claim to be fishermen who have run out of provisions and who approached their interceptors for assistance. These issues, in addition to the related evidentiary problems, hinder the search for solutions at the early stages of piracy arrests. It also eliminates the possible use of the nationality principle as a basis for prosecution of Somali pirates.

## 2. Flag-State Jurisdiction

International maritime law jurisdiction largely follows that of international public law. Flag-state jurisdiction is an extension of the nationality principle. Because vessels are subjects of nationality, they are subject to flag-state jurisdiction, whereby, except in exceptional cases, a ship on the high seas is subject only to the jurisdiction of the state granting it the right to sail under its flag.<sup>12</sup> Somalia is currently not in a position to exercise this function. Somali registry has collapsed, and pirate ships include hijacked vessels from other registries. In effect, the arresting states and third states have, through either the arrests or the transfer agreements, assumed some flag-state functions on behalf of Somalia.

### B. *The Territorial Principle*

#### 1. Territorial Jurisdiction

The nationality principle is the corollary of the territorial principle.<sup>13</sup> A state's jurisdiction extends over all persons and things within its land

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10. See Jonathan Saul & Camila Reed, *Shabaab-Somali Pirate Links Growing: UN Adviser*, REUTERS (Oct. 20, 2011, 1:17 PM EDT), <http://www.reuters.com/article/2011/10/20/ozatp-somalia-shabaab-pirates-idAFJ0E79J0G620111020>.

11. See generally Marie Beauchamps, "*Terrorism*" and National Identity; *Denaturalization in the Security Paradigm: Irregularity and Political Struggles*, ACADEMIA.EDU (Feb. 22-23, 2013), [http://www.academia.edu/2962314/\\_Terrorism\\_and\\_National\\_Identity\\_Denaturalization\\_in\\_the\\_Security\\_Paradigm\\_Irregularity\\_and\\_Political\\_Struggles\\_](http://www.academia.edu/2962314/_Terrorism_and_National_Identity_Denaturalization_in_the_Security_Paradigm_Irregularity_and_Political_Struggles_).

12. See UNCLOS, *supra* note 7, art. 92(1).

13. See CRAWFORD, *supra* note 3, at 458.

boundaries, its national air space, and its internal and territorial waters.<sup>14</sup> A state may exercise jurisdiction on the basis of the territorial principle by prescribing criminal conduct.<sup>15</sup>

In addition to nationality, the TFG and the semiautonomous regions may, in theory, exercise jurisdiction over Somali pirates under the territorial principle.<sup>16</sup> Because of the complications of prosecuting Somali pirates suspects under the nationality principle, Puntland and Somaliland rely on this principle for their prosecutions. Nevertheless, pirate suspects found in or brought into a territory of a state may be prosecuted therein regardless of where the piracy occurred.<sup>17</sup> Although, how pirate suspects end up in a particular jurisdiction may be material to their defense. In any event, jurisdiction under the principle of territoriality is only academic until Somalia reestablishes a functional government able to exercise effective jurisdiction over its maritime territory.

## 2. Port-State Jurisdiction

Port-state control is an extension of the territorial principle. With few exceptions, any offense committed in port is punishable by the coastal state under the territorial principle.<sup>18</sup> This would not apply to pirate-related and other offenses committed within that state's territory. Offenses committed at port are not piracy, but robbery at sea, and may be prosecuted under domestic penal codes under the territorial principle.<sup>19</sup> Unlike flag-state jurisdiction, port-state jurisdiction, per se, neither creates a link nor provides for a right of jurisdiction, let alone jurisdiction over pirates. Other piratical-related offenses may be prosecuted as maritime security offenses under other international maritime conventions, such as the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention).<sup>20</sup> Further, although hostage vessels and crews may be docked in Somali

14. See UNCLOS, *supra* note 7, art. 2(1)-(2).

15. S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 19-20 (Sept. 7); see *Nottebohm Case* (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6).

16. However, in *Ahlstrom v. Commission*, 96 I.L.R. 148, 169 (E.C.R. 1988), the Court of Justice of the European Communities stated, "[T]he only two legal bases of jurisdiction in international law are the principles of nationality and territoriality."

17. See *United States v. Said*, 757 F. Supp. 2d 554, 557 (E.D. Va. 2010) (quoting 18 U.S.C. § 1651 (2012)).

18. See UNCLOS, *supra* note 7, art. 11.

19. See, e.g., *infra* Part V.A.3.

20. See Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *concluded* Mar. 10, 1988, 1678 U.N.T.S. 221 [hereinafter SUA Convention]. For discussion thereof, see *infra* Part III.B.

ports, the TFG is unable to prosecute the kidnappers. Currently, in Somalia, there are few functional ports outside of Puntland and Somaliland, and there is no national port authority.

### 3. Coastal-State Jurisdiction

Coastal-state control, too, is an extension of the territorial principle. Pirates who find themselves in a state's coastal waters can be treated the same way and for the same reasons as those found in ports, provided the piracy was committed outside that state's territory and the pirates were not delivered from foreign vessels except by the coastal state's request, consent, or agreement.<sup>21</sup> This is because criminal jurisdiction over foreign vessels by a coastal state is prohibited by UNCLOS, except under conditions laid down in article 27(1) and parts V and XII.<sup>22</sup> Similar to port-state jurisdiction, coastal-state jurisdiction, per se, does not create a link or provide for jurisdiction, let alone jurisdiction over pirates. Unless the offense occurs on the high seas or other places beyond national jurisdiction, the equivalent piratical offense is armed robbery at sea.

It is possible for a port or coastal state to arrest a pirate ship and its crew in its coastal territory for piracy committed on the high seas and/or in a place outside the jurisdiction of that state, regardless of whether the piracy is committed against a vessel of that state or against a vessel of a foreign state. Or a foreign state may request the assistance of the coastal state.<sup>23</sup> It is also possible for the coastal state to respond to a request from a foreign state arising from hot pursuit of a robbery at sea in the territory of a foreign state.<sup>24</sup> For offenses on the high seas or in a place outside the jurisdiction of that state, it would be the reversal of the principle of hot pursuit.<sup>25</sup> Outside of these scenarios, issues of jurisdictional links to piracy do not arise in respect to port- or coastal-state control. Piracy is principally a crime on the high seas.

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21. For instance, the transfer agreements between the United States, European Union, and United Kingdom with Kenya, Mauritius, and the Seychelles allowed the former nations to deliver Somali pirate suspects to the latter jurisdictions for prosecution.

22. UNCLOS, *supra* note 7, art. 27(1), pts. V, XII (limiting the jurisdiction of a coastal state on a foreign vessel and excluding the EEZ and acts related to the protection and preservation of the marine environment from coastal-state jurisdiction).

23. *See id.* arts. 2(1)-(2), 21, 24(1), 25.

24. *Id.* art. 111.

25. *Cf. id.*



#### 4. The Continental Shelf, the EEZ, and the High Seas

The division between piracy and robbery at sea is complex. Under UNCLOS article 101, piracy consists of two elements: first, it must be committed “*on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft*” and, second, it must be “*against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.*”<sup>26</sup> The high seas can be a *place outside the jurisdiction of any state*, which confuses the piracy definition, or the location where piracy is committed. However, the latter refers to uninhabited islands (*terra nullius*) and the shores of uninhabited territories, such as those of the Antarctic, which are beyond national jurisdiction.<sup>27</sup> But piracy is also a crime in areas other than the high seas as suggested by the phrase “any other place outside the jurisdiction of any State.”<sup>28</sup>

Following this confusion, there is no consensus on whether piracy can be committed on the continental shelf or the Exclusive Economic Zone (EEZ).<sup>29</sup> A related issue is whether the continental shelf and the EEZ are part of the high seas. Both maritime zones are beyond the territorial sea, where national jurisdiction ends, and the contiguous zone, where national jurisdiction is limited to sanitary and fiscal measures.<sup>30</sup> The rights and jurisdiction of the coastal state over the continental shelf and EEZ are limited.<sup>31</sup> Although neither *terra nullius* nor the high seas, the two zones are also neither territorial sea nor contiguous zones; any state can arrest pirate suspects in the two zones.<sup>32</sup> It follows that piracy can be committed on both the continental shelf and EEZ.<sup>33</sup> From that viewpoint, piracy could be committed in the two zones, both of which are beyond national jurisdiction and are, according to UNCLOS article 101(a), outside the jurisdiction of any state.

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26. *Id.* art. 101(a) (emphasis added).

27. *Report of the Second Comm. on Territorial Seas*, League of Nations Doc. C.230.M.117 1930 V (1930) (emphasis added).

28. *See* UNCLOS, *supra* note 7, art. 100.

29. *See id.* arts. 55-56, 76-77.

30. *See id.* art. 33(1)(a).

31. *See id.* arts. 56, 77.

32. *See id.*

33. This position is supported by other authors and jurists. *See* 1 E.D. BROWN, THE INTERNATIONAL LAW OF THE SEA: INTRODUCTORY MANUAL 303 (1994) (discussing UNCLOS article 101(a)(i), the equivalent of the High Seas Convention article 15(1)(a), in the context of UNCLOS articles 86 and 88-115).

