

A PIRATE LOOKS AT THE TWENTY-FIRST  
CENTURY: THE LEGAL STATUS OF SOMALI  
PIRATES IN AN AGE OF SOVEREIGN SEAS  
AND HUMAN RIGHTS

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Mother, Mother Ocean, after all these years I've found,  
My occupational hazard being my occupation's just not around.<sup>1</sup>

INTRODUCTION

Captains Blackbeard and Kidd, and even Hook and Sparrow, are the primary conception of piracy for many people.<sup>2</sup> For these people, “real piracy is dead and the rest is entertainment.”<sup>3</sup> But this vision of piracy merely represents the industry during its so-called Golden Age.<sup>4</sup> One need not travel to the seventeenth century or join a Goonies<sup>5</sup> adventure to find treasure or pirates. Pirates can be found today in the exact same places in which they thrived three hundred years ago: environments of lax law enforcement, advantageous geography, and sometimes even public complicity that allow them to ply

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1 JIMMY BUFFET, *A Pirate Looks at Forty*, on A1A (Dunhill 1974). I would like to apologize to Jimmy Buffet for adapting the title of his song for use in the title of this Note.

2 See Jack A. GOTTSCHALK & BRIAN P. FLANAGAN, *JOLLY ROGER WITH AN UZI* 143 (2000).

3 *Id.*

4 The Golden Age of Piracy is considered by many to be from 1692–1725. *Id.* at 4.

5 *THE GOONIES* (Amblin Entertainment 1985).

their trade out of sight and out of mind.<sup>6</sup> Pirates have remained in that forgotten dimension—until recently.

Somali pirates captured the world's attention on September 25, 2008, when a gang of heavily armed pirates in speedboats, referring to themselves as the Somali Coast Guard, hijacked a Ukrainian freighter, the *Faina*, carrying thirty million dollars worth of refurbished Soviet tanks, artillery, grenade launchers and ammunition.<sup>7</sup> The pirates demanded a ransom of twenty million dollars cash.<sup>8</sup> While this sensational story piqued the interest of many in Europe and the United States, it also exposed seemingly uncharacteristic deferential behavior and policy towards international outlaws. While the U.S. Navy encircled the pirates and the Russians moved in to join the engagement, the negotiations continued.<sup>9</sup> Certainly, concerns for the crew's safety caution against a commando operation on a ship full of explosives, but the galling fact is that on Somalia's Banaadir Coast this is business as usual, and, until recently, the international community has done little to change it.<sup>10</sup>

The U.N. Security Council has now passed several resolutions intended to allow foreign states to police Somali waters for pirates and even continue their pursuit on land,<sup>11</sup> but the international response has been inconsistent. The French Navy has been aggressively confronting pirates, arresting them, and sending them to Paris to face trial.<sup>12</sup> By contrast, the British Royal Navy has generally sought to avoid confrontation with pirates due to concern over human rights violations.<sup>13</sup> With one fantastic exception,<sup>14</sup> the United States has also refrained from prosecuting Somali pirates on its own soil, preferring

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6 See GOTTSCHALK & FLANAGAN, *supra* note 2, at 10–14, 20 (discussing the environmental opportunities that led to the rise of piracy and the eventual changes in circumstance that resulted in its demise).

7 Jeffrey Gettleman, *Somalia Pirates Capture Tanks and Unwanted Global Notice*, N.Y. TIMES, Sept. 27, 2008, at A1.

8 See Jeffrey Gettleman, *Pirates Tell Their Side: They Want Only Money*, N.Y. TIMES, Oct. 1, 2008, at A6.

9 Gettleman, *supra* note 7.

10 See *id.*

11 See *infra* notes 104–05, 110–11 and accompanying text.

12 See, e.g., John S. Burnett, Op-Ed., *Captain Kidd, Human-Rights Victim*, N.Y. TIMES, Apr. 20, 2008, at WK 12 (recounting an April 11, 2008 French commando operation, which resulted in the capture of a gang of pirates, and its aftermath).

13 See *id.*

14 See Benjamin Weiser, *A Young Somali in Manhattan, to Face U.S. Charges of Piracy*, N.Y. TIMES, Apr. 22, 2009, at A1 (reporting the arraignment of a suspected Somali pirate in the Southern District of New York).

instead to seek arrangements for the trial of pirates in Kenya and elsewhere in the region.<sup>15</sup>

This somewhat reluctant response from the international community is in large part the result of states proceeding cautiously in nebulous legal waters.<sup>16</sup> The effectiveness of Security Council resolutions has been limited because they leave unresolved the ultimate issue of a pirate's legal status.<sup>17</sup> Piracy—the world's oldest crime against the law of nations—does not have an easily applied and universally accepted definition.<sup>18</sup> First, it is not clear what a pirate—as opposed to a sea-robber, mutineer, or terrorist—is. Second, it is hotly contested whether piracy creates international jurisdiction, or whether areas of international jurisdiction (the high seas) create the only opportunity for legally cognizable piracy. Third, further ambiguity surrounds the question of whether a pirate has a nationality or human rights. Resolution of the Somali pirates' legal status will provide solid legal footing that will enable the international community to pursue the pirates forcefully.

This Note attempts to define the legal status of Somali pirates. Part I examines the history of piracy and its past legal treatment in order to determine the customary international law of piracy as it existed prior to the twentieth century. Part II examines modern piracy generally, and then more specifically in the context of Somalia, with the purpose of establishing whether the Somali mariner-militants are in fact pirates. Part III surveys the twentieth century legal agreements on the use of force, the law of the sea, and human rights, in

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15 See Jeffrey Gettleman, *Rounding up Suspects, the West Turns to Kenya as Piracy Criminal Court*, N.Y. TIMES, Apr. 24, 2009, at A8.

16 See Burnett, *supra* note 12 (explaining that the British Royal Navy's reluctance to detain pirates may be due to the fact that captured pirates may be granted asylum because of the gruesome nature the punishments they faced under Islamic Law in their country of origin); Eugene Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, ASIL INSIGHTS, Feb. 6, 2009, <http://www.asil.org/insights090206.cfm>; see also Mark Landler, *Palau Agrees to Take Chinese Detainees, Helping Obama's Guantanamo Plan*, N.Y. TIMES, June 10, 2009, at A6 (describing the difficulties of finding a safe relocation state, outside of the United States, for seventeen ethnic Uighurs from Western China).

17 See *infra* note 115 and accompanying text.

18 See Martin Murphy, *Piracy and UNCLOS: Does International Law Help Regional States Combat Piracy?*, in *VIOLENCE AT SEA* 155, 159–73 (Peter Lehr ed., 2007) (detailing the limitations of the piracy provisions of the U.N. Convention of the Law of the Sea, due to the difficulty of establishing a universal definition of piracy); cf. Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1, 17 (2007) (observing that “there may be at least six different meanings of ‘piracy’ circulating among various domestic and international laws”).

order to determine the extent to which the customary international law of piracy may have been codified, supplemented, or overridden. Finally, Part IV analyzes the implications of the newly established Somali pirates' legal status, with particular focus on who may—and who ought to—assert jurisdiction over the Somali pirates, and what can—and what ought to—be done with the Somali pirates upon their arrest.

### I. A BRIEF HISTORY OF PIRACY

Records of anti-piracy laws date back to the ancient Athenians,<sup>19</sup> but the Roman Republic made the first lasting impression on piratical jurisprudence.<sup>20</sup> Cicero famously declared pirates to be *hostis humani generi*, meaning “enemy of all mankind.”<sup>21</sup> In so declaring, Cicero and the Romans introduced the element of universal jurisdiction into the law of piracy.<sup>22</sup>

There are two interpretations of Cicero's universal jurisdiction over pirates. Some scholars have argued that even at this early stage of the law of nations, the principle of universal jurisdiction over pirates was inherently limited by the extent of municipal jurisdiction.<sup>23</sup> In other words, an individual who committed piratical acts was not considered a pirate while within any nation's municipal jurisdiction, and therefore was not susceptible to prosecution by any nation except the one within whose territorial waters he was.<sup>24</sup> An alternative interpretation is that the principle of universal jurisdiction was a legal compromise between effective enforcement of the law against pirates and the sovereign rights of nations over their territorial waters.<sup>25</sup> The compromise of universal jurisdiction, therefore, was to permit encroachments by foreign nations in the territorial waters of any nation for the purpose of hunting down pirates and protecting commerce among nations.<sup>26</sup> The determination as to which interpretation of this crucial tenant of the law against piracy has become customary international law—if either interpretation has become so

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19 See GOTTSCHALK & FLANAGAN, *supra* note 2, at 1.

20 See Douglas R. Burgess, Jr., *Hostis Humani Generi: Piracy, Terrorism and a New International Law*, 13 U. MIAMI INT'L & COMP. L. REV. 293, 301 (2006).

21 *Id.*

22 See *id.* at 302.

23 See *id.*

24 See *id.*

25 See Murphy, *supra* note 18, at 161.

26 See *id.*

developed—requires further inquiry into the evolution of piracy and universal jurisdiction as developed in the common law.<sup>27</sup>

Throughout the history of Western Civilization, pirates, despite bearing the label of enemies of all mankind, have not been consistently treated as criminals.<sup>28</sup> Often, warring, or merely rival, European nations supplemented their navies with pirates.<sup>29</sup> As one scholar noted, “Queen Elizabeth viewed pirates as an essential adjunct to the Royal Navy.”<sup>30</sup> Pirates were used to diminish the accrual of wealth by foreign powers while maintaining an official peace among nations.<sup>31</sup> Alternatively, pirate attacks could serve as a desired provocation to lure an enemy into a war it was not prepared to wage.<sup>32</sup> Of further advantage was the broad base of sailors experienced in maritime combat that pirates provided.<sup>33</sup> The problem, however, for countries that used pirates as weapons against each other was that the pirates could not be relied upon to forego their piratical activity upon request of government or even by mandate of law.<sup>34</sup> The pirates’ rejection of law and the exercise of their will against the interests of society firmly placed them in the class unto themselves that Cicero had long ago identified.

