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Case Western Reserve Journal of
International Law

Volume 46 | Issue 1

2014

Moving from Crisis Management to a Sustainable Solution for Somali Piracy: Selected Initiatives and the Role of International Law

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A stylized world map in a light blue-grey tone, showing the outlines of continents and major landmasses. It is set against a background of a faint grid of latitude and longitude lines.

Case Western Reserve Journal of International Law

Volume 46

Fall 2013

Issues 1 & 2

MOVING FROM CRISIS MANAGEMENT TO A
SUSTAINABLE SOLUTION FOR SOMALI PIRACY:
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INTERNATIONAL LAW

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MOVING FROM CRISIS MANAGEMENT TO A SUSTAINABLE SOLUTION FOR SOMALI PIRACY: SELECTED INITIATIVES AND THE ROLE OF INTERNATIONAL LAW

Ved P. Nanda & Jonathan Bellish†*

Since 2012 a sharp decline in Somali piracy has occurred, primarily due to proactive naval actions from many countries and the shipping industry's preventive measures by implementing best management practices and the employment of private armed guards. In addition, numerous international organizations have been actively engaged in the complex process of combating piracy. But the underlying causes of piracy—such as poverty and unemployment among youth, coupled with the political, economic, and security problems in Somalia—persist. Hence, maritime piracy continues to be a global nuisance. Several states and international organizations are also engaged in the prosecution of pirates, which is an immense logistical and legal challenge, especially the prosecution of pirate leaders and financiers of piracy groups who constitute part of the land-based criminal networks and reside outside Somalia. The ongoing regulation of private maritime security companies by international, national, and non-governmental entities also presents an equally important challenge, as the security companies aspire to meet the twin objectives of ensuring the effective provision of maritime security and protecting the lives of innocent civilians who might be mistaken for pirates or otherwise get caught in the crossfire. As cost-effective suppression at sea continues, the transition must be to a sustainable solution on shore that can be accomplished with capacity-building measures. These include creating economic opportunities within Somalia and enhancing the rule of law along the Somali coastline. Otherwise, the hard-fought gains made to date could be reversed.

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I. INTRODUCTION

Notwithstanding a sharp decline in Somali piracy since 2012, maritime piracy continues to be an ongoing global threat to international navigation, trade, and maritime and regional security. Efforts to combat this menace include concerted action by several international organizations, including the United Nations (U.N.), North Atlantic Treaty Organization (NATO), European Union (EU), African Union (AU), and the League of Arab States. More than forty countries are also involved in undertaking operations on their own or through the following coalitions: the European Union Naval Force Somalia through Operation Atalanta, the Standing Naval Group of NATO through Operation Ocean Shield, and the Combined Task Force 151.

In 2009, the Contact Group on Piracy off the Coast of Somalia (CGPCS) was established to coordinate several international organizations and countries engaged in preventing piracy. A number

of other international, regional, and national initiatives, such as the Djibouti Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden (“Djibouti Code of Conduct”), and the Indian Ocean Commission Anti-Piracy Partnership Program, also complement the international efforts. The shipping industry, which is burdened with the spiraling costs of piracy, has also taken preventive steps by complying with the Best Management Practices for Protection Against Somalia Based Piracy,¹ (BMP) and, with the help of private maritime security companies (PMSCs), is actively engaged in combating piracy.

All these efforts have resulted in an effective response to fight Somali piracy, but as the recent 2013 World Bank Report, *The Pirates of Somalia: Ending the Threat, Rebuilding a Nation*,² aptly warns, “the long-term solution to piracy off the Horn of Africa cannot be dissociated from the construction of a Somali state that is viable at both central and local levels.”³

While the scope of this article is limited to a discussion of the challenges the international community faces in combating Somali piracy, it is worth noting here that the scourge of global piracy demands long-term and persistent efforts to prevent, deter, and combat this ongoing threat. In Part II we review the nature and scope of the menace, while Part III studies the role of international organizations to meet the piracy challenge. Part IV outlines the United States’ counter-piracy efforts. Parts V and VI discuss two issues that will play an important role in transitioning from crisis-management to a sustainable solution to maritime piracy, with Part V focusing on the importance of effectively regulating PMSCs, and Part VI describing ongoing efforts to establish Somalia’s exclusive economic zone (EEZ). Part VII analyzes the applicable legal