### C. *The Passive-Personality Principle*

As aliens, pirates who harm a national can be prosecuted by the victim's state.<sup>34</sup> Because "aliens may be punished for acts abroad harmful to nationals of the forum,"<sup>35</sup> the United States<sup>36</sup> and France<sup>37</sup> could have used this principle to prosecute pirates who kidnapped and murdered their nationals in the Indian Ocean. There is contention regarding whether this principle provides a state with jurisdiction to make the extraterritorial conduct of aliens an offense where the victim is a national of the legislating state.<sup>38</sup> However, such jurisdiction would favor states whose nationals are injured by Somali piracy.

### D. *The Protective Principle*

Pirates can also be prosecuted by a state whose national security is threatened or has been affected by piracy. Under this principle, a state has jurisdiction to criminalize extraterritorial conduct, regardless of the nationality of the offender, where that conduct is against the security, territorial integrity, or political independence of the state.<sup>39</sup> This stems from the notion that the jurisdiction of a state can be applied in cases where the conduct takes place outside the territorial jurisdiction of the state but is viewed as prejudicial to the state's security interests.<sup>40</sup> Although there is circumstantial evidence that Somali piracy is related to terrorism, no country has prosecuted under this principle, probably because of the difficulty in proving a threat to national security based on an act of piracy committed as far away as the Indian Ocean.

### E. *The Universality Principle, International Crimes, and Extraterritoriality*

Universality is the leading principle that provides for jurisdiction to prosecute piracy. Under this principle, a state has jurisdiction to criminalize conduct by an alien outside its territory regardless of the

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34. See *United States v. Yunis*, 681 F. Supp. 896, 903 (D.D.C. 1988).

35. See CRAWFORD, *supra* note 3, at 461.

36. For examples and analysis of U.S. piracy cases, see *infra* Part V.A and Roger L. Phillips, *Pirate Accessory Liability: Developing a Modern Legal Regime Governing Incitement and Intentional Facilitation of Maritime Piracy*, 25 FLA. J. INT'L L. 271, 276-77 (2013).

37. For examples and analysis of French piracy cases, see Ademun-Odeke, *Somali Piracy-Jurisdiction over Foreign Pirates in Domestic Courts and Third States Under International Law*, 17 J. INT'L MAR. L. 121, 126 (2011).

38. See CRAWFORD, *supra* note 3, at 461.

39. See *id.* at 462.

40. See *id.*

victim's nationality or of any impact the conduct may have on a security interest of the state.<sup>41</sup> Universal jurisdiction comes from customary international law, and crimes committed outside the jurisdiction of any state fall within it.<sup>42</sup> Universal jurisdiction empowers every state to exercise jurisdiction over conduct that constitutes a crime under international law.<sup>43</sup> The exercise of such jurisdiction is normally contrary to international law except in cases of crimes in violation of customary international law (*delicta juris gentium*).<sup>44</sup> Under this principle, pirates can be tried and punished under the law of nations by any state regardless of where the offense was committed.<sup>45</sup> They are considered *humani hostis generic* (enemies of the human race) and outlaws who have, through their actions, forsaken their own states' protection.<sup>46</sup>

However, how pirates find themselves in the prosecuting state's jurisdiction may be a material defense.<sup>47</sup> This was the basis for high court acquittal in the first-ever appeal in Kenya—*In re Mohamud Mohamed Dashi*.<sup>48</sup> The defendants successfully argued that there was no jurisdictional link with Kenya because the incident involved no Kenyan vessel, crew, cargo, or arrest.<sup>49</sup> Thus, universal jurisdiction is relevant for arresting states, but not third states, and is currently impractical in Somalia.<sup>50</sup>

#### *F. Consent, Conventions, Treaties, and Agreements*

International criminal jurisdiction can also be achieved through other means. First, it may be achieved through treaties between the flag state and foreign states to waive the home state's protection. Second, it

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41. See *In re Piracy jure gentium*, [1934] A.C. 586 (P.C.).

42. See UNCLOS, *supra* note 7, arts. 100, 105.

43. CRAWFORD, *supra* note 3, at 467.

44. See *In re Piracy jure gentium*, [1934] A.C. 586.

45. See CRAWFORD, *supra* note 3, at 469-71.

46. See *In re Piracy jure gentium*, [1934] A.C. 586. As such, pirates lose protection of their home state and can be arrested, prosecuted, and punished by any state; pirates were once simply hanged in a public place as a deterrent.

47. See generally Ademun Ademun-Odeke, *Jurisdiction by Agreement over Foreign Pirates in Domestic Courts: In re Mohamud Mohamed Dashi & 8 Others*, 24 U.S.F. MAR. L.J. 35 (2011-12).

48. See *id.* at 49.

49. *Id.* at 44.

50. Some texts treat prosecution under universal jurisdiction the same as the prosecution of crimes under customary international law. Admittedly, the distinction between the two is rather blurred. See CRAWFORD, *supra* note 3, at 467-68. It is also unclear whether universal jurisdiction over pirates is a principle of international customary maritime law or international criminal jurisdiction under public international law. The general preference seems to favor piracy *jure gentium* under international maritime law. See *id.* at 302-06.

may be achieved through a bilateral or multilateral treaty.<sup>51</sup> Third, certain international conventions may confer automatic jurisdiction.<sup>52</sup> Among these are the Geneva Convention on the High Seas (High Seas Convention),<sup>53</sup> UNCLOS,<sup>54</sup> the SUA Convention,<sup>55</sup> several genocide conventions,<sup>56</sup> and recent maritime terrorism and security conventions.<sup>57</sup> Fourth, jurisdiction may be achieved through agreements between flag states, the best and most recent examples being the transfer agreements discussed below.<sup>58</sup> Other examples include extradition treaties<sup>59</sup> and shiprider agreements.<sup>60</sup>

### III. JURISDICTION UNDER CUSTOMARY INTERNATIONAL LAW AND CONVENTIONS

#### A. *Customary International Law and the High Seas Convention and UNCLOS*

Under customary international law, codified in the High Seas Convention and UNCLOS, ships reasonably suspected of piracy may, regardless of nationality, be approached, boarded, and searched by warships of the arresting states.<sup>61</sup> In addition, if the suspicion proves justified, persons and property on board may be seized.<sup>62</sup> In an ideal situation, no state other than Somalia would exercise criminal jurisdiction over Somali vessels, save under codified customary international law.<sup>63</sup> However, these are not ideal times.

The arresting state may try pirate suspects without being limited by any rules restricting the jurisdiction of domestic courts in criminal matters.<sup>64</sup> The phrase “without being limited by any rules restricting the

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51. *See id.* at 459-60.

52. *Id.* at 470.

53. Convention on the High Seas arts. 14-21, *done* Apr. 29, 1958, 450 U.N.T.S. 11 [hereinafter High Seas Convention].

54. UNCLOS, *supra* note 7, art. 105.

55. SUA Convention, *supra* note 20, art. 6(1)(b).

56. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

57. *See, e.g.*, G.A. Res. 52/164, U.N. Doc. A/RES/52/164 (Jan. 9, 1998).

58. *See infra* Part IV.

59. CRAWFORD, *supra* note 3, at 469.

60. *Shiprider Agreement*, UNTERM, <http://unterm.un.org/dgaacs/unterm.nsf/8fa942046ff7601c85256983007ca4d8/dbd8a24747a968da85256db100504f5c?OpenDocument> (last visited Apr. 8, 2014).

61. High Seas Convention, *supra* note 53, art. 19; UNCLOS, *supra* note 7, art. 105.

62. *See* High Seas Convention, *supra* note 53, art. 19; UNCLOS, *supra* note 7, art. 105.

63. High Seas Convention, *supra* note 53, art. 19; UNCLOS, *supra* note 7, art. 105.

64. Ademun-Odeke, *supra* note 1, at 6 (citing UNCLOS, *supra* note 7).

jurisdiction of domestic courts” is important.<sup>65</sup> Although this phrase *prima facie* does not cover prosecutions by other affected and interested states, it is an additional source of authority for arresting states’ actions against Somali piracy and for the necessary jurisdictional link between the respective domestic courts and detained pirates. The arresting state may also determine “the action to be taken with regard to the [ship], aircraft or property, subject to the rights of third parties.”<sup>66</sup> However, despite such clarity, arresting states have been hesitant to prosecute or to transfer prosecution to third states. This hesitance was due to uncertainties as to the legality of their operations and treatment of pirate suspects.<sup>67</sup>

UNCLOS provides only general guidelines and not detailed rules on jurisdiction: the framework for the repression of piracy is now contained in articles 100 through 107 and 110.<sup>68</sup> Despite the seemingly settled position that piracy is an international crime that allows for jurisdiction by any state, there remains a requirement for linkage between the pirate suspect and the jurisdiction.<sup>69</sup>

The U.N. Security Council has repeatedly reaffirmed “that international law, as reflected in [UNCLOS], sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities.”<sup>70</sup> However, the lack of firm guidelines provided by UNCLOS on state responsibilities in the apprehension and prosecution of pirates under the Convention has been problematic. For instance, one of UNCLOS’s core provisions provides only, “All States shall co-operate 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.”<sup>71</sup> The United Nations General Assembly has also repeatedly encouraged states to cooperate to address piracy and armed robbery at sea in its resolutions. For example, in Council Resolution 64/71, the U.N. General Assembly recognized “the crucial role of international cooperation at the global, regional, subregional and bilateral levels in combating, in accordance with international law, threats to maritime security, including piracy.”<sup>72</sup>

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65. *See id.* This phrase was not included in the High Seas Convention.