Pirates considered themselves to be legally separate from any nation or rule of law.<sup>35</sup> Blackstone assessed the pirate’s unique legal status as one characterized by perpetual war with society: a pirate “[h]as renounced all the benefits of society and . . . by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right, by the rule of self-defence, to inflict that punishment upon him . . . .”<sup>36</sup> True to the conception of pirates as separate legal entities, pirate ships operated under their own laws—

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27 Pirates are not a phenomenon of Western civilization; rather, they are common to all maritime civilizations. See GOTTSCHALK & FLANAGAN, *supra* note 2, at 63. The rise of the law of nations, however, does appear to be rooted in Western civilization. Therefore, at the risk of an ethnocentric analysis of piracy, the inquiry into piracy and its evolution in the law will focus predominately on piracy as it occurred and was treated in the West for the purpose of gaining a better understanding of customary international law.

28 See Burgess, *supra* note 20, at 298.

29 See *id.*

30 *Id.* at 302.

31 See *id.* at 302–03.

32 See *id.*

33 See *id.*

34 See *id.* at 303–06 (describing the reasons for turning pirate, which were wholly divorced from defending the Crown).

35 See *id.* at 306.

36 4 WILLIAM BLACKSTONE, COMMENTARIES \*71.

known as “pirate articles”—that were “often as specific and meticulous as acts of Parliament.”<sup>37</sup> Thus, in the law of nations there were three legal categories in the eighteenth century: states, civilians, and pirates.<sup>38</sup>

Pirates, once considered assets to states, became liabilities at the close of the seventeenth century. As the states’ interest in peace grew in order to support flourishing maritime commerce, pirates became a universal problem and thus lived up to their ancient title as the enemies of all mankind. In 1856, the European nations signed the Declaration of Paris,<sup>39</sup> which abolished state-sponsored piracy and sounded the death knell for piracy in the West as Western imperial powers cooperated to eradicate the mutual threat to their continued prosperity.<sup>40</sup>

Universal jurisdiction has been a long-standing practical solution to the common problem of piracy throughout the history of Western civilization.<sup>41</sup> In a time when the political force of the world was amassed in only a few empires with a common heritage and a common interest in distant commerce, universal jurisdiction over pirates was a logical response.<sup>42</sup> As more nations set to sea, the interest in peaceful maritime commerce correspondingly grew, but the practice of international anti-piracy enforcement and the application of universal jurisdiction changed.<sup>43</sup>

A rift developed between universal jurisdiction over piracy in theory and in practice as emerging maritime powers enacted domestic legislation to enforce international norms against piracy and as the scourge of piracy diminished.<sup>44</sup> Thus, pirates in the nineteenth and twentieth centuries were increasingly “hunted down by their own countrymen.”<sup>45</sup> This evolving practice carried with it two implications contrary to the theoretical tenets of universal jurisdiction. First, routine domestic enforcement potentially implied exclusive domestic

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37 Burgess, *supra* note 20, at 305.

38 *See id.* at 299.

39 Declaration Respecting Maritime Law, Apr. 16, 1856, *reprinted in* THE LAWS OF ARMED CONFLICT 787 (Dietrich Schindler & Jiří Toman eds., 1988).

40 *See* Bahar, *supra* note 18, at 12–13; *see also* PHILIP GOSSE, THE HISTORY OF PIRACY 297–98 (1932) (discussing the decline of Western piracy in the late nineteenth century).

41 *See* Murphy, *supra* note 18, at 161.

42 *See id.*

43 *See id.*

44 *See id.*

45 *Id.*

jurisdiction over pirates in a state's territorial waters.<sup>46</sup> The competence of emerging powers to police their own coastal waters and the interests in reserving the economic exploitation of coastal waters to nationals created both an incentive and a justification for excluding foreign military powers from a state's territorial waters. As the threat of large-scale piracy diminished at the turn of the twentieth century, the need for foreign powers to contest exclusive domestic jurisdiction diminished correspondingly and removed a strong justification for the maintenance of truly universal jurisdiction over pirates in the face of the increasing demands for exclusivity of territorial waters. Second, domestic enforcement over pirates that typically operated close to home allowed for a retained association by pirates to their country of origin.<sup>47</sup> Thus, pirates, as conceived of by those who were enforcing domestic laws against them, had not removed themselves from society or declared war against mankind, but rather were domestic criminals. This brief historical survey, and particularly the late-arriving emergence of greater domestic enforcement against piracy, tends to show that universal jurisdiction over pirates was a compromise among nations to sacrifice exclusivity of municipal maritime jurisdiction in order to gain safer, more dependable, and more lucrative maritime commerce. Thus, according to customary international law—at least as it was at the turn of the twentieth century—piracy was not limited to geographic zones of predetermined universal jurisdiction, but rather universal jurisdiction over pirates extended to anywhere a pirate could be found.<sup>48</sup>

Four other observations regarding customary international law may be made from a historical analysis of piracy. First, piracy is an occupational crime. While an act of piracy is certainly a prerequisite to becoming a pirate, it is the status of being a pirate—being an enemy of mankind—that is the crime.<sup>49</sup> Second, activities that constitute “acts of piracy” are not specifically delineated by international law, but rather are subject to specifications set forth by municipal governments.<sup>50</sup> As a result, acts of piracy have been construed in a variety of ways, including constructions so narrow as to only encompass “sea

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46 *See id.* (“In fact . . . this universal jurisdiction existed more in theory than reality.”); *see also* GOTTSCHALK & FLANAGAN, *supra* note 2, at 32 (describing the illegality of foreign state enforcement actions in another state's territorial waters).

47 *See* Murphy, *supra* note 18, at 161.

48 *See* Burgess, *supra* note 20, at 314.

49 *See id.*

50 *See* United States v. Smith, 18 U.S. (5 Wheat.) 153, 158–60 (1820).

robbery,<sup>51</sup> and constructions so broad as to include any business-dealings with those engaged in sea robbery.<sup>52</sup> Thus, depending on municipal legislation, a pirate may exist on land without ever having set to sea. Customary international law has the capacity to define piracy so broadly as to include any acts that further the pirate industry, but still retains tremendous flexibility by allowing for municipal specification of acts constituting piracy.

Third, a pirate remains a pirate whether he is financed, condoned, or supported by a recognized state or not. A state that aids and abets a private enterprise—or even a quasi-legitimate political organization—in order to violate the territorial integrity of another state<sup>53</sup> does not legitimize actions taken by the enterprise or organization. Rather, that state is itself in violation of international law.<sup>54</sup> Historically, pirates have demonstrated that they have an agenda independent of states, even where they operate for the benefit of a given state, and thus they maintain a separate legal status that remains unchanged and unqualified by state sponsorship.

Fourth, a pirate's legal separation from states necessarily implies that he is devoid of citizenship.<sup>55</sup> Today this implication has substantial relevance, but in historical practice a determination of citizenship was rendered moot by universal jurisdiction and capital punishment.<sup>56</sup> Historical practice does, however, offer three exceptions in which pirates maintained their citizenship. First, pirates in league with a state were not considered pirates by that state because they never severed the connection between themselves and their political community.<sup>57</sup> Second, a state could pardon pirates, and those pardoned

51 Burgess, *supra* note 20, at 310–11 (discussing English Justice Sir Charles Hedges's definition of piracy). The International Maritime Board more precisely defines piracy as "an act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in furtherance of that act." PETER CHALK, *THE MARITIME DIMENSION OF INTERNATIONAL SECURITY* 3 (2008).

52 See Burgess, *supra* note 20, at 312 (discussing Britain's Piracy Act of 1721).

53 "[A] ship on the high seas is . . . placed in the same position as [the] national territory . . . of the State under whose flag the vessel sails . . . ." *In re S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 25 (Sept. 7).

54 See *Military & Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 118–19 (June 27).

55 See 4 BLACKSTONE, *supra* note 36, at \*71; Burgess, *supra* note 20, at 306–07.

56 See *A Collection of Piracy Laws of Various Countries*, 26 AM. J. INT'L L. 887, 895–96 (Supp. 1932) (observing that death was the punishment for piracy in the United States until 1897, and in Great Britain until 1832).

57 See GOTTSCHALK & FLANAGAN, *supra* note 2, at 19. The tale of Captain Kidd actually shows the limits of this exception. See *id.* at 15–17.

would themselves peaceably reenter society.<sup>58</sup> Third, a state could determine that an individual who sailed and plundered with pirates was not actually a pirate at all, but had been impressed into service as a member of the crew.<sup>59</sup> Thus, while a pirate is theoretically stateless, states did permit those pirates against whom they declined to enforce piracy laws to be a part of their political community, which indicates that pirates cannot completely forsake their citizenship. The crime of piracy is fundamentally a renunciation of society, but after society has undertaken some sort of legal proceedings regarding the individual's piratical acts, that individual may reenter society. In sum, even pirates—the enemies of all mankind—hold a residual citizenship in their country of origin.

The customary international law of piracy that developed over the two thousand year period ending at the turn of the twentieth century is due respectful consideration. This law was born of the common experience of many and various nations and empires, enduring across time despite significant technological change. Throughout diverse periods of human history, in which the world was intimately familiar with the scourge of piracy, this functional customary law to combat piracy was known and employed with legitimacy and some success. Piracy may not have been a serious twentieth century problem, but it is becoming a rather serious twenty-first century problem.<sup>60</sup> In addressing this recurring problem, we would be remiss to cast aside the ample accumulation of knowledge and law from piracy's past.

## II. MODERN PIRACY

### A. *In General*

Today, piracy is on the rise. The annual average number of reported actual or attempted pirate attacks around the world for the period from 2000 to the end of 2006 amounts to almost one attack each day, and represents a sixty-eight percent increase from the annual average from 1994 to 1999.<sup>61</sup> Moreover, many more pirate attacks occur than are reported—perhaps twice as many.<sup>62</sup> Of equally great concern is the more advanced weaponry of which the pirates are availing themselves. Noel Choong, director of the International Maritime Bureau (IMB) office in Kuala Lumpur observed, “Five to six

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58 *See id.* at 19–20.

59 *See id.*

60 CHALK, *supra* note 51, at 6–13 (discussing the recent emergence of piracy).

61 *See id.* at 6.