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1. BMP 4: BEST MANAGEMENT PRACTICES FOR PROTECTION AGAINST SOMALI BASED PIRACY (2011) [hereinafter BMP4], *available at* http://www.mschoa.org/docs/public-documents/bmp4_low_res_sep_5_2011.pdf. These practices are developed by the industry group and, at the request of the International Chamber of Shipping, the International Maritime Organization (IMO), circulated the document. *See* Int’l Maritime Org. [IMO], *Piracy and Armed Robbery Against Ships in Waters off the Coast of Somalia, Best Management Practices for Protection Against Somalia Based Piracy*, Annex 2, MSC.1/Circ.1339 (Sept. 14, 2011).
 2. THE WORLD BANK, *THE PIRATES OF SOMALIA: ENDING THE THREAT, REBUILDING A NATION* (2013), *available at* http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2013/05/06/000333037_20130506120556/Rendered/PDF/767130WP0REPLA0alia0main0report0web.pdf [hereinafter WORLD BANK REPORT].
 3. *Id.* at xxv.

framework, and Part VIII provides some recommendations based on our research and analysis. Part IX then concludes.

II. THE NATURE AND SCOPE OF THE MENACE OF PIRACY: CURRENT TRENDS

The Piracy Reporting Center of the International Maritime Bureau (IMB), a division of the International Chamber of Commerce, and the International Maritime Organization (IMO), both issue piracy reports. The IMB reports for 2012 show a sharp decline in attacks compared with those of prior years, from 410 incidents in 2009, 445 in 2010, and 439 in 2011, to 297 in 2012.⁴ What is striking, however, is that Somalia, as the location of actual and attempted attacks, showed 49 such attacks in 2012 as compared with 80 attacks in 2009, 139 in 2010, and 160 in 2011.⁵ IMB's updated report shows only nine Somalia-related incidents, including two hijackings, from January 1, 2013 through July 15, 2013.⁶ Similarly, such attacks in the Gulf of Aden diminished from 117 in 2009 to 53 in 2010, 37 in 2011, and 13 in 2012.⁷

Effective counter-piracy operations by naval forces and PMSCs in the Gulf of Aden and off the coast of Somalia may have resulted in diminished pirate activity in East Africa, but the diminished activity has coincided with a rise in maritime crime in West Africa. To illustrate, attempts off the coast of Nigeria increased from 10 in 2011 to 27 in 2012 and from 6 to 15 off the coast of Togo in the span of one year.⁸ As of July 15, 2013, Nigeria-related incidents numbered 22,

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4. ICC INT'L MAR. BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS: REPORT FOR THE PERIOD 1 JANUARY – 31 DECEMBER 2012, at 5-6 (2013) [hereinafter IMB 2012 ANNUAL REPORT]. While exhibiting the same decline in piracy incidents, the numbers given by IMO differ, as for 2012 its number of reported piracy incidents was 341, compared with 544 reported incidents in 2011. Int'l Maritime Org. [IMO], *Reports on Acts of Piracy and Armed Robbery Against Ships: Annual Report – 2012*, at 2, MSC.4/Circ.193 (Apr. 2, 2013) [hereinafter *IMO 2012 Annual Report*].
 5. IMB 2012 ANNUAL REPORT, *supra* note 4, at 5.
 6. *Piracy and Armed Robbery News and Figures*, ICC COMMERCIAL CRIME SERVS. (July 15, 2013), <http://www.icc-ccs.org/piracy-reporting-centre/piracynewsfigures> [hereinafter *ICC July 2013 Report*].
 7. IMB 2012 ANNUAL REPORT, *supra* note 4, at 5.
 8. Of the twenty-seven Nigeria incidents, four vessels were hijacked, thirteen boarded, eight fired upon, and two were attempted attacks. *Piracy Falls in 2012, But Seas off East and West Africa Remain Dangerous, Says IMB*, ICC COMMERCIAL CRIME SERVS. (Jan. 16, 2013), <http://www.icc-