66. High Seas Convention, *supra* note 53, art. 19.

67. This assertion is based on the author’s field research with arresting naval officers in Mombasa, Kenya.

68. *See* UNCLOS, *supra* note 7, arts. 100-107, 110.

69. *See id.*

70. U.N. Secretary-General, *Report Pursuant to Security Council Resolution 1897* (2009), ¶ 34, U.N. Doc. S/2010/556 (Oct. 27, 2010).

71. UNCLOS, *supra* note 7, art. 100.

72. G.A. Res. 64/71, ¶ 69, U.N. Doc. A/RES/64/71 (Mar. 12, 2010).

There are, however, still serious problems with UNCLOS regarding jurisdiction. First, the definition of jurisdiction is bifurcated.<sup>73</sup> Second, wide, nonmandatory, and ambiguous discretion of action is given to states parties to cooperate in the repression of piracy, to execute seizure of pirate ships or aircrafts, and to prosecute captured pirate suspects.<sup>74</sup> Third, the power to arrest pirate suspects is restricted to warships and military aircraft, and jurisdiction is reserved for courts of arresting states.<sup>75</sup> Fourth, the threat of liability if a vessel is seized without adequate grounds may deter forceful actions over pirate suspects.<sup>76</sup> Most arresting states participating in the anti-Somali-piracy patrols have been concerned about such liability.<sup>77</sup> In particular, possible liability may arise for exercise of the rights of visit, seizure, and hot pursuit without adequate grounds.<sup>78</sup> These ambiguities have hampered jurisdiction efforts and therefore the fight against piracy.<sup>79</sup> Fifth, and finally, UNCLOS's effectiveness was overtaken by the new developments in recent decades of maritime terrorism and security.<sup>80</sup>

## B. *Maritime Security Conventions and Recommendations*

### 1. The Amended SUA Convention

Outside customary international law, piracy and related offenses can be tried as a variety of maritime security offenses under many international instruments. One such instrument is the SUA Convention,<sup>81</sup> which is based on its civil aviation counterpart.<sup>82</sup> The original Convention was ineffective, being aimed generally at terrorism and

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73. See UNCLOS, *supra* note 7, art. 101(a)(i)-(ii). This leaves persistent problems of private versus public motives and piracy, a high seas offense, versus robbery at sea, a territorial waters offense.

74. *Id.* arts. 100, 105.

75. *Id.* arts. 105, 107.

76. See *id.* art. 106. This fact is also corroborated by the author's field research interviews with arresting naval officers in Mombasa, Kenya.

77. See *id.* art. 106.

78. *Id.* arts. 110(3), 106, 111(8).

79. See generally Ryan P. Kelley, Note, *UNCLOS, but No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy*, 95 MINN. L. REV. 2285 (2011).

80. These developments occurred, most notably, after the hijacking of the MS ACHILLE LAURO in 1985 and the terrorist attacks of September 11th. See G.A. Res. 52/164, *supra* note 57; International Convention for the Suppression of the Financing of Terrorism pmb., *adopted* Dec. 9, 1999, 2178 U.N.T.S. 197.

81. See SUA Convention, *supra* note 20.

82. See Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation pmb., Sept. 23, 1971, 974 U.N.T.S. 177.

unlawful acts at sea rather than piracy.<sup>83</sup> This shortcoming was remedied by the passage of the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (2005 SUA Protocol).<sup>84</sup> The amended SUA Convention now serves as one of the major weapons employed against piracy.

The amended SUA Convention provides that parties “create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation.”<sup>85</sup> The amended SUA Convention is boosted by U.N. Security Council Resolution 1846, which urges states parties “to fully implement their obligations under [the Convention] and cooperate with the [International Maritime Organization (IMO)] to build judicial capacity for the successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somalia.”<sup>86</sup> The amended SUA Convention also provides justification for agreements, third-state prosecutions, and their application to Somalia.<sup>87</sup>

## 2. IMO Recommendations

The IMO has issued a number of resolutions, directives, and guidelines that have formed the basis for U.S. Security Council resolutions on Somali piracy.<sup>88</sup> One such example is the IMO Recommendations to Governments for Preventing and Suppressing Piracy and Armed Robbery Against Ships.<sup>89</sup> The recommendations, *inter alia*, suggest possible countermeasures that can be employed by rescue coordination centers and security forces, including the Djibouti Code of Conduct.<sup>90</sup> Thus, the amended SUA Convention and related IMO

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83. For wider aspects of the SUA Convention, see *Contemporary Practice of the United States Relating to International Law*, 100 AM. J. INT’L L. 214, 224 (John R. Crook ed., 2006).

84. See Int’l Mar. Org. [IMO], Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, IMO Doc. LEG/CONF.15/21 (Nov. 1, 2005) [hereinafter 2005 SUA Protocol].

85. Press Release, U.N. Security Council, Security Council, Adopting Resolution 2125(2013), Tightens Anti-Piracy Measures, Agrees To Consider Creation of Specialized Courts in Somalia, Broader Region, U.N. Press Release SC/11177 (Nov. 18, 2013).

86. S.C. Res. 1846, *supra* note 4, ¶ 15.

87. See 2005 SUA Protocol, *supra* note 84.

88. See *supra* Part III.C.

89. IMO, Piracy and Armed Robbery Against Ships, IMO Doc. MSC.1/Circ.1333 (June 26, 2009).

90. For the Djibouti Code of Conduct, see IMO, Protection of Vital Shipping Lanes, ¶¶ 4-11, IMO Doc. C102/14 (Apr. 3, 2009). For a detailed analysis of the recommendation, see *Piracy and Armed Robbery at Sea*, IMO 5-6 (Jan. 2000), <http://www.imo.org/KnowledgeCentre/>

instruments provide and reinforce the bases for universal and extraterritorial jurisdiction over Somali piracy.

### C. U.N. Security Council Resolutions

It was necessary for the U.N. Security Council to supplement and strengthen UNCLOS, the SUA Convention, and other IMO instruments in response to the new challenges posed by Somali piracy. The first measure was U.N. Security Council Resolution 751, which set up a committee to address threats posed by Somali piracy.<sup>91</sup> However, actual effectiveness began with Resolution 1269, which dealt with the maintenance of international peace and security.<sup>92</sup> This effectiveness was enhanced by Resolution 1772.<sup>93</sup>

Further, Resolution 1814 requests nations with military capacity in the area to actively fight piracy on the high seas off the Somali coast and seeks repressive action in a manner consistent with UNCLOS.<sup>94</sup> Resolution 1816 condemns acts of piracy and armed robbery off the Somali coast and authorized, for a six-month period, “all necessary means” to repress such acts.<sup>95</sup> Resolution 1816 was unanimously adopted, with TFG support, and passed on the understanding that the measures do not affect states’ obligations under UNCLOS.<sup>96</sup> This resolution introduced tougher sanctions against Somalia because of Somalia’s apparent failure to prevent a surge in piracy.<sup>97</sup> Resolution 1772 urges naval powers to deploy vessels and aircraft to combat piracy in the region.<sup>98</sup> It “welcomed the initiatives of the European Union, North Atlantic Treaty Organization (NATO) and other countries to counter piracy.”<sup>99</sup> Member States’ attention was drawn to the fact that the draft resolution “calls on the secretary general to look at a long-term solution to escorting the safe passage of World Food Programme [WFP] ships.”<sup>100</sup>

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ReferencesAndArchives/FocusOnIMO%28Archives%29/Documents/Focus%20on%20IMO%20-%20Piracy%20and%20Armed%20robbery%20at%20Sea.

91. See S.C. Res. 751, ¶ 11, U.N. Doc. S/RES/751 (Apr. 24, 1992).

92. S.C. Res. 1269, pmb., U.N. Doc. S/RES/1269 (Oct. 19, 1999) (concerning the responsibility of the U.N. Security Council in the maintenance of international peace and security).

93. See S.C. Res. 1772, U.N. Doc. S/RES/1772 (Aug. 20, 2007).

94. S.C. Res. 1814, ¶ 10, U.N. Doc. S/RES/1814 (May 15, 2008).

95. S.C. Res. 1816, *supra* note 4, ¶ 7(b).

96. *Id.* pmb.

97. *Id.*

98. S.C. Res. 1772, *supra* note 93, ¶¶ 9, 11.

99. *Deploy Naval Vessels To Fight Piracy: UN*, INDIA TODAY (Nov. 21, 2008, 13:35 IST), <http://indiatoday.intoday.in/story/Deploy+naval+vessels+to+fight+piracy:+UN/1/20651.html>.

100. *Id.* (internal quotation marks omitted).