62 *See id.* at 7.

years ago, when pirates attacked, they used machetes, knives, and pistols. Today, they come equipped with AK-47s, M-16s, rifle grenades, and RPGs.”<sup>63</sup> Piracy’s ascendance creates a number of dangers that could cause catastrophic damage.

The costs of piracy are felt most acutely by the crew of seized ships. Although few crew members are ever killed by pirates, hundreds of crew members are held hostage each year.<sup>64</sup> In economic terms, the plague of piracy is manifest in increased insurance premiums, increased avoidance of pirate-infested waters, and correspondingly decreased trade and use of ports in countries whose coasts have high concentrations of pirates.<sup>65</sup> The IMB estimates that piracy may cost the shipping industry up to sixteen billion dollars annually.<sup>66</sup> Furthermore, the potential for a large scale economic disaster resulting from collisions of hijacked vessels in heavily trafficked shipping lanes remains ever present. Such a collision could close down an entire channel and port operations for months, and subsequent pollution of the water could also destroy marine life and fertile coastal lowlands, not only crippling any industries dependent on navigating and harvesting the affected areas, but potentially threatening the sources of food on which the inhabitants of the region are dependent.<sup>67</sup> Politically, piracy can breed corruption among public officials that may weaken a government’s claim to legitimacy or hinder a government’s attempt to gain control of its territory.<sup>68</sup>

Modern piracy is a truly global problem. While there is an inclination among residents of advanced industrialized nations to dismiss piracy as a problem reserved for the third world, pirate attacks do occur in Europe and North America.<sup>69</sup> Furthermore, North American and European interests are still threatened, even when pirate

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63 *Id.* at 14 (quoting Choong).

64 *See Piracy Doubles in First Six Months of 2009*, ICC COMMERCIAL CRIME SERVS., July 15, 2009, [http://www.icc-ccs.org/index.php?option=com\\_content&view=article&id=362:piracy-doubles-in-first-six-months-of-2009&catid=60:news&Itemid=51](http://www.icc-ccs.org/index.php?option=com_content&view=article&id=362:piracy-doubles-in-first-six-months-of-2009&catid=60:news&Itemid=51) (reporting 561 crew members taken hostage in the second quarter of 2009); Int’l Maritime Org., *Piracy in Waters off the Coast of Somalia*, [http://www.imo.org/home.asp?topic\\_id=1178](http://www.imo.org/home.asp?topic_id=1178) (last visited Nov. 23, 2009) (reporting over 600 sailors were held hostage by Somali pirates in 2008).

65 *See* CHALK, *supra* note 51, at 15–16.

66 *Id.* at 16.

67 *See id.* at 17; GOTTSCHALK & FLANAGAN, *supra* note 2, at 114.

68 *See* Peter Lehr & Hendrick Lehmann, *Somalia—Pirates’ New Paradise*, in *VIOLENCE AT SEA*, *supra* note 18, at 1, 14–15.

69 *See id.* at 44–55; *see also* Michael Schwirtz, *Russia Says Ship’s Hijackers Were Taken Without a Shot*, N.Y. TIMES, Aug. 19, 2009, at A4 (describing the capture and liberation of a Russian cargo ship taken in the Baltic Sea).

attacks occur in distant regions, by virtue of European and North American nations' extensive involvement in maritime commerce.<sup>70</sup> In fact, the vast majority of pirate attacks do occur in distant regions, particularly off the coasts of Africa and Southeast Asia.<sup>71</sup> In these locations, pirates take advantage of zones of high congestion, an inability of certain states to police their waters, and a proliferation of small arms.<sup>72</sup> The attention and vigilance of the entire global community will be required to combat these circumstances that enable piracy to threaten the global community. Modern piracy has presented itself as a real threat to humanity, and it merits a legal response in kind.

### B. Piracy in Somalia

Piracy off the Somali coast only contributes approximately eight percent of the world's reported pirate activity,<sup>73</sup> yet the waters off Somalia have been declared the most dangerous in the entire Indian Ocean by the IMB.<sup>74</sup> Somali pirates are known for indiscriminately attacking vessels ranging in size from small fishing trawlers to massive oil tankers.<sup>75</sup> Both the IMB and the U.S. Department of State have advised international shippers and others to avoid the Port of Mogadishu and stay at least two hundred miles off the Somali coast.<sup>76</sup> In fact, the region has become so notoriously dangerous that the United Kingdom's National Union of Marine, Aviation and Shipping Transport (NUMAST) wants the coastal waters to be declared a war zone.<sup>77</sup>

The Somali pirates, for all their ferocity, have rather humble origins. Modern Somali piracy was born of poor coastal fishermen.<sup>78</sup> After the collapse of the Somali government in 1991, and the subsequent collapse of the Somali Navy, the fisheries off the Somali coast could no longer be protected from foreign exploitation.<sup>79</sup> The poor

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70 See CHALK, *supra* note 51, at 36.

71 See *id.* at 10 fig.2.2.

72 See *id.* at 10–14.

73 See *id.* at 10 fig.2.2. Four percent of the world's reported pirate activity is directly attributable to Somalia, whereas another four percent occurs in the Gulf of Aden and the Red Sea. *Id.* Piracy in the Gulf of Aden is fairly attributable to Somali pirates because the Gulf is on Somalia's north shore, parts of which are notorious pirate havens. See Jeffrey Gettleman, *Somalia's Pirates Flourish in a Lawless Nation*, N.Y. TIMES, Oct. 31, 2008, at A1.

74 Lehr & Lehmann, *supra* note 68, at 6.

75 See *id.* at 14; Associated Press, *Pirates Hijack Philippine Chemical Tanker Off Somalia*, N.Y. TIMES, Nov. 12, 2008, at A14.

76 Lehr & Lehmann, *supra* note 68, at 6.

77 See *id.*

78 See *id.* at 13–14.

79 See *id.* at 11–14 (analyzing the factors that gave rise to Somali piracy).

Somali fishermen along the coast suffered as foreign trawlers encroached further and further into Somalia's exclusive economic zone, using internationally banned fishing equipment that transformed their rich maritime environment into a wasteland.<sup>80</sup> The Somali fishing vessels also suffered violence at the hands of foreign fishing vessels that destroyed Somali fishing equipment and even rammed smaller Somali fishing vessels.<sup>81</sup> As their country fell to pieces, the Somali fishermen had only themselves to look to for protection. They armed themselves and confronted foreign vessels demanding "taxes."<sup>82</sup> As Somali diplomat Mohamed Osman Aden observed, "From there, they got greedy . . . . They start[ed] attacking everyone."<sup>83</sup>

Today, Somali piracy is predominantly a ransom-driven business,<sup>84</sup> though evidence of their evolution from fishermen engaging in self-defense is still apparent. For example, in holding forty-eight crew members of Taiwanese trawlers hostage in August 2005, the pirates referred to themselves as the "Somali Volunteer National Coast Guard" and referred to the ransom of \$5000 per head as a fine for the criminal act of illegal fishing.<sup>85</sup> More recently, the spokesman for the pirate crew that seized the *Faina* told the Western media that they "don't consider [themselves] sea bandits."<sup>86</sup> Instead, he asked that the pirates be thought of as a coast guard that patrols the waters to stop illegal fishing and dumping.<sup>87</sup> The spokesman went further to proclaim that the pirates had no intention of killing the crew, or off-loading the cargo of tanks and grenade launchers, nor had the pirates any idea that such cargo was onboard when they decided to seize the ship.<sup>88</sup> As their spokesman stated so simply, "[The pirates] just want the money."<sup>89</sup> Regardless of the Somali mariners' initial motivation for attacking foreign ships, it is clear that they now operate for personal enrichment as opposed to self-defense or civic duty. Today, the individuals seizing ships off Somalia are no longer fishermen, nor are they members of a coast guard. Rather, they are highly organized pirates engaged in a violent quest for treasure.

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80 *See id.* at 13.

81 *See id.*

82 Gettleman, *supra* note 8.

83 *Id.* (quoting Mohamed Osman Aden).

84 *See, e.g., id.*

85 Lehr & Lehmann, *supra* note 68, at 14.

86 Gettleman, *supra* note 8 (quoting Sugule Ali).

87 *Id.*

88 *Id.*

89 *Id.* (quoting Sugule Ali).

All piracy requires an enabling environment, and in Somalia “the enabling environment is formed by the failed state itself.”<sup>90</sup> As one reporter observed, “What is happening off Somalia’s shores is basically an extension of the corrupt, violent free-for-all that has raged on land . . . since the central government imploded in 1991.”<sup>91</sup> Due to the government’s inability to regulate its seas, pirates were able to take hold. Now, the thriving pirate industry<sup>92</sup>—one of the few successful industries in Somalia—has created entrenched interest groups.<sup>93</sup> Many corrupt government officials, warring and rival clans, and even small coastal fishing communities have strong interests in the continued success of the Somali pirates.<sup>94</sup> Under such conditions, the growth of the pirate industry is easy to explain: “All you need is three guys and a little boat, and the next day you’re millionaires.”<sup>95</sup> But the prosperity of a few has come at the expense of many. In addition to the danger and expense to international shipping interests, the prevalence of piracy has severely harmed legitimate port and fishing activities, as well as trade, in an economy that cannot afford obstacles to its development.<sup>96</sup> In discouraging legitimate economic activity, pirates have also deprived the government of taxes.<sup>97</sup> Worse still, piracy has hampered United Nations’ relief efforts for the starving inland Somali population.<sup>98</sup> Pirates are contributing to the lack of economic devel-

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90 Lehr & Lehmann, *supra* note 68, at 11.

91 Gettleman, *supra* note 73.

92 Presently, the Somali pirate industry employs over 1000 gunmen who collected approximately \$120 million in 2008 alone. See Mary Kimani, *Tackling Piracy off African Shores*, AFR. RENEWAL, Jan. 2009, at 3; Andrew Cawthorne, *Somali Pirates Seize Dutch Boat, Chase U.S. Ship*, REUTERS, May 7, 2009, <http://www.reuters.com/article/latest-Crisis/idUSL755771>. The marked growth in attacks is manifest in the increased number of pirate attacks. See, e.g., Mark McDonald, *For Somali Pirates, 2009 Is a Record Year*, N.Y. TIMES, Dec. 30, 2009, at A9 (reporting that Somali pirates registered a two hundred percent increase in attacks from 2007 to 2008, and set a record for highest annual number of pirate attacks in 2009).