Resolution 1846 empowered states and regional organizations to use all necessary means to combat Somali piracy for a twelve-month period.<sup>101</sup> Notably, with TFG consent, the authorization for “all necessary measures” (code for “use of force”) was included.<sup>102</sup> Consequently, the tougher Resolution 1851 allows the international community to occupy, where necessary in the pursuit of pirate suspects, Somali land and territorial sea.<sup>103</sup> In that respect, Resolution 1851 took existing antipiracy measures a step further.<sup>104</sup> It also authorizes states to use land-based operations in Somalia as part of the fight against piracy off the Somali coast.<sup>105</sup> This adoption of a tough stance is understandable. The Resolution was particularly focused on the deteriorating humanitarian situation due to pirates’ interception of WFP aid shipments to internally displaced Somali refugees within Somalia and throughout the region.<sup>106</sup> Resolution 1897 continued the strong stance from Resolutions 1846 and 1851.<sup>107</sup> It was in this context that the issue of the allied powers’ and other states’ involvement in criminal jurisdiction over Somali pirate suspects became a factor.<sup>108</sup>

Thus, UNCLOS, the amended SUA Convention, and U.N. Security Council resolutions provided added authority and mechanisms for intervention and the arresting of pirate suspects, but they did not provide guidelines for prosecutions by third states. They do not, in themselves, create a basis for a state to prosecute an individual for piracy. They do, however, seek to provide a degree of political pressure to prevent piracy and arrest pirate suspects and, perhaps, to provide additional international legal authority.

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101. S.C. Res. 1846, *supra* note 4, ¶ 6.

102. S.C. Res. 1851, *supra* note 4, pmb., ¶ 3.

103. *Id.* ¶ 2 (allowing incursions into Somali territory to pursue terrorists and pirates despite its respect for Somali sovereignty).

104. *Cf. id.*

105. *See id.* ¶ 5.

106. *Deploy Naval Vessels To Fight Piracy: UN*, *supra* note 100.

107. *See* U.N. Secretary-General, *supra* note 70.

108. *See id.*; *see also* S.C. Res. 2125, *supra* note 4 (tightening antipiracy measures and agreeing to consider creation of specialized courts in Somalia and the broader region).

## IV. JURISDICTION UNDER TRANSFER AGREEMENTS

A. *The Need for Transfer Agreements*

As noted above, arresting states had been reluctant to prosecute Somali pirates in their own jurisdictions for a variety of reasons.<sup>109</sup> Their preference was to transfer pirate suspects to third states in the region, which would prosecute on their behalf.<sup>110</sup> Transfer does not solve the missing-link issue between the offense, the suspects, and the third states—a problem later resolved only through transfer agreements. Nevertheless, the apprehending and investigating officers of the arresting states remain essential in the prosecution process. In normal jurisdictions, officers' powers and legal mandates are provided by national legislation. In the case of Somalia, the EU Naval Force (EUNAVFOR),<sup>111</sup> NATO Operations Ocean Shield,<sup>112</sup> and other non-EU and non-NATO state officers assume that role. Left unchecked, Somali piracy is a threat to international peace and security, happening, as it is, near a volatile and unstable Persian Gulf region.<sup>113</sup>

It is against this background, and to supplement international law, that the allied powers engineered a series of agreements with third states for reception and prosecution of pirate suspects in those countries. These transfer agreements set out conditions and modalities for the orderly transfer of pirate suspects and seized property detained by operating forces to third states as well as conditions for their treatment following such transfer.<sup>114</sup> It is under these conditions that the arresting states' navies transfer pirate suspects to third states. With everything in place, the only missing link between the suspects and the third states was the suspects' physical presence. But, in what material way do these agreements create or reinforce the necessary link between the suspects and the receiving jurisdiction?

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109. See *supra* Part III.A. These reasons are (1) expenses of repatriation, (2) fear of asylum-seeking, (3) security risks of transfer back home, (4) expenses of the trials, and (5) obsolete piracy legislations.

110. This statement is based on field research interviews on record with the author.

111. See *Suspect Pirates Apprehended by EU Naval Force Flagship Transferred to the Seychelles*, EUNAVFOR (Jan. 30, 2014, 16:51), <http://eunavfor.eu/suspect-pirates-apprehended-by-eu-naval-force-flagship-transferred-to-the-seychelles/>.

112. See *Counter-Piracy Operations*, N. ATL. TREATY ORG., [http://www.nato.int/cps/en/natolive/topics\\_48815.htm](http://www.nato.int/cps/en/natolive/topics_48815.htm) (last visited Apr. 22, 2014).

113. See Ademun Odeke, *Somali Piracy-Effects on Oceanborne Commerce and Regional Security and Challenges to International Law and World Order*, 25 AUSTL. & N.Z. MAR. L.J. 134, 134, 151, 153 (2011).

114. See Jeffrey Gettleman, *The West Turns to Kenya as Piracy Criminal Court*, N.Y. TIMES (Apr. 23, 2009), [http://www.nytimes.com/2009/04/24/world/africa/24kenya.html?\\_r=0](http://www.nytimes.com/2009/04/24/world/africa/24kenya.html?_r=0).

*B. Do Transfer Agreements Extend the Arresting State's Jurisdictional Link?*

Regardless of the above linkage and the additional mandated contextual analysis for third states' actions and jurisdiction over Somali pirates, there was already sufficient authority for such actions. The difference here is the U.N. Security Council reinforcement. The intervention of Council resolutions and the transfer agreements are timely and instrumental. The allied powers and third states' involvement can also be regarded as exceptions to exclusive jurisdiction by the flag state and the nationality and territorial principles. The agreements are intended to, and in fact do, create the necessary links between the offense, the suspects, and the third states. However, one author thinks that existing jurisdiction rules are outdated and that it is high time new rules are promulgated to replace the outmoded doctrines that are based solely on customary international law.<sup>115</sup>

*C. Are Transfer Agreements an Exception to the Nationality Link?*

Despite UNCLOS's provisions, it seems that international law was not prepared for Somali-type piracy and had not, and indeed could not have, made provisions to deal with it. This probably explains the allied powers' initial hesitancy and ambivalence about whether to approach and apprehend suspected pirates. Even when states eventually arrested pirate suspects, the indecision on whether to release or charge the suspects persisted.

It is debatable whether pirates should be regarded as combatants and accorded such treatment under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>116</sup> This fear of violating international law and the indecision as to whether suspected pirates could be tried outside Somalia under the various headings discussed above<sup>117</sup> added to the earlier confusion that led to the release of the first suspects. Against this background, it was initially

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115. See Guy Manchuk, Comment, *The Law of the Flag and Maritime Criminal Jurisdiction: A New Rule To Replace an Outdated, Inconvenient Doctrine*, 32 TUL. MAR. L.J. 221, 221-48 (2007) (making the point after surveying the recent application of, and practice regarding, the rule).

116. See Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 TUL. MAR. L.J. 1, 3-5, 34-35 (2008) (discussing treating pirates as war combatants and the dilemma with regard to the combined effect of U.S. practice, the High Seas Convention, and UNCLOS); see also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, 1465 U.N.T.S. 5 [hereinafter Torture Convention].

117. See *supra* Part II.

difficult to make a case to try Somali pirates in third states.<sup>118</sup> It was particularly uncertain whether current international law alone was sufficient for the purpose. In that context, the introduction of the amended SUA Convention, U.N. Security Council resolutions, and the transfer agreements greatly clarified the position.

*D. Do Transfer Agreements Create Jurisdictional Links with Third States?*

Currently, the most direct link between Somali pirate suspects and third states' jurisdiction are the transfer agreements. Despite completion of many piracy trials, the legality of the transfer agreements has never been challenged in any third-state piracy prosecution. However, the introduction of transfer agreements implies that UNCLOS, the amended SUA Convention, and U.N. Security Council resolutions had been ineffective in combating Somali piracy.

This ineffectiveness is, supposedly, now remedied via the transfer agreements with the European Union<sup>119</sup> and the Exchange of Letters with the United States, Denmark, and the United Kingdom.<sup>120</sup> Save for China, the remaining participating states have not made similar arrangements with any third states.<sup>121</sup> The transfer agreements ensure that the issues of unlawful arrest and illegal transport of pirate suspects will not arise.

*E. Do Transfer Agreements Create or Develop International Law?*

First, transfer agreements derive their authority from U.N. Security Council resolutions,<sup>122</sup> which collectively provide Member States the

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118. See *Signing of Piracy Agreement with Mauritius*, GOV.UK (June 8, 2012), <https://www.gov.uk/government/news/signing-of-piracy-agreement-with-mauritius>; Agreement Between the European Union and the Republic of Mauritius on the Conditions of Transfer of Suspected Pirates and Associated Seized Property from the European Union-Led Naval Force to the Republic of Mauritius and on the Conditions of Suspected Pirates After Transfer, 2011 O.J. (L 254) 3.

119. Exchange of Letters Between the European Union and the Government of Kenya on the Conditions and Modalities for the Transfer of Persons Suspected of Having Committed Acts of Piracy and Detained by the European Union-Led Naval Force (EUNAVFOR), and Seized Property in the Possession on EUNAVFOR, from EUNAVFOR to Kenya and for Their Treatment After Such Transfer, 2009 O.J. (L 79) 49-59 [hereinafter EU-Kenya Transfer Agreement].

120. See, e.g., Memorandum of Understanding Concerning the Conditions of Transfer of Suspected Pirates and Armed Robbers and Seized Property in the Western Indian Ocean, the Gulf Of Aden, and the Red Sea, U.S.-Kenya (Jan. 16, 2009) (on file with author) [hereinafter U.S.-Kenya Transfer Agreement].

121. See James Thao Gathii, *Kenya's Piracy Prosecutions*, 104 AM. J. INT'L L. 416, 417 (2010).

122. See S.C. Res. 751, *supra* note 91, ¶ 11; S.C. Res. 1814, *supra* note 94, pmb.; S.C. Res. 1816, *supra* note 4; S.C. Res. 1838, pmb., U.N. Doc. S/RES/1838 (Oct. 7, 2008); S.C. Res.

power to approach pirate vessels, arrest pirate suspects, and confiscate the vessels. Second, the agreements act as a link with UNCLOS and the amended SUA Convention, which define and make provisions for state practice in dealing with piracy and maritime security.<sup>123</sup> Third, the agreements link municipal legislation and universal rules by harmonizing agreement provisions with third states' legislation.<sup>124</sup>

Finally, a further mandate for action is found in IMO Assembly Resolution A.922(22), which adopted and set out in its annex the Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships.<sup>125</sup> The Resolution invites “[g]overnments to develop, as appropriate, agreements and procedures to facilitate co-operation in applying efficient and effective measures to prevent acts of piracy and armed robbery against ships.”<sup>126</sup> Mention should also be made of the December 2008 Communiqué of the International Conference on Piracy Around Somalia, which stressed “the importance of enhancing coordination and cooperation in the fight against piracy, and welcomed the recent efforts of States and organizations to establish means for that cooperation.”<sup>127</sup> The overall objective of the process was, therefore, to establish a physical link between third states and the suspects, a necessary requirement of criminal jurisdiction.

#### *F. Do Transfer Agreements Safeguard Human Rights?*

Transfer agreements take into consideration international humanitarian law (including nonapplication of the death penalty) and the principles of natural justice in the treatment of suspected pirates.<sup>128</sup> However, although states are free to enter into such mutual arrangements to promote international law, it is doubtful whether the mechanisms provide an acceptable basis for either criminal or civil jurisdiction in third states over nonnationals in *all* aspects of piracy. That notwithstanding, the agreements do provide safeguards for humanitarian treatment and

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1846, *supra* note 4, ¶ 7; S.C. Res. 1897, *supra* note 70, ¶ 3; U.N. Secretary-General, *supra* note 5, pmb.

123. UNCLOS, *supra* note 7, arts. 100-107.

124. See Merchant Shipping Act, (2012) Cap. 389 §§ 364-384 (Kenya).

125. See IMO, Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships, IMO Res. A.922(22) (Jan. 22, 2002).

126. *Id.* ¶ 3.

127. See *International Conference on Piracy Around Somalia: Communiqué*, HIRAAN ONLINE (Dec. 11, 2008), <http://www.hiraan.com/news/2008/dec/Final%20Communique%20-%20International%20Piracy%20Conference.pdf>.

128. See, e.g., EU-Kenya Transfer Agreement, *supra* note 119; see also Torture Convention, *supra* note 116; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

guarantee the fair trial of pirate suspects,<sup>129</sup> except for the failure to protect the rights of underage pirates. Courts in all jurisdictions have ignored the plight of these juveniles. The United States,<sup>130</sup> the Netherlands,<sup>131</sup> and Germany<sup>132</sup> have all rejected the defense of underage pirate suspects, contrary to the Convention on the Rights of the Child.<sup>133</sup> Although their names were withheld, in Malaysia, underage pirate suspects were imprisoned for eight years, as compared to ten for the adults.<sup>134</sup> Reasons given for flouting the rights of underage pirates include the difficulty of establishing the correct age of the accused.<sup>135</sup> In some cases, because the trial process is so lengthy, the suspect has achieved the age of maturity by the time of trial. Only the Seychelles has made provisions in its legislation for the treatment of underage suspects, keeping them in separate detention facilities and even repatriating them back to Somalia without prosecution.<sup>136</sup>

## V. JURISDICTIONAL LINKS IN ARRESTING STATES

### A. *The United States*

#### 1. Modern Piracy

The United States, like the other allied powers, was a reluctant late convert to prosecuting Somali pirates in at home. Despite prioritizing “high value” pirates, faced with the prospects discussed above, the United States was forced to take in and try more pirate suspects themselves. Accordingly, about twenty suspects have so far been transported to Virginia and charged with piracy under the law of

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129. See, e.g., EU-Kenya Transfer Agreement, *supra* note 119.

130. See *Underage Somali Pirate Cries in Court. Should the Feds Go Easy on Him?*, SODAHEAD (Apr. 22, 2009), <http://www.sodahead.com/united-states/underage-somali-pirate-cries-in-court-should-the-feds-go-easy-on-him/question-335887/?page=2&link=ibaf&q=&esrc=s>.

131. See Mark Schenkel, *Somali Pirates' Trial Begins in the Netherlands*, NRC.NL (May 25, 2010), <http://vorige.nrc.nl/article2551172.ece>.

132. See Roger L. Phillips, *Long Road to Justice—The German Piracy Trial*, PIRACY-LAW (Oct. 21, 2012), <http://piracy-law.com/2012/10/21/long-road-to-justice-the-german-piracy-trial/>.

133. See art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3.

134. See Hidir Reduan, *Malaysia: Seven Somali Pirates Sentenced*, NEW STRAITS TIMES (Sept. 4, 2013), [http://www.hiiraan.com/news4/2013/Sept/40985/malaysia\\_seven\\_somali\\_pirates\\_sentenced.aspx](http://www.hiiraan.com/news4/2013/Sept/40985/malaysia_seven_somali_pirates_sentenced.aspx).

135. S. Whitman et al., *Children and Youth in Marine Piracy: Causes, Consequences and the Way Forward*, ROMÉO DALLAIRE CHILD SOLDIERS INITIATIVE 12 (Dec. 2012), <http://www.childsoldiers.org/wp-content/uploads/2014/02/Children-and-Youth-in-Marine-Piracy-RDCSI.pdf>.

136. See Lauren Hahn, Comment, *Juvenile Justice and Piracy: Prosecutions of Juvenile Pirates in the United States*, 20 GEO. MASON L. REV 241, 259-60 (2012).

nations.<sup>137</sup> The arrests arose from four separate incidents: five suspects who allegedly shot at the USS ASHLAND on April 1, 2010;<sup>138</sup> five suspects (who sunk a skiff and confiscated its mother ship) seized on March 31, 2010, by the USS NICHOLAS;<sup>139</sup> suspects captured by the USS BAINBRIDGE and the USS HALYBURTON after hijacking the M/V MAERSK ALABAMA, an incident portrayed in the movie *Captain Phillips*;<sup>140</sup> and a suspect who was lured to the United States during a sting operation in November 2013 and charged with conspiracy and masterminding piracy.<sup>141</sup>

The charges against pirates include attack to plunder a vessel, assault with a dangerous weapon in a maritime jurisdiction, conspiracy to use firearms during a crime of violence, and use of a firearm during a crime of violence.<sup>142</sup> Although these charges are more specific than those in other jurisdictions, these charges are also more general penal code offenses than those of maritime piracy in other jurisdictions. These latter charges seem to follow UNCLOS article 101 offenses, though the United States is not a party.

It appeared that the United States and the other arresting states were faced with a choice: either take the suspects and charge them on home soil or release them. These jurisdictional difficulties led to the United Nations' contemplating setting up a specialist international piracy criminal court.<sup>143</sup>

## 2. The Law of Nations

U.S. piracy jurisprudence is based on the law of nations, or customary international law, starting with Justice Story's retorts in the famous case of *United States v. Smith*:<sup>144</sup>

There is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature; and whatever may be

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137. See *United States v. Hasan*, 747 F. Supp. 2d 642, 655 (E.D. Va. 2010); *United States v. Said*, 757 F. Supp. 2d 554 (E.D. Va. 2010).

138. *Said*, 757 F. Supp. 2d at 556-57.

139. See *Hasan*, 747 F. Supp. 2d at 654, 661.

140. CAPTAIN PHILLIPS (Columbia Pictures Industries, Inc. 2013). For details on the portrayal of Captain Richard Phillips, see Nick Logan, *Capt. Richard Phillips Still Sailing Seas After 2009 Pirate Attack*, GLOBAL NEWS (Oct. 12, 2013, 3:30 PM), <http://globalnews.ca/news/899327/capt-richard-phillips-still-sailing-seas-after-2009-pirate-attack/>.

141. See *infra* Part V.C.2.

142. See Press Release, U.S. Dep't of Justice, Five Somalis Sentenced to Life Plus 80 Years in Prison for Piracy Against USS Nicholas (Mar. 14, 2011), <http://www.justice.gov/usao/vae/news/2011/03/20110314hasannr.html>.