93 See Gettleman, *supra* note 73.

94 See *id.* (describing the “not-so-underground” pirate industry in Boosaaso, Somalia, where “[e]very time a seized ship tosses its anchor, it means a pirate shopping spree”); see also Lehr & Lehman, *supra* note 68, at 12–13, 17 (stating that coastal communities “actively turn [ ] a blind eye” to piracy).

95 Gettleman, *supra* note 73 (quoting Abdullahi Omar Qawden, a former captain of the defunct Somali Navy).

96 See *id.*

97 See *id.*

98 See *id.*; see also Lehr & Lehman, *supra* note 68, at 2–3 (recounting the hijacking of the *MV Semlow* and the *MV Miltzow* in 2005, which were chartered by the U.N. World Food Program to deliver 850 tons of food aid to Somali victims of the Boxing Day tsunami of December 2004).

opment and attainment of political stability in Somalia. Thus, the prevalence of piracy itself has created further incentive to engage in piracy while simultaneously limiting the Somali government's capacity to enforce anti-piracy laws.

In order to successfully combat the Somali pirates, international assistance is required. The former Prime Minister of the Somali Transitional Federal Government (TFG), Ali Mohamed Gedi,<sup>99</sup> had appealed to neighboring countries to send naval assistance to enforce some sort of law in Somali waters.<sup>100</sup> Unfortunately, Somalia's neighbors are not in a position to assist in anti-piracy efforts. The current Somali government's chief ally in the region, Ethiopia, is a landlocked country, and withdrew even from its land engagement in Somali territory in response to widespread Somali resentment.<sup>101</sup> Somalia's other regional neighbors such as Eritrea, Yemen, and Kenya, while perhaps having an incentive to provide a modicum of order off the Somali coast, have only a limited naval capacity that leaves them barely able to patrol their own exclusive economic zones, let alone combat the hundreds of heavily armed and coordinated pirates operating in Somali waters.<sup>102</sup>

Lacking national and regional enforcement capability, Western navies are absolutely necessary to quell the rise of piracy in Somalia. NATO initiated a mission in the region known as Operation Allied Provider that actively engaged in anti-piracy operations.<sup>103</sup> The mission was undertaken pursuant to U.N. Security Council Resolutions 1816<sup>104</sup> and 1838,<sup>105</sup> which authorize any foreign navy to enter Somali territorial waters and use all necessary force to combat piracy that

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99 Gedi resigned from the post of prime minister on October 29, 2007 after a falling out with then President Yusuf. See Jeffrey Gettleman, *Somalia Premier Quits as Colleagues Cheer*, N.Y. TIMES, Oct. 30, 2007, at A8. President Yusuf resigned as well on December 29, 2008, after international pressure to step down. Jeffrey Gettleman, *Islamist Militants in Somalia Begin to Fight One Another*, N.Y. TIMES, Dec. 29, 2008 at A6 [hereinafter Gettleman, *Islamist Militants*]. President Sheik Sharif Sheik Ahmed is now in control of the TFG. See Jeffrey Gettleman, *In Long-Riven Somalia, a Leader Is Raising Hopes for Stability*, N.Y. TIMES, Sept. 17, 2009, at A1.

100 See Lehr & Lehmann, *supra* note 68, at 6.

101 See Mohammed Ibrahim & Jeffrey Gettleman, *Suicide Bombers Hit Pockets of Calm in North Somalia, Killing at Least 21*, N.Y. TIMES, Oct. 30, 2008, at A17.

102 See Lehr & Lehmann, *supra* note 68, at 18.

103 Associated Press, *NATO Fleet Sails Toward Somalia to Guard Against Piracy*, N.Y. TIMES, Oct. 23, 2008, at A12; see N. Atl. Treaty Org., Counter-Piracy Operations, [http://www.nato.int/cps/en/natolive/topics\\_48815.htm](http://www.nato.int/cps/en/natolive/topics_48815.htm) (last visited Nov. 23, 2009) [hereinafter NATO, Counter-Piracy].

104 S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008).

105 S.C. Res. 1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008).

would be consistent with the treatment of piracy by international law if it were to take place on the high seas.<sup>106</sup> Operation Allied Provider included among its functions the escort of vessels chartered by the U.N. World Food Program, as well as the patrol of shipping lanes off the coast of Somalia.<sup>107</sup> In December 2008, the European Union (EU) took over this mission under the name Operation Atalanta.<sup>108</sup> States that are not members of NATO or the EU have also sent navies to engage pirates in the region pursuant to the Security Council Resolutions, including India, Malaysia, Saudi Arabia, Russia, and China.<sup>109</sup> With new international support pouring in from a wide range of far-away countries, anti-piracy efforts have recently picked up momentum.

The most significant development, however, has been U.N. Security Council Resolution 1851,<sup>110</sup> which authorizes any and all countries combating piracy off the Somali coast to engage pirates on land or sea provided that there is advance consent by the TFG.<sup>111</sup> Consent from the TFG will not be difficult to obtain considering that the extent of the government's direct control of Somali territory is a tenuous hold over a mere few city blocks inside Mogadishu.<sup>112</sup> The beleaguered TFG is desperate for any international assistance, and is no doubt hopeful that international anti-piracy efforts on land may be translated to support for the TFG itself in its efforts to establish dominance over rival Somali factions.<sup>113</sup> However, Resolution 1851 does not appear to be an indirect method of engaging Islamic insurgents; instead Resolution 1851 is a recognition of the magnitude of the problem of Somali piracy and an attempt to bring international pressure to bear on all groups in Somalia that engage in the entire pirate industry.<sup>114</sup>

The U.N. Security Council Resolutions (collectively, the Resolutions) have been successful in identifying the scope of Somali piracy

106 See S.C. Res. 1816, *supra* note 104, ¶ 7; S.C. Res. 1838, *supra* note 105, ¶ 2.

107 NATO, Counter-Piracy, *supra* note 103.

108 See *NATO Hands Over Counter-Piracy Operation to EU*, N. ATL. TREATY ORG., Dec. 15, 2008, <http://www.nato.int/docu/update/2008/12-december/e1215a.html>.

109 See Jeffrey Gettleman, *Pirates in Skiffs Still Outmaneuvering Warships off Somalia*, N.Y. TIMES, Dec. 16, 2008, at A6; Mark McDonald, *China Seems Prepared to Join Antipirate Patrols, in Rare Move Beyond the Pacific*, N.Y. TIMES, Dec. 18, 2008, at A6.

110 S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008).

111 See *id.* ¶ 6. This authorization, which was set to expire in December 2009, was renewed for another twelve month period in November 2009 by U.N. Security Resolution 1897. S.C. Res. 1897, ¶ 7, U.N. Doc. S/RES/1897 (Nov. 30, 2009).

112 See Gettleman, *Islamist Militants*, *supra* note 99.

113 See Lehr & Lehmann, *supra* note 68, at 19.

114 See S.C. Res. 1851, *supra* note 110.

and encouraging a coordinated international response, but their overall effectiveness has been limited by their failure to apply the customary international law of piracy.<sup>115</sup> As a result, confusion still exists among Western navies over the international law of piracy and the permissible extent of the use of force. On a number of occasions, the Danish Navy has released suspected pirates captured off the Somali coast onto the beach after concluding that the Danish government did not have jurisdiction over the pirates.<sup>116</sup> The Italian Navy also seems reluctant to arrest pirates, preferring to limit itself to warding off pirate attacks rather than dealing with the potential legal quagmire that might follow an assertion of jurisdiction.<sup>117</sup> This avoidance of legal proceedings against pirates has proven instructive for the pirates in international law. One pirate, Jama Ali, claims that the pirates “know international law,” which is to say that the pirates are not concerned about the possibility of arrest by foreign navies because they believe that they will be promptly released on a Somali beach upon capture.<sup>118</sup> Perhaps then, the one-time lethal American response to an American citizen being held hostage took the Somali pirates by surprise, but it appears to have done little to systematically discourage pirates from continuing their attacks, even against American-flagged ships.<sup>119</sup> Indeed, despite the international response fostered by the Resolutions, the Somali pirates attacked and hijacked a record number of ships in 2009.<sup>120</sup> While the Resolutions have been helpful in combating piracy in some respects, they have not provided adequate legal guideposts to foreign navies. The Resolutions presume to authorize an enormous exception in the case of Somalia to customary international law, rather than blessing the anti-piracy activities that the U.N. is encouraging as customary international law, with the result that some foreign navies are reluctant to engage in activities that constitute the exception to the rule.

The Security Council’s authorization of universal jurisdiction over Somali pirates has introduced three highly relevant and explicit assumptions that reflect a major change in the conception of international piracy law over the last hundred years. First, the Resolutions

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115 See *id.* ¶ 10. U.N. Security Resolution 1851 expressly disavows any contribution to customary international law. *Id.*

116 See Gettleman, *supra* note 109; see also Gettleman, *supra* note 73 (recounting the Dutch Navy’s September 2008 arrest and subsequent release of ten men found on a boat in possession of a long ladder and rocket-propelled grenades).

117 See Gettleman, *supra* note 109.

118 *Id.* (quoting Jama Ali).

119 See Commercial Crime Servs., *supra* note 64.

120 McDonald, *supra* note 92.

treat the enforcement jurisdiction exercised by foreign navies over pirates in Somali territorial seas as an exception to international customary law, rather than the status quo.<sup>121</sup> The Security Council justifies this exception on the basis of the express plea for help from the internationally recognized—although internally inept—Somali government.<sup>122</sup> Presumably, the Security Council believes that without the Somali Republic's permanent representative to the United Nations's request for international assistance it would be violating international law to exercise jurisdiction over pirates in Somali lands or waters. Second, the Resolutions stress the need for adherence to international human rights law in conducting anti-piracy patrols.<sup>123</sup> Third, the Resolutions acknowledge the existence of the nationality of pirates, and even encourage the national governments from which the pirates originate to exercise jurisdiction over them—although not exclusively.<sup>124</sup> The Resolutions thus represent a departure from the customary law of piracy—at least as it existed prior to the twentieth century. In order to gain a better idea of the context in which the Resolutions were made and insight into the legitimacy of their departure from the ancient law of piracy, an examination of the transformation of international law governing the use of force, piracy and the seas during the twentieth century is essential.