143. See generally U.N. Secretary-General, *supra* note 5.

144. See 18 U.S. (5 Wheat.) 153 (1820).

the diversity of definitions, in other respects, all writers concur, in holding, that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy.<sup>145</sup>

Forty years later in *In re Tivnan*,<sup>146</sup> citing Chief Justice Marshall's famous United States House of Representatives speech, it was reaffirmed that piracy is an offense against every nation:

A pirate, under the law of nations, is an enemy of the human race. Being the enemy of all, he is liable to be punished by all. Any act which denotes this universal hostility, is an act of piracy. Not only an actual robbery therefore, but cruising on the high seas without commission, and with intent to rob, is piracy. This is an offence against all and every nation, and is therefore alike punishable by all.<sup>147</sup>

Accordingly, the U.S. concepts of piracy are deeply rooted in the law of nations.

Otherwise, piracy in the United States is defined as "acts of robbery and depredation upon the high seas, which, if committed on land, would have amounted to a felony."<sup>148</sup> It includes *brigandage* committed on the sea or from the sea (i.e., robbery and banditry as perpetrated by a band of robbers or brigands<sup>149</sup> and plundering and outlawry,<sup>150</sup> hence the classification of pirates as plundering outlaws). Piracy is now a codified federal offense: "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."<sup>151</sup>

### 3. Statutory Extraterritoriality

The U.S. extraterritorial definition of piracy also emanates from the law of nations. However, the early cases under the U.S. Criminal Code of 1790, before the 1819 amendment, struggled to distinguish piracy *jure gentian* from piracy under municipal law.<sup>152</sup> More relevant to current proceedings, piracy need not be committed in U.S. territorial waters. It

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145. *Id.* at 161.

146. (1864) 122 Eng. Rep. 971 (Q.B.).

147. *Id.* at 978.

148. Joseph Story, *Chapter XX: Power To Punish Piracies and Felonies*, CONSTITUTION SOCIETY, [http://www.constitution.org/js/js\\_320.htm](http://www.constitution.org/js/js_320.htm) (last visited Apr. 8, 2014) (internal quotation marks omitted). Under many state statutes, a felony is any offense punishable by death or imprisonment for a term exceeding one year. For federal and state classifications of felony, see 18 U.S.C. § 3559 (2012); MODEL PENAL CODE § 6.01 (2013).

149. *See* 18 U.S.C. §§ 1661, 2280 (elaborating on a robbery ashore and an armed robbery at sea, respectively).

150. *Id.* §§ 1658-1659 (plundering of distressed vessels, respectively).

151. *Id.* § 1651.

152. *See, e.g.,* United States v. Klintock, 18 U.S. (5 Wheat.) 144, 150-51 (1820).



can occur on the high seas or anywhere else in the world, including, in this instance, the Indian Ocean. Moreover, for the United States to have jurisdiction, the suspect has to either be brought into, or find himself in, the United States or anywhere the United States exercises jurisdiction. In other words, the United States treats piracy as a universal crime for which it has universal and/or extraterritorial jurisdiction.

Accordingly, any suspects apprehended by U.S. warships in the Indian Ocean under United States Operation 150/151 or a transfer agreement, if not handed over to a third state, can be transferred to and tried in the United States. Thus, for the United States to have jurisdiction, the nationality of the pirates or robbers, the nationality of the victims, the flag of the ship attacked, and the flag/nation of the capturing ship are all irrelevant.

The United States also seems to assume jurisdiction over pirates or armed robbers found in its territory and/or captured on the high seas, although the place of commission of the offense may be relevant. The United States would not have jurisdiction under 18 U.S.C. § 1651 over offenders who committed the acts in Somali territorial waters, although the SUA statutes<sup>153</sup> would cover such offenders if found in the United States.

### *B. Other Countries*

Prosecution of Somali pirate suspects has taken place in the Middle East, Asia, France,<sup>154</sup> Germany,<sup>155</sup> Italy,<sup>156</sup> the Netherlands,<sup>157</sup> Spain,<sup>158</sup> the Republic of Korea,<sup>159</sup> Malaysia,<sup>160</sup> India,<sup>161</sup> China,<sup>162</sup> and Japan.<sup>163</sup>

153. *Id.* § 2280(a)(2).

154. For piracy prosecutions in France, see Ademun-Odeke, *supra* note 37, at 126.

155. *Id.* at 125; see also Kate Connolly, *Somali 'Pirates' Go on Trial in Hamburg*, *GUARDIAN* (Nov. 22, 2010, 5:31 EST), <http://www.theguardian.com/world/2010/nov/22/somali-pirates-trial-hamburg>.

156. See Matteo Crippa, *Update: Convictions in First Italy Piracy Trial*, *PIRACY-LAW* (Dec. 2, 2012), <http://piracy-law.com/2012/12/02/convictions-in-first-italy-piracy-trial/>.

157. See Ademun-Odeke, *supra* note 37, at 125-26; see also *Trial of Alleged Somali Pirates Opens in Netherlands*, *BBC NEWS* (May 25, 2010, 11:26 ET), <http://www.bbc.co.uk/news/10151792>.

158. See Ademun-Odeke, *supra* note 37, at 126.

159. *Id.* at 128.

160. See Andrea Bottorff, *Malaysia Court Charges Suspected Somali Pirates*, *JURIST* (Feb. 11, 2011, 12:22 PM), <http://jurist.org/paperchase/2011/02/malaysia-court-charges-suspected-somali-pirates.php>.

161. See Ademun-Odeke, *supra* note 37, at 128.

162. See *Rare Piracy Trial in China*, *N.Y. TIMES* (Dec. 16, 1999), <http://www.nytimes.com/1999/12/16/world/rare-piracy-trial-in-china.html>.

163. See Adam Westlake, *Two Somalians Charged in Japan's First Trial over Sea Piracy*, *JAPAN DAILY PRESS* (Jan. 15, 2013), <http://japandailynews.com/two-somalians-charged-in-japans->

*C. Conspirators and Masterminds*

## 1. Belgium: Mohamed Hassan and Mohamed "Tiiceey" Aden

Two recent incidents have raised two further issues of jurisdiction over pirates. The first is whether conspirators or pirate masterminds can be prosecuted. The answer to the first issue is affirmative: UNCLOS article 101(c) makes illegal "any act of inciting or intentionally facilitating an act" of piracy.<sup>164</sup> The second issue is whether the mere presence of the suspect in a jurisdiction justifies prosecution even where that presence was achieved by trickery, allurement, or even abduction. On that point, the jury is still out.

One incident involving trickery occurred in Belgium.<sup>165</sup> That pending case will test whether, outside perimeters covered in this Article, a suspect can be brought into a jurisdiction through kidnapping or other dubious means. Mohamed Abdi Hassan (alias "Big Mouth") and his accomplice Mohamed "Tiiceey" Aden were arrested in Bruges on October 12, 2013, after being tricked into travelling to Belgium on a flight from Nairobi, Kenya. They face charges of kidnapping and piracy involving the 2009 capture of a Belgian ship the M/V POMPEI.<sup>166</sup>

It will be difficult for "Big Mouth" to escape justice because he announced in Mogadishu, in January 2013, that he was quitting piracy after a highly profitable eight-year career. He claimed that he persuaded other pirates to do the same. Described in 2012 by the United Nations as "one of the most notorious and influential leaders" in Somali piracy, he was implicated in the 2008 capture of the Saudi supertanker the M/V SIRIUS STAR, which was released for a ransom of \$7 million.<sup>167</sup> "U.N. experts have accused a former Somali president of shielding him by issuing him a diplomatic passport."<sup>168</sup>

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first-trial-over-sea-piracy-1521570/; Martha Neil, *Japanese Trial of Claimed Somali Pirates Raises Interpretation Issues*, A.B.A. J. (Mar. 20, 2013, 4:49 PM CST), [http://www.abajournal.com/news/article/japanese\\_trial\\_of\\_claimed\\_somali\\_pirates\\_raises\\_interpretation\\_issues/](http://www.abajournal.com/news/article/japanese_trial_of_claimed_somali_pirates_raises_interpretation_issues/).

164. UNCLOS, *supra* note 7, art. 101(c).

165. See *Notorious Somali Pirate Nabbed in Undercover Operation*, YAHOO! FINANCE (Oct. 15, 2013, 1:19 AM SGT), <http://sg.finance.yahoo.com/news/notorious-somali-pirate-nabbed-undercover-164341585.html>; *Belgium Arrests Somali Pirate Chief After Luring Him into Film Trap*, DAILY STAR (Oct. 14, 2013, 10:05 PM), <http://www.dailystar.com.lb/News/Middle-East/2013/Oct-14/234618-notorious-somali-pirate-arrested-in-belgium.ashx#ixzz2hkbaNu7K>.

166. *Notorious Somali Pirate Nabbed in Undercover Operation*, *supra* note 165; *Belgium Arrests Somali Pirate Chief After Luring Him into Film Trap*, *supra* note 165.

167. *Notorious Somali Pirate Nabbed in Undercover Operation*, *supra* note 165.

168. *Belgium Arrests Somali Pirate Chief After Luring Him into Film Trap*, *supra* note 165.

Other than the questionable means by which he ended up in the jurisdiction, if he can be linked with the capture and detention of the POMPEI, Belgian prosecutors should easily establish the link between him, the offense, and the jurisdiction. The Saudis, as another affected state, may also want to question him for the hijacking, detention, and ransoming of the SIRIUS STAR.

## 2. The United States: Ali Muhamad Ali

In November 2013, the United States tried another Somali, Ali Mohamed Ali, for hijacking the Danish vessel the M/V CEC FUTURE on November 7, 2008.<sup>169</sup> Ali was accused of masterminding and personally profiting from the hijacking and was charged with involvement in a conspiracy by pirates to hijack a ship.<sup>170</sup> If convicted, Ali faced a mandatory sentence of life imprisonment.<sup>171</sup>

The pirates, via Ali, demanded a \$7 million ransom, which was reduced to \$1.7 million after prolonged negotiations.<sup>172</sup> Ali was also accused of demanding an additional \$75,000 for himself, although his lawyers said the sum was for another group of pirates on the mainland. The prosecuting U.S. attorney opined: “The defendant didn’t have to have a gun. His mouth was his gun, and that was the most important gun on board because it was the gun that got them the money.”<sup>173</sup> Additional charges included conspiracy, attacking a vessel, and hostage-taking.<sup>174</sup>

Ali denied his involvement in the seizure of the CEC FUTURE, claiming that he was a mere translator and go-between for the pirates and shipowners for more than two months.<sup>175</sup> He claimed that a translator was needed because the pirates spoke neither Russian nor English.<sup>176</sup> His lawyers pointed out that “Ali [had] since advised other victims of piracy, and add[ed] that, after the crew was released, Ali contacted the United States Department of Homeland Security to provide details of the

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169. See *U.S. To Drop Piracy Case Against Somali*, WALL ST. J. (Jan. 18, 2014, 9:14 PM ET), <http://online.wsj.com/news/articles/SB10001424052702304149404579329410819452356> (subscription only); Katrine Grønvald Raun & Tomas Kristiansen, *Somali Negotiator Acquitted in Clipper Piracy Charges*, SHIPPING WATCH (Nov. 28, 2013, 13:04), <http://shippingwatch.com/carriers/article6289419.ece>.

170. Paul Lewis, *Piracy Mastermind or Mere Translator? Somali Man on Trial over Ship Hijacking*, GUARDIAN (Nov. 8, 2013, 10:57 EST), <http://theguardian.com/world/2013/nov/08/somali-piracy-trial-us>.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Somali Negotiator Acquitted in Clipper Piracy Charges*, *supra* note 169.

175. Lewis, *supra* note 170.

176. *Id.*

ordeal.”<sup>177</sup> Save for Ali’s previous U.S. residence, U.S. interests were tenuous, being outside all linkage categories discussed in this Article.

Together with “Big Mouth” above, this would have been the first such conviction under UNCLOS article 101(a)(i). It is unlikely that the manner of his allurement to the United States would be material. The Convention merely provides for the arresting state to try the suspect in its jurisdiction, not the legality of getting him there. However, the case was dismissed.<sup>178</sup>

## VI. JURISDICTIONAL LINKS WITH OTHER AFFECTED AND INTERESTED STATES AND NONSTATE ENTITIES

### A. *Other Affected and Interested States*

#### 1. Arresting States Parties to Transfer Agreements

A number of third states, including the Seychelles and Mauritius, have graduated to arresting states by undertaking arrests and can now prosecute in domestic courts. Tanzania, not previously a third state, has leaped into that elite group of arresting states.

#### 2. Nonarresting States Parties to Transfer Agreements

Although by far the largest contributor to the effort against piracy and the most affected economically and in security by piracy, Kenya remains a third state, not having acquired arresting naval capacity.

#### 3. Nonarresting Nonparties to Transfer Agreements

##### a. Categories of Affected States

It is possible that criminal jurisdiction may be exercised by states other than arresting states and third states. There are two authorities for this. First, in article 3(4) of the Kenya-U.S. Transfer Agreement, the participants recognize that multiple states—including the flag state, the suspected state of origin of the suspects, the state of nationality of persons on board the ship, and the state of the ownership of cargo—may have legitimate interests in cases arising from the proceedings.<sup>179</sup> Although aspects of these can be accommodated under one or the other of the general principles of international jurisdiction discussed above,<sup>180</sup> this possibility widens the scope of interested states to include labor-

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177. *Id.*

178. See *U.S. To Drop Piracy Case Against Somali*, *supra* note 169.

179. See U.S.-Kenya Transfer Agreement, *supra* note 120.

180. See *supra* Part II.

supplying states such as the Philippines; open registries such as Liberia and Panama, including beneficial ownerships of open registries such as Japan and Greece; either a single cargo-owning state for tankers or several cargo-owning states for containers and tramps; or bulk carriers for multiple-cargo carriers. Other interested states would include flag states of the warship, states whose international and domestic trade is damaged by pirate actions, and finally, states receiving suspects from arresting states under simple understanding or other informal arrangements.<sup>181</sup>

b. States with Affected Economies

Yemen has suffered economic hardship because of Somali pirates. Yemen claims to have lost in excess of \$350 million, including \$200 million by fishermen forced to stop fishing in the pirate-infested waters of the Gulf of Aden and the Indian Ocean.<sup>182</sup> Yemen claims \$150 million in additional damages for erecting a 2500-kilometer security center along its coastline and for patrol boats. Yemen has tried twenty-two Somali pirate suspects.<sup>183</sup> Twelve of those were arrested by the Indian navy and transferred to Yemen under unknown arrangements and on July 15, 2010, were charged with two offenses: hijacking a Yemeni boat, the SALLAH ADDIN, and attempting to hijack a second Yemeni boat, using the SALLAH ADDIN. The other ten were arrested by a Russian warship and handed over to the Yemeni authorities (again, under unknown arrangements).<sup>184</sup> They were charged with possession of standard hijacking weapons, including AK47s, RPGs, iron ladders, and knives, and for attempting to hijack a Yemeni vessel.<sup>185</sup>

The Yemeni experiences demonstrate some silent features in the saga. First, they reveal that some participating allied powers in the antipiracy naval patrol are arresting and transferring suspects to third states through informal arrangements that might not afford due protection to the suspects like the Kenyan, Mauritian, and Seychellois agreements. Second, the Yemeni experiences provide proof that some of the pirates' motherships are themselves hijacked from other flag states, in

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181. See *Trial of Suspected Somali Pirates Opens in Yemen*, HIIRAAN ONLINE (Oct. 25, 2010), [http://www.hiiraan.com/news2\\_rss/2010/Oct/trial\\_of\\_suspected\\_somali\\_pirates\\_opens\\_in\\_yemen.aspx](http://www.hiiraan.com/news2_rss/2010/Oct/trial_of_suspected_somali_pirates_opens_in_yemen.aspx).

182. *Piracy Costs Yemen \$350 Million; Pirates' Attacks in Indian Ocean and Gulf of Aden Surge*, YEMEN POST, <http://www.yemenpost.net/Detail123456789.aspx?SubID=1068> (last updated Apr. 10, 2010, 10:20:51 PM).

183. *Id.*

184. *Id.*

185. *Id.*

which case nationality is difficult to prove. Third, it demonstrates the diverse constituency of interested and affected states and nonstate entities.

#### 4. Flag States

Flag and beneficial-owning states come under this category. Does this mean that under this category, open-registry states, most of whose vessels have been pirated, have jurisdiction to prosecute pirates in their own courts and/or obtain compensation? If so, against which party and to what extent would they be able to, and what proof of damage would be necessary to succeed? Unfortunately, these states lack naval and consular capacity to effect arrests and protect their vessels. In addition to their prosecution rights as arresting states, could the mainly Western beneficial-owning states of these vessels arrest and prosecute on behalf of the open-registry states? There is no precedent for that, but there is a similar experience, where registration was transferred to another state for protection purposes.<sup>186</sup>

#### 5. Labor-Supplying States

Apart from the detentions and sufferings of hijacked sailors and crew, would the labor-supplying states, such as Myanmar, the Philippines, and Bangladesh, have the right to sue pirates for the deaths and detention of their citizens and the corresponding loss of income that the crew normally repatriates, which is a great source of income for these countries? Although nominal by Western income standards, these remissions greatly impact these economies. Would they claim reimbursement of any state support given to families of detained crew? However, if they could themselves arrest or enter into transfer agreements with arresting states, these labor-supplying states could prosecute for losses under the passive-personality and protective principles.<sup>187</sup>

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186. See Ademun Ademuni-Odeke, *Merchant Shipping and the Gulf War*, 10 MARINE POL'Y REP. 6, 6-12 (May 1988) (describing Kuwait tankers that were temporarily transferred to a U.S. registry for protection from Iraqi revenge attacks during the Second Gulf War between the Western Allies and Iraq).

187. See *supra* Part II.C-D. They could sue for deaths and injuries to their nationals and the effect on national security.

## 6. States Operating International Waterways

As a direct result of Somali piracy, the Egyptian government has suffered enormous revenue losses resulting from a fall in the volume of vessels travelling the Suez Canal.<sup>188</sup> These vessels now favor the longer and costlier Cape of Good Hope route.<sup>189</sup> The Panama Canal would be another case in point if it found itself in that scenario. What remedies are available for Egypt?