### III. TRANSFORMATION OF THE LEGAL LANDSCAPE FOR THE CRIME OF PIRACY

#### A. *The Reach of Universal Jurisdiction in an Era of Increasing State Sovereignty over the Seas*

The customary international law of piracy that developed prior to the twentieth century was well suited to combat piracy. Legally unqualified universal judicial and enforcement jurisdiction over pirates justified on the basis of the noncitizenship of pirates was a highly effective legal tool that prevented pirates from seeking refuge by traveling into nearby foreign jurisdictions unwilling or unable to

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121 See, e.g., S.C. Res. 1851, *supra* note 110, ¶ 10.

122 See S.C. Res. 1816, *supra* note 104, ¶ 9.

123 See *id.* ¶ 11.

124 See *id.* The Resolution “[c]alls upon all States, and in particular flag, port and coastal States, States of the nationality of victims and perpetrators or [sic] piracy and armed robbery, and other States with relevant jurisdiction under international law . . . .” *Id.*

exercise their own anti-piracy measures.<sup>125</sup> However, at the time the law of the sea underwent a process of codification,<sup>126</sup> piracy was becoming less of a concern for nations worldwide. The lull in pirate activity diminished the priority given to the customary law of piracy as the law of the sea was codified.

In 1932, the Harvard Group—a group of jurists assembled by Harvard Law School and tasked by a League of Nations committee at loggerheads to determine the significance of piracy in the law of nations<sup>127</sup>—observed the confusion in customary international law resulting from the change in circumstances quite clearly:

The reason for the startling lack of international case authority and modern state practice is apparent, as soon as one remembers that large scale piracy disappeared long ago and that piracy of any sort on or over the high sea[s] is sporadic except in limited areas bordered by states without the naval forces to combat it. Piracy lost its great importance in the law of nations before the modern principles of finely discriminated state jurisdictions . . . became thoroughly established. . . . Formerly naval powers fought pirates with little regard for the sort of problems that would trouble our modern world of intense commerce and strongly asserted national claims of numerous states . . . .<sup>128</sup>

Further compounding the minimization of piracy law, as also noted by the Harvard Group, was a movement to claim larger territorial seas. Customary law initially provided for territoriality over only those waters that could be enclosed and occupied, and thus a state's territorial claims were limited to internal waterways and ports.<sup>129</sup> Gradually, customary international law expanded its recognition of a state's sovereignty over adjacent waters to enable the protection of coastland.<sup>130</sup> Even as recently as 1980, territorial waters were only recognized for the narrow band of water three miles from the coast, and, again, only

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125 See Jeffrey Gettleman, *What Tho. Jefferson Knew About Pirates*, N.Y. TIMES, Apr. 12, 2009, at WK 4 (describing the U.S. Navy's bombardments of the Barbary Coast in response to piracy).

126 That is only to say that there was an attempt to define piracy in a comprehensive manner, not that this process resulted in the crystallization of previously recognized international norms or the creation of superseding new international legal norms.

127 Murphy, *supra* note 18, at 157.

128 Joseph W. Bingham, *Piracy*, 26 AM. J. INT'L L. 739, 764 (Supp. 1932).

129 See generally HUGO GROTIUS, *THE FREEDOM OF THE SEAS* (James Brown Scott ed., Ralph Van Deman Magoffin trans., Oxford Univ. Press 1916) (1608) (arguing that the seas are open to all).

130 *R v. Keyn*, (1876) 2 Exch. Div. 63, 191 (opinion of Cockburn, C.J.) (discussing the view that the territorial sea was the distance reachable by cannon fire).

to provide for the defense and security of the nearby land.<sup>131</sup> But as colonized states asserted and received their independence, they also asserted a much broader and unprecedented territorial sea.<sup>132</sup> In 1982, the third U.N. Convention on the Law of the Sea<sup>133</sup> (UNCLOS III) extended every state's territorial sea to twelve miles from the coast,<sup>134</sup> and granted an exclusive economic zone as far as two hundred miles from the coast.<sup>135</sup> The expansion of territorial seas and the attendant exclusion of foreign warships<sup>136</sup>—except for purposes of transit—naturally crippled the capacity for an international response to piratical activity.

UNCLOS III's most significant blow to international anti-piracy efforts, however, was not the expansion of the territorial sea, but rather was the restriction of legally cognizable piracy to the high seas.<sup>137</sup> Piratical acts occurring in territorial seas were to be considered merely armed robbery on the sea. Armed robbery at sea, according to UNCLOS III, is not subject to the jurisdiction of any state, but rather only to the domestic jurisdiction of the state in whose territorial water the armed robber acts.<sup>138</sup> UNCLOS III, by exiling piracy to the high seas, ignored the original nature of universal jurisdiction over pirates as a compromise with respect to territorial sovereignty, and thereby gutted the law of piracy of its most fundamental provision.

The vastly different global geopolitical environment of the twentieth century made it appear reasonable to sacrifice piracy law in order to establish a new and more definitive world legal order. The conver-

131 See GOTTSCHALK & FLANAGAN, *supra* note 2, at 33; see also MARK W. JANIS, *SEA POWER AND THE LAW OF THE SEA*, at xiii–xiv (1976) (describing the customary international law of a three-mile territory that prevailed until the end of World War II).

132 See Ann L. Hollick, *The Origins of 200-Mile Offshore Zones*, 71 AM. J. INT'L L. 494, 494–500 (1977) (describing a failed attempt by several Latin American states to assert a two hundred mile territorial sea). Another example of an unprecedented claim during this period is the now internationally accepted Truman Proclamation, which asserted U.S. sovereignty over part of the continental shelf beyond the U.S. territorial sea. Proclamation No. 2667, 3 C.F.R. 39 (Supp. 1945). The State Department's Office of Economic Affairs resisted the adoption of such an assertion because it was such a departure from customary international law that the proposal could lead to serious misunderstandings with foreign countries. See Memorandum by the Office of Economic Affairs (Sept. 23, 1944), in 2 FOREIGN RELATIONS OF THE UNITED STATES 1845, 1485–86 (1967).

133 United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS III].

134 *Id.* art. 3.

135 *Id.* art. 57.

136 See *id.* arts. 29–32.

137 See Murphy, *supra* note 18, at 159.

138 See *id.* at 155; UNCLOS III, *supra* note 133, art. 105.

gence of increased emphasis on territorial sovereignty over coastal waters, a virtual elimination of large-scale piratical activity, and an apparent presumption that sovereign states were capable of dealing with whatever piracy still remained led to a codification of international maritime law that threatened to nullify two thousand years of international customary law on piracy. The twentieth century circumstances that made piracy so easy to dismiss are no longer representative of the world in the twenty-first century. It can no longer be said that large-scale piracy is an anachronism, and it can no longer be assumed that sovereign states are capable of successfully fighting their own pirates. Easy cases—such as the twentieth century problem of piracy—make bad law,<sup>139</sup> but we should not feel obligated to carry UNCLOS III's twentieth-century piracy law into the twenty-first century.

As it concerns certain aspects of piracy, UNCLOS III is more than bad law; it is invalid law. The element of the law of piracy permitting universal judicial jurisdiction<sup>140</sup> over pirates wherever they are found is unsusceptible to override by treaty because the prohibition of piracy is a peremptory norm of general international law or *jus cogens*.<sup>141</sup> For a norm to qualify as *jus cogens*, the international community must recognize the norm as “essential for the protection of [its] fundamental interests.”<sup>142</sup> The international ban on piracy is *jus cogens* because it is essential to the international community's fundamental interests to eliminate stateless pariahs that threaten global security. Thus, UNCLOS III cannot circumscribe the application of piracy law by reconstituting piratical activity as armed robbery on the sea. Furthermore, universal judicial jurisdiction attaches to pirates regardless of the territory in which they are found, as it does to most criminals who violate *jus cogens* norms, because piracy represents a serious “attack on the international legal order,” and because such jurisdiction is part of a longstanding international practice that is still invoked by courts

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139 *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 804 (1980) (Blackmun, J., concurring). Justice Blackmun observed that “the intuitively sensed obviousness of a case induces a rush to judgment, in which a convenient rationale is too readily embraced without full consideration of its internal coherence or future ramifications.” *Id.*

140 This section refers to universal *judicial* jurisdiction as opposed to universal *enforcement* jurisdiction. See *infra* Part III.B for further discussion of universal enforcement jurisdiction.

141 Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (“A treaty is void if . . . it conflicts with a peremptory norm of general international law.”).

142 ANTONIO CASSESE, *INTERNATIONAL LAW* § 6.5.2, at 141 (2001) (quoting R. Ago, Special Rapporteur) (emphasis omitted).

today.<sup>143</sup> Thus, UNCLOS III did not, indeed could not, as a mere treaty, undo one of the most ancient and well-respected international laws and the most fundamental element of the law of piracy.

A peremptory norm, such as universal judicial jurisdiction over pirates, may be supplanted by a new peremptory norm of the same character; but the provisions of UNCLOS III regarding piracy law do not possess the requisite character of *jus cogens* to invalidate universal judicial jurisdiction over pirates. UNCLOS III piracy rules cannot claim to have the general acceptance required to be *jus cogens* because due consideration was not given to those rules. UNCLOS III was a package deal.<sup>144</sup> While the conference was attended by over 150 states, the fact that reservations to the terms of the treaty were generally prohibited raises the distinct possibility that many countries felt that the piracy provisions, although objectionable, were not worth the trouble of derailing such a massive convention.<sup>145</sup> It cannot be said, therefore, that the piracy laws codified in UNCLOS III were generally accepted by the community of nations.

Indeed, to the extent that it can be asserted that the laws of piracy were seriously considered at all in the ratification of the treaty, they were certainly the product of bargain and compromise rather than universal acceptance. The piracy laws of UNCLOS III were taken from UNCLOS I,<sup>146</sup> almost unchanged.<sup>147</sup> UNCLOS I in turn took its piracy provisions from those proposed by the International Law Commission—unofficial successors to the Harvard Group—whose goal was to appease the political interests of states on a vast array of maritime legal issues in order to encourage state attendance and ratification of UNCLOS I, rather than to determine with diligence and accuracy the customary law of piracy.<sup>148</sup> As a result, “the 1958 Law of the Sea Conference adopted only those parts of the [Harvard] Draft recommended by the Commission, and the Commission recommended only

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143 See *R v. Bow St. Metro Stipendiary Magistrate, Ex Parte Pinochet (No.3)*, [2000] 1 A.C. 147, 275 (H.L. 1999) (opinion of Lord Millet); CASSESE, *supra* note 142, at 141; see also *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (comparing the torturer to “the pirate and slave trader before him,” referring to him as *hostis humani generis*, and declaring universal jurisdiction over him appropriate).

144 See Hugo Caminos & Michael R. Molitor, *Progressive Development of International Law and the Package Deal*, 79 AM. J. INT’L L. 871, 873 (1985).

145 See UNCLOS III, *supra* note 133, art. 309; cf. Caminos & Molitor, *supra* note 144, at 873, 882 (observing that the breadth of inclusion suggests wide acceptance of the treaty terms, and that the treaty terms were considered to be indivisible).

146 United Nations Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 516 U.N.T.S. 205.

147 Murphy, *supra* note 18, at 158.

148 See *id.*

those that it thought the Conference would accept.”<sup>149</sup> The substance and process of the ratification of piracy laws as provided in UNCLOS III do not merit the status of preemptory norms of general international law, and therefore cannot trump the longstanding law of universal judicial jurisdiction over pirates.

*B. International Law and the Use of Force in the Wake of the U.N. Charter*

The survival of universal *judicial* jurisdiction over pirates does not entail the survival of universal *enforcement* jurisdiction over pirates. At first glance, the two elements of the customary law of piracy may appear inseparable, as a state's ability to put pirates on trial seems to contemplate a state's ability to arrest pirates. However, universal enforcement jurisdiction generally has not enjoyed the degree of acceptance enjoyed by universal judicial jurisdiction. Although states enjoyed considerable independence in their decision to resort to force prior to World War II, the general inviolability of territorial integrity was still an important tenet of international law.<sup>150</sup> The freedom to resort to force, however, was curtailed sharply with the advent of the United Nations.<sup>151</sup> The U.N. Charter, through Article 2(4),<sup>152</sup> “introduced . . . a radically new notion: a general prohibition of the unilateral resort to force by states.”<sup>153</sup> Over the years, this general prohibition has been recognized widely as a *jus cogens* norm.<sup>154</sup> As a *jus cogens* norm latest in time, the prohibition against unilateral state use of force in the territory of a foreign state overrides any international customary law or *jus cogens* norm that may have existed with regard to universal enforcement jurisdiction. Thus, the U.N. Charter effectively eliminated any provision of the law of piracy for universal enforcement jurisdiction over pirates.

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149 *Id.*

150 See *The Apollon*, 22 U.S. (9 Wheat.) 362, 370–71 (1824) (“It would be monstrous to suppose that our revenue officers were authorized to enter into foreign ports and territories, for the purpose of seizing vessels which had offended against our laws.”). This declaration may be distinguished from cases of piracy because pirates do not offend against the law of any one mere state, but against the law of nations itself.

151 See W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT’L L. 642, 642 (1984).

152 See U.N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . .”).

153 Reisman, *supra* note 151, at 642.

154 See Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT’L L. 645, 648 (1984).

The one exception that the Charter does allow to its prohibition on the unilateral use of force is self-defense.<sup>155</sup> This self-defense exception—established by Article 51 of the Charter—would, in certain extreme circumstances, permit states to use force in the territory of another state against pirates.<sup>156</sup> International law imposes five conditions on the right of self-defense. The use of force must be: (1) for a defensive purpose,<sup>157</sup> (2) in response to a significant armed attack,<sup>158</sup> (3) against the responsible party,<sup>159</sup> (4) in accordance with the principles of necessity and proportionality,<sup>160</sup> and (5) reported to the Security Council.<sup>161</sup>

All members of the international community of states have the Article 51 right to use force in self-defense in both their collective and individual capacities in response to the armed attacks of the Somali pirates. Such a response would certainly meet the requirement of having a defensive purpose. For a use of force to have a defensive purpose it “must aim at stopping an attack in progress, defending against a future attack once an attack has occurred, or ending an unlawful occupation.”<sup>162</sup> In the context of Somali piracy, any international response against pirates in Somali territory could easily be justified as defense against a future attack, because the chance of another pirate attack is virtually certain.

A state’s armed response to Somali piracy could also conform to the “necessary and proportional force” limitation on self-defense. This limitation restricts the use of force only to that force which is “necessary to accomplish a reasonable military objective,”<sup>163</sup> and even then only to that force that would not lead to civilian collateral damage “excessive in relation to the concrete and direct military advan-

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155 See U.N. Charter art. 51.

156 See *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶¶ 11–12 (Dec. 19) (separate opinion of Judge Simma) (arguing that armed attacks by irregular forces of a non-state actor can give rise to the right to use force unilaterally in self-defense).

157 U.N. Charter art. 51.

158 *Id.* Article 51 conditions self-defense on the occurrence of an “armed attack,” but later case law in the International Court of Justice has construed this to require the armed attack to be “significant.” See *Military & Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

159 See *Armed Activities on the Territory of the Congo*, 2005 I.C.J. at ¶ 146.

160 *Oil Platforms*, (Iran v. U.S.), 2003 I.C.J. 161, 198 (Nov. 6) (quoting *Military & Paramilitary Activities*, 1986 I.C.J. at 94).

161 See U.N. Charter art. 51.

162 Mary Ellen O’Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 893 (2002).

163 *Id.* at 903.

tage anticipated.”<sup>164</sup> In the battle against Somali pirates there should be little trouble meeting the condition for necessary and proportional force assuming that a state limited its use of force to that required to bring Somali pirates to justice, and did not become ensnared in the larger Somali civil war.

The two greatest potential stumbling blocks for an Article 51 use of force against Somali pirates are meeting the conditions of using force against the responsible party, and only using force in response to a significant armed attack. States are not the only actors that can perpetrate significant armed attacks.<sup>165</sup> Indeed, significant armed attacks may be attributed to “armed bands, groups, irregulars or mercenaries” provided that those attacks are of a sufficient magnitude.<sup>166</sup> The magnitude of an armed attack may be measured by considering the cumulative effect of armed attacks in the past, and it is not necessarily measured by the death toll of the armed attack.<sup>167</sup> Instead, the requisite magnitude of an attack appears to be measured by the general disruption to global security and the world order. Thus, while al Qaeda’s 2001 attack on the World Trade Center in New York City, which resulted in 3000 deaths, was considered a significant armed attack,<sup>168</sup> the United States’ recruiting, training, arming, financing, directing and facilitating of the Contras in Nicaragua that resulted in over 25,000 deaths was not considered a significant armed attack.<sup>169</sup> It is therefore possible that under extreme circumstances, activity by irregular forces that does not cause a relatively substantial number of casualties can nevertheless constitute a significant armed attack.

The right of self-defense is conditioned on its exercise against the party responsible for the initial attack.<sup>170</sup> Difficulties arise where a state does not directly carry out an attack. There is controversy over whether irregular forces may be a responsible party within the meaning of Article 51. The International Court of Justice (ICJ) opinions have taken an unnecessarily restrictive view of Article 51, limiting the

164 Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 57, June 8, 1977, 1125 U.N.T.S. 3; *see also* O’Connell, *supra* note 162, at 903 (discussing the requirements of Protocol I).

165 *See Military & Paramilitary Activities*, 1986 I.C.J. at 119.

166 *See id.* at 103–04.

167 *See id.* (observing that the proper analysis for determining the occurrence of an armed attack involves an examination of the operation’s “scale and effects”).

168 *See* O’Connell, *supra* note 162, at 893.

169 *See Military & Paramilitary Activities*, 1986 I.C.J. at 93–94; Daniel Ortega Saavedra, *More Contra Aid, More Suffering*, N.Y. TIMES, Jan. 14, 1988, at A31.

170 *See Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 116, ¶ 146 (Dec. 19).

right of self-defense exclusively to situations where attacks are imputable to foreign states.<sup>171</sup> Thus, in the ICJ's advisory opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,<sup>172</sup> the Court determined that Israel had no Article 51 right to the use of force because Israel did not claim that it was under attack from a foreign state.<sup>173</sup> However, in light of the increasing relevance of irregular forces, and trans-state terrorist organizations in particular, there has been a shift in the doctrine of self-defense.<sup>174</sup> The international community is now willing to accept that nonstate actors can carry out significant armed attacks that trigger a right to self-defense. In fact, Judges Simma and Kooijmans noted in separate opinions to an ICJ ruling that, "it would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State . . . ."<sup>175</sup> This shift in international law may be observed in the global support for the United States' use of force in Afghanistan following the terrorist attacks of September 11th as demonstrated by Security Council Resolutions 1368 and 1373.<sup>176</sup> In territories nominally part of a state but over which governmental authority is almost completely absent, it would defy common sense to prohibit the use of force in self-defense in the name of territorial integrity. While international law is in a state of flux regarding the legal capacity of trans-state actors, there is a logical trend toward permitting states to use force in lawless foreign territories against nonstate actors. This trend should inform the legal standard employed today, and thus a non-state actor should be treated as a responsible party where the territory in which it may be found is almost completely devoid of governmental authority.

The Somali pirate attacks do constitute significant armed attacks, and Somali pirates should be regarded as the responsible parties and the legitimate targets of military strikes in self-defense, even in Somali territory. While the Somali pirates kill less than one hundred people annually, they engage in hundreds of indiscriminate attacks armed with increasingly lethal weaponry, putting any ship as far as seven hun-

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171 *See id.* ¶¶ 9–10 (separate opinion of Judge Simma).

172 Advisory Opinion, 2004 I.C.J. 136 (July 9).

173 *See id.* at 194.

174 *Armed Activities on the Territory of the Congo*, 2005 I.C.J. at ¶ 11 (separate opinion of Judge Simma).

175 *Id.* ¶ 12 (footnote and internal quotation marks omitted).

176 *See id.* ¶ 11. *See generally* S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (condemning the September 11, 2001 terrorist attacks); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (same).

dred miles off the Somali coast in peril<sup>177</sup> and taking several hundred seafarers hostage each year.<sup>178</sup> The pirates have demonstrated that they pose a grave threat to global security and the world order, as their victims have included the United Nations, and the cargo seized has included tanks, desperately needed food aid, and thousands of barrels of oil. The Somali pirates' violent attacks have turned the waters off Somalia—through which eight percent of the world's trade and twelve percent of the world's oil passes<sup>179</sup>—into the most dangerous in the Indian Ocean. Thus, the Somali pirate attacks have surpassed mere frontier incidents and, taken cumulatively, have risen to the level of a significant armed attack. These attacks trigger the right of states to use force against the pirates, and due to the almost complete lack of governmental authority in the Somali territory, the states may use force in Somalia to effectively respond to pirate attacks.

Every state has the inherent right under Article 51 to take action against the Somali pirates on the grounds of self-defense. The Somali pirates are at war with the world, and they have substantially disrupted global security, thereby mounting a significant armed attack against the world. Moreover, because Somalia is a failed state lacking governmental control over most of its territory,<sup>180</sup> foreign states are permitted under international law to use force in Somali territory to defend themselves. The use of force against the Somali pirates by any state thus has only three conditions on its implementation. The use of force must be necessary, it must be proportional, and it must be reported to the United Nations.

In the wake of the Charter, the only method of enforcing the law of piracy against Somali pirates within Somali territory other than under a theory of Article 51 self-defense is by authorization from the Security Council.<sup>181</sup> The Security Council may take whatever actions it deems "necessary to maintain or restore international peace and security."<sup>182</sup> Security Council actions may be taken in response to anything from a breach of peace to a mere threat to peace.<sup>183</sup> At the

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177 See Andrew Jacobs, *China Warns Pirates Who Hijacked Cargo Ship off Somalia*, N.Y. TIMES, Oct. 22, 2009, at A19.

178 See *supra* note 64 and accompanying text.

179 See Int'l Maritime Org., *supra* note 64.

180 See Gettleman, *Islamist Militants*, *supra* note 99. While many governments may have a limited ability to exclude rival governments and armies from the territory that they claim, that fact alone does not amount to governmental authority over a territory with respect to *jus ad bellum*.

181 See U.N. Charter art. 39.

182 *Id.* art. 42.

183 See *id.* art. 39.

Security Council's discretion, it may call upon all or a select few U.N. member states to enforce any action that the Security Council deems necessary for the maintenance of international peace.<sup>184</sup>

It is within the expansive powers of the Security Council to take action against Somali pirates. The Somali pirates, at a minimum, constitute a threat to peace that the Security Council is empowered to counter by itself or with the aid of U.N. members. Thus, the current U.N. Security Resolutions authorizing member states to use force against Somali pirates in Somalia are within the power of the United Nations, and represent another legally permissible method of exercising enforcement jurisdiction over the Somali pirates.

### C. *The Human Rights of the Enemy of All Mankind*

As the "enemies of all mankind," pirates separate themselves from society by their acts. This separation is recognized in the law by granting universal judicial jurisdiction over pirates and effectively depriving them of their citizenship for the purposes of trying and punishing them. The denial of citizenship is an extreme legal measure that would, were it not for the law's peremptory status, violate a pirate's human rights under international law and constitute cruel and unusual punishment under the U.S. Constitution.<sup>185</sup> While a pirate may temporarily lose his or her citizenship, there is simply no act, whether executed autonomously or imposed externally, that can strip human beings of their humanity and thus of their human rights. Indeed, several human rights treaties of the latter half of the twentieth century did not condition any rights granted on a person's citizenship.<sup>186</sup>

As persons endowed with human rights, pirates have rights to certain treatment while legal proceedings are being exercised against them, as well as during and after the administration of punishment. The treatment owed to pirates during legal proceedings is a minimal

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184 *Id.* art. 48.

185 *See* Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) ("No one shall be arbitrarily deprived of his nationality . . ."); *see also* *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (holding that depriving a U.S. citizen of his citizenship for deserting the military violates the Eighth Amendment). "[Deprivation of citizenship] is a form of punishment more primitive than torture . . ." *Id.* at 101.

186 *See, e.g.*, International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) (entered into force Jan. 3, 1976).

form of due process—that is, pirates are entitled to a fair trial<sup>187</sup> and equal protection under the law.<sup>188</sup> The treatment owed pirates during and after the administration of punishment is the right to be free from torture or “cruel, inhuman or degrading treatment or punishment.”<sup>189</sup> These very basic human rights are hopefully simple enough for advanced democratic nations to provide while the convicted pirates are in their custody. Other countries in the Horn of Africa region, such as Kenya, have also been found capable of administering justice to pirates in a fair, humane and impartial manner.<sup>190</sup> The legal complications of prosecuting piracy in connection with human rights do not stem primarily from a lack of jurisdiction or an inability to provide sufficient human rights protections; rather, the major legal complications arise after a pirate has been punished and is due to be released from the custody of the prosecuting state.

After a pirate has been duly punished, his citizenship is reinstated, and, *ceteris paribus*, the pirate should be returned to the state of which he is a citizen. However, for most states,<sup>191</sup> this general treatment is subject to Article 3 of the Convention Against Torture (CAT), which prohibits the return of “a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture . . . .”<sup>192</sup> In making this determination, authorities should “take into account all relevant considerations including . . . the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”<sup>193</sup> At first glance, the CAT may appear to bar the forced return of anyone, including pirates, to Somalia. Somalia has had no functioning central government since 1991, has been largely dominated by warlords of rival and warring clans, and has been in the grips of an Islamic revolutionary movement whose stated goal is to make Somalia an Islamic

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187 The Nuremberg Trial, 6 F.R.D. 69, 107 (1946) (“With regard to the constitution of the court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law.”).

188 See *id.*; Universal Declaration of Human Rights, *supra* note 185, art. 7.

189 *Id.* art. 5.

190 See Kontorovich, *supra* note 16; Bahar, *supra* note 18, at 16–17 (describing a Kenyan court’s fair treatment of pirates captured by the U.S. Navy); see also Gettleman, *supra* note 109 (reporting that the British plan is to routinely hand over individuals captured in the region and suspected of piracy to Kenyan courts for trial).

191 The United States ratified the CAT through the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2006)).

192 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

193 *Id.*

state and impose Islamic law.<sup>194</sup> As a result, to the extent that there is law in Somalia it has often been arbitrary and cruel.<sup>195</sup> Nonetheless, the CAT does not, under these circumstances, proscribe the return of individuals to Somalia.

The CAT only imposes a duty upon states to refrain from returning individuals to their country of origin when government officials of that country know of or remain willfully blind to acts of torture.<sup>196</sup> Simple knowledge of a national condition in which acts of torture are likely to occur does not rise to the character of willful blindness, provided that government officials are in fact actively attempting to suppress the torturous acts.<sup>197</sup> Therefore, the U.S. government (and any other country) may, consistent with international law and CAT, return citizens of Somalia to Somalia provided that reasonable diplomatic assurances are made that either torture is not likely to occur in the territory of the particular government or that, given that torture upon return is plausible, persons acting in an official governmental capacity are acting to suppress such torturous acts.

The perennial state of civil war in Somalia makes it difficult, but not impossible, to determine who is acting in an official capacity. There are numerous organizations claiming to be the government of Somalia, or part of Somalia, or entirely independent of Somalia, and none of them control all of Somalia.<sup>198</sup> TFG is currently recognized by the international community as the sole legitimate government in Somalia, but now controls only a few city blocks in Mogadishu and is chronically teetering on the verge of collapse.<sup>199</sup> Its predominant

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194 See Gettleman, *Islamist Militants*, *supra* note 99; Jeffrey Gettleman, *Situation in Somalia Seems About to Get Worse*, N.Y. TIMES, Dec. 7, 2008, at A6.

195 See, e.g., Jeffrey Gettleman, *Somalia: Rape Victim Executed*, N.Y. TIMES, Oct. 29, 2008, at A9 (reporting the public execution by stoning of a woman accused of adultery).

196 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 192, art. 1; *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004); 8 C.F.R. § 1208.18(a)(1) (2009) (limiting the definition of torture to the intentional infliction of severe pain or suffering on a person for certain purposes “when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 192, art. 1.

197 See *Hernandez Aquino v. Mukasey*, 297 F. App’x 35, 37 (2d Cir. 2008) (holding that there were no grounds for non-refoulement of an individual who had been threatened with torture by powerful gangs in El Salvador because, “although gang violence is pervasive in El Salvador, the evidence did not demonstrate that the government of El Salvador acquiesced in such violence”).

198 See *Lehr & Lehmann*, *supra* note 68, at 8–11.

199 See Gettleman, *Islamist Militants*, *supra* note 99.

nemesis is the Shabab—a multi-clan army determined to overthrow the TFG and transform Somalia into an Islamic state.<sup>200</sup> The Shabab controls territory within Somalia and may be said to govern the residents of part of that territory, although the Shabab has been designated a terrorist organization by the United States.<sup>201</sup> Another governmental body is the government of Somaliland, which declared its independence from Somalia in 1991 and has maintained a relatively peaceful, orderly, and democratic society. Somaliland has an independent military wing financed by the United States, although neither the United States nor the rest of the international community recognize its independence.<sup>202</sup> Finally, there is the government of Puntland, which is a semi-stable region that has considered itself semi-autonomous since 1998.<sup>203</sup> Obviously there is and will continue to be conflict over the governance and political control of Somalia.

Despite the ongoing civil war in Somalia and the assertions by various groups of legitimate governmental authority, the determination of who is acting in an official governmental capacity for the purposes of human rights law is actually quite simple. The application of international human rights law does not require that a given state be unified under one government, nor does it require that any particular government operating within a state be recognized by the international community.<sup>204</sup> The determining factor of state action for the purposes of applying international human rights law is “merely the semblance of official authority.”<sup>205</sup> While Somalia lacked a central government for over seventeen years, it has had no shortage of political organizations purporting to have official authority and acting under such representations. Each of the aforementioned Somali political organizations control and govern a territory that is generally identifiable at any given time, which is sufficient to consider any individual acting under the authority of these regimes to be acting in an official capacity for the purposes of international human rights law.<sup>206</sup>

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200 See Jeffrey Gettleman, *Somalia Makes Peace Deal with a Militia*, N.Y. TIMES, Oct. 27, 2008, at A11.

201 See *id.*

202 See Lehr & Lehmann, *supra* note 68, at 9.

203 *Id.*

204 See *Kadic v. Karadžić*, 70 F.3d 232, 245 (2d Cir. 1995) (noting that the “customary international law of human rights . . . applies to states without distinction between recognized and unrecognized states”).

205 *Id.*

206 Governmental authority for the purposes of international human rights law is distinct from governmental authority for the purposes of triggering a right to self-defense against a nonstate actor within foreign territory. Human rights law looks to define governmental authority broadly so as to ensure that perpetrators of human

The acknowledgment of separate legally cognizable *de facto* governments in a period of civil war enables distinctions to be drawn among Somali governments such that gross violations of human rights by one government in a particular region of Somalia do not prejudice the human rights record of another government in Somalia.<sup>207</sup> For the duration of this civil war, villages, towns, cities, and whole regions of Somalia will likely change hands among warring factions, and rival factions will be formed, altered, and dissolved. Throughout these turbulent and uncertain times, however, the territories of rival Somali factions may be distinguished on the basis of *de facto* control, and the governments may be held accountable for their human rights records.<sup>208</sup>

Foreign state signatories to the CAT may thus return Somali pirates to Somalia provided that the *de facto* governing body of the region into which they are released does not acquiesce to acts of torture. This will require such CAT signatories to make a two-pronged analysis in evaluating whether a Somali may be returned to a particular region. First, the CAT signatory must determine which *de facto* governments are able to provide adequate diplomatic assurances that their officials do not participate in, and are not willfully blind to, acts of torture. Second, the CAT signatory must identify into which sufficiently safe *de facto* government's control the Somali citizen is to be returned. This will naturally be a fact intensive analysis, but it does appear that at least some regions in Somalia—Somaliland, for instance—are under *de facto* control of governments that may be able to provide adequate assurance of the preservation of human rights of returned Somali pirates.<sup>209</sup>

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rights abuses cannot escape liability by asserting non-governmental status. Thus, the litmus test for human rights law is a “semblance of official authority.” *See id.* at 245. For the purposes of *jus ad bellum*, the threshold for governmental authority is set higher in order to more accurately capture a realistic picture of the balance of power among state and non-state actors as well as to allow foreign states to defend themselves against nonstate actors based in weak and potentially hostile states. Thus, the litmus test for *jus ad bellum* is “almost complete absence of governmental authority in the whole or part of the territory.” *See* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda) 2005 I.C.J. 116, ¶¶ 9–12 (Dec. 19) (separate opinion of Judge Simma).

207 *Cf.* Williams v. Bruffy, 96 U.S. 176, 180–81 (1877) (evaluating the validity of actions of *de facto* governments during a time of civil war).

208 *See id.*

209 *See* Gettleman, *supra* note 73 (observing that Puntland provides jails for pirates); *see also* Ibrahim & Gettleman, *supra* note 101 (“The Somaliland government has been credited with setting up a small but functioning democracy, and providing a degree of peace and safety to more than a million people.”).

#### IV. CHARTING THE COURSE FORWARD: IMPLICATIONS OF THE SOMALI PIRATES' LEGAL STATUS

The customary international law of piracy provides states with maximum flexibility in their pursuit of pirates. This flexibility is the result of two key factors in piracy law. First, international piracy law allows municipal governments broad discretion in establishing the extent to which they criminalize piratical activity. Second, universal judicial jurisdiction grants every state jurisdiction to try pirates regardless of where they may be found or their state of origin. These two factors enable states that cooperate with each other to choose among a wide range of legal regimes to which they may subject pirates.

However, legislation and adjudication are only part of the piracy puzzle. To actually enforce the international law of piracy against pirates in a foreign state, either the states must have the permission of the Security Council or the pirate attacks must trigger an Article 51 right of self defense. There are, of course, prudential concerns that may caution against exercising universal enforcement jurisdiction over pirates in all cases.<sup>210</sup> Acts of executive authority in foreign territorial lands and waters are often unwelcome and provocative, regardless of the foreign government's ability to uphold the rule of law. Nonetheless, neither the law of piracy nor the *jus ad bellum* function as a complete bar to all such acts; instead, they allow such determinations to be made on a case-by-case basis.

Human rights law has emerged as a new element in international law and the law of piracy. This recent addition requires that legal proceedings against a pirate accord them a fair trial, and that after a sentence has been carried out, he is returned to his country of origin.<sup>211</sup> The pirate's return may—depending on the treaty obligations of the prosecuting state—be subject to the limitation that the pirate be free from torture upon return.<sup>212</sup>

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210 For example, several states, such as Indonesia, are highly protective of their territorial seas, and are vehemently opposed to granting foreign nations the legal authority to pursue the enormous number of pirates in their territorial waters. *See* Bahar, *supra* note 18, at 22. In the case of Indonesia, U.S. interests are likely better served by sacrificing enhanced anti-piracy enforcement in order to avoid angering and provoking the Indonesian government and populace.

211 *See supra* Part III.C.

212 Where a pirate may not be returned because there is a substantial likelihood of torture upon return, the state that has the pirate in its custody may be obligated to release the former pirate into its own territory. *Cf. In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33, 43 (D.D.C. 2008) (releasing seventeen Uighurs into the Washington, D.C. area, after the government conceded their detention was no longer necessary and had failed to find a country willing to receive them after over three

In the context of Somalia, the pirate's legal status so defined grants every country the legal authority to participate in the three fundamental elements of an international response to piracy—namely, enforcement, adjudication, and refoulement. In enforcing anti-piracy law, every country is entitled to patrol Somalia for pirates wherever they may be found, on land and sea, and to arrest such pirates. After arrest, countries may subsequently try the captured pirates themselves or deliver them to another competent and fair tribunal for trial. Finally, countries have the authority and the right to return punished pirates to a Somali territory in which officials do not acquiesce to acts of torture.

The international community needs to change its present approach to the anti-piracy enforcement in three crucial ways. First, the international community should recognize that states do not require Security Council approval to engage in counter-piracy measures and enforce anti-piracy laws in Somalia. Every state has the inherent right to use force against the Somali pirates under Article 51, and a global understanding of that point will provide the legal support for more confident, aggressive, and effective anti-piracy initiatives. Second, the United Nations should not condition foreign anti-piracy measures in Somalia on the TFG's permission. Such a condition is harmless enough in this situation where the TFG has incentive to grant permission because in doing so it is legitimized as the official Somali government, strengthened by the presence of allies, and benefitted by a reduction in the number of pirates. However, setting a precedent whereby the effectiveness of anti-piracy measures—and any measures countering non-state actors—are beholden to the whims of an inept governmental organization does not serve the purpose of legitimizing the anti-piracy measures or ensuring that foreign states will not encounter organized domestic resistance while pursuing pirates. Furthermore, the TFG's participation in the anarchy of a failed state does not vest it with the legal authority to bind the entire country in allowing any and all nations to enter its territory.<sup>213</sup> This

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years and almost one hundred requests to various countries), *rev'd*, *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), *cert. granted*, No. 08-1234, 2009 WL 935637 (U.S. Oct. 20, 2009).

213 *Cf. Williams*, 96 U.S. at 186 (finding that the validity of the acts of a de facto government that is engaged in civil war in which it has control over a portion of the territory embroiled in war “depends entirely upon [the government’s] ultimate success” in the war); *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 280 (7th Cir. 1990) (refusing to recognize the validity of acts of the Turkish Republic of Northern Cyprus because it lacked international recognition (besides Turkey) and had failed to take control over the entire

provision exposes important global anti-piracy efforts to unnecessary vulnerability and uncertainty, and establishes bad precedent. Third, while it is not legally mandated under the principle of universal jurisdiction, the global anti-piracy effort would likely benefit from an established legal adjudication process for all Somali pirates. This would serve the purposes of legitimizing anti-piracy efforts, eliminating confusion surrounding the pirate's prosecution after arrest, allaying fears of legal complications with respect to refoulement, and enabling concentration of human rights resources so as to ensure that pirates both during and after arrest are treated in accordance with international human rights law.

#### CONCLUSION

In the effort to engage the enemy of mankind in battle, the civilized world needs the law. The law provides certainty by informing states of the extent of their power and affirmative obligations. So informed, states are able to effectively coordinate among themselves and proceed with confidence in the legitimacy of their actions. The law also grants states freedom of action so that the community of nations might be able to respond to problems in ways that the states determine are both effective and reasonable under the circumstances. The modern law of piracy provides both certainty and freedom of action. States may look to and rely on the law of piracy when designing an international legal process in response to the Somali pirates. But there is no legally prescribed international response to Somali piracy. A response could take a number of different forms, and it is the law of piracy that allows states this broad discretion to determine the most reasonable way to combat particularly extreme forms of piracy in the lawless corners of the world. Indeed, the international community should combat pirates, if not around the world, at least in Somalia, where pirates pose a serious threat to the life and welfare of millions of people and the domestic government is powerless to stop them.

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island of Cyprus); Bahar, *supra* note 18, at 71 (cautioning, on the basis of unforeseeable legal implications, against the acceptance of the TFG's permission to pursue pirates in Somali territorial seas).