*B. Nonstate Entities*

## 1. Shipowners, Charterers, and Operators

Only states are permitted jurisdiction under international law. Although they bear the brunt of piracy losses, nonstate entities do not have jurisdiction. How would the shipowners, charterers, and operators recoup their losses of freight earnings, demurrage, and damages for detention of ships? Who and where would they sue? What remedies would they receive? How would they navigate around the jurisdictional link issues raised in this Article? It would make no difference even if they were state corporations or state monopolies. These are issues raised by Somali piracy that are not addressed by UNCLOS or international law.

## 2. Cargo Interests

Cargo interests are in the same position as the nonstate entities discussed above. What remedies would be available to a consignor of cargo that has been pirated or delayed by the actions of pirates? For insured private entities, would the insurer who has paid have subrogation rights against the pirates? Would the answer be different if the consignor were a state or a state corporation? Would the reverse be true of consignees, whether private, state, or state-corporation?

## 3. Bankers, Lawyers, and Insurers

Like the shipowners, charterers, operators, and cargo interests discussed above, insurers, bankers, ship brokers, and cargo mortgagees have no stake under international law because they are nonstate entities.<sup>190</sup>

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188. Peter Kenyon, *Egypt's Suez Canal Threatened by Somali Pirates*, NPR (Dec. 1, 2008, 6:00 AM ET), <http://www.npr.org/templates/story/story.php?Id=97629335>.

189. *Id.*

190. See *Ransom Payments—Funding Terrorism, Are They Legal?*, PETROLEUM REV., Aug. 2013, at 34, 35-36.

The real losers are probably the mortgagees, not the bankers, lawyers, and insurers. Commentators argue that bankers, lawyers, and insurers are among the indirect beneficiaries of piracy by readily agreeing to pay ransoms and subsequently hiking premiums.<sup>191</sup> Is there an argument that they are complicit in aiding and abetting piracy?<sup>192</sup>

*C. A Remedy for Nonstate Entities?*

Considering the lack of a jurisdictional link and the absence of any common fund to compensate these parties, perhaps the international community, advised by shipping and related interests, would consider creating an international fund for this purpose. The International Oil Pollution Compensation Fund (IOPC Fund)<sup>193</sup> serves as a guiding principle for providing remedies to nonstate actors. Perhaps a revision of UNCLOS and the creation of an international piracy court (IPC) could encompass these suggestions. Otherwise, the only avenue for these nonstate entities is to pass on the additional costs of piracy to their customers.

VII. PROPOSED SOLUTIONS

The United Nations Secretary-General has proposed a national and regional solution to Somali piracy. The report to the U.N. Security Council is wide-ranging and identifies seven options:<sup>194</sup>

- (1) Shipriding agreements, to permit rides and arrests by third states' enforcement officers;<sup>195</sup>
- (2) Implementation of UNCLOS antipiracy provisions in national legislations;
- (3) Amendments to UNCLOS to allow for unlimited state jurisdiction;
- (4) Extension of powers of international courts and tribunals;
- (5) Extension of the powers of the International Tribunal for the Law of the Sea;

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191. *Piracy Threat Hikes Insurance Premiums*, NBCNEWS.COM, [http://www.nbcnews.com/id/27826246/ns/world\\_news-Africa/E/Piracy-threat-hikes-insurance-premiums/#.UZWfDcflJap](http://www.nbcnews.com/id/27826246/ns/world_news-Africa/E/Piracy-threat-hikes-insurance-premiums/#.UZWfDcflJap) (last updated Nov. 20, 2008, 4:04:58 PM ET).

192. *See id.*

193. *See generally Funds Overview*, IOPC FUNDS, <http://www.iopcfunds.org/about-us/> (last visited Apr. 2, 2014).

194. *See* U.N. Secretary-General, *supra* note 5.

195. For a definition, description, and function of these types of agreements, see *Shiprider Agreement*, *supra* note 60, and *What Is a Shiprider Agreement?*, ANSWERS, [http://wiki.answers.com/Q/What\\_is\\_a\\_shiprider\\_Agreement](http://wiki.answers.com/Q/What_is_a_shiprider_Agreement) (last visited Apr. 8, 2014).



- (6) Extension of the powers of the International Court of Justice and the International Criminal Court to allow prosecutions;<sup>196</sup> and
- (7) Creation of an IPC.

New and urgent solutions are therefore necessary.<sup>197</sup> U.N. Security Council Resolution 1976 calls for the establishment of a specialized Somali court, including an extraterritorial antipiracy court to prosecute pirate suspects within Somalia and the region.<sup>198</sup> The reunification of the Somali state and restoration of its government and state institutions would be the ideal and long-term political and juridical solution. It would eradicate the safe haven, political vacuum, and lawlessness in which piracy thrives.

#### VIII. CONCLUDING REMARKS

Piracy is a universal crime. Any state can arrest and punish perpetrators through the right of approach, arrest, and seizure of suspected pirate vessels by warships of any state under the universality principle codified in UNCLOS. However, although the principle is more liberal in permitting any state to arrest and prosecute pirates, it assumes prosecution by arresting rather than third states, except by extradition or some other arrangement. Under UNCLOS and various general principles of international criminal jurisdiction, there must exist a link between the suspect and jurisdiction.

The arresting states' initial reluctance to transport and prosecute pirates at home, when no links existed in favor of third states, frustrated early international efforts to prosecute Somali pirates. The transfer agreements, establishing the missing link with third states, supplemented UNCLOS provisions. It is for those reasons that the preambles to the agreements open with general references to international law and UNCLOS in particular. Further, mandates were introduced by the amended SUA Convention and other conventions, U.N. Security Council resolutions, and IMO guidelines.

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196. See Kevin H. Govern, *National Solutions to an International Scourge: Prosecuting Piracy Domestically as a Viable Alternative to International Tribunals*, 19 U. MIAMI INT'L & COMP. L. REV. 1 (2011).

197. See Samir Amin, *Is There a Solution to the Problems of Somalia?*, PAMBAZUKA NEWS (Feb. 17, 2011), <http://pambazuka.org/en/category/features/70973>; U.N. Secretary-General, *supra* note 5. For more recommendations, see Robert I. Rotberg, World Peace Found., *Combating Maritime Piracy: A Policy Brief with Recommendations for Action*, SOMALILANDPRESS (Jan. 26, 2010), <http://somalilandpress.com/wp-content/uploads/2010/02/Combating-Maritime-Piracy.pdf>.

198. See 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 L. 399 (2011).

Stopping piracy requires bold and innovative efforts. The transfer agreements have provided respite-but how effective and for how long? The U.N. Secretary-General's proposals and the many U.N. Security Council resolutions are not only temporary solutions but have proved only partially effective. Except for the Somaliland and Puntland regions, Somalia is a failed state, and the TFG is unable to exercise jurisdiction over Somali pirates based on nationality and territorial principles. The remaining principles of international and maritime jurisdiction have neither been utilized nor are they useful. A temporary solution would be to utilize existing international courts and tribunals and mechanisms such as shiprider agreements. One long-term solution is a revision of UNCLOS (for which there seems to be no international appetite) to widen the definition of piracy offenses and create a specific international court whose jurisdiction would render superfluous the need for links as a precondition for jurisdiction.

The SUA Convention and related conventions have introduced new offenses of maritime terrorism and security, under which fall certain acts of endangering the safety and navigation of merchant ships and endangering the safety and operation of oil rigs and production platforms. These new offenses can be prosecuted independently or in addition to piracy.

The permanent political and economic solution would be the restoration of the Federal Somali Government and its state institutions, a realization the international community is only slowly and grudgingly acknowledging. This would enable the Somali state to exercise control over its territory, lessening the extent of piracy through the creation of employment and allowing it to arrest and prosecute its own nationals in its jurisdiction. Meanwhile, many states and nonstate entities whose economies and businesses are adversely affected, but are unable to sue because they are not parties to international jurisdiction systems, have been left without redress.

Yesterday it was the Strait of Malacca. Today it is Somalia. Tomorrow it will be the Gulf of Guinea that, like the Arabian Gulf, is the next major alternative source of global energy. After that, it will be another region of the world. International law generally and UNCLOS in particular must develop coping mechanisms. International law must create viable, internationally acceptable instruments and institutions to counter piracy. Priority should be given to the establishment and maintenance of the link between the offense, the suspects, and the jurisdiction.

Somali piracy exposes the weakness in international law and in UNCLOS regarding criminal jurisdiction. The international efforts to combat piracy have attempted to develop the necessary jurisprudence and create the progressive development of international law to cope with modern challenges. For those reasons, UNCLOS, praised as the “Constitution for the Oceans,”<sup>199</sup> should be regarded as only a general rather than an exhaustive codification. Revising UNCLOS is essential, as is creating specialized courts in Somalia, leaving much work to be done to reduce piracy.

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199. ‘A Constitution for the Oceans,’ *Remarks by Tommy T.B. Koh, of Singapore*, UNITED NATIONS, [http://www.un.org/depts/los/convention\\_agreements/texts/koh\\_english.pdf](http://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf) (last visited Apr. 21, 2014) (adapted from statements by the President of the Third U.N. Conference on the Law of the Sea on Dec. 6, and Dec. 11, 1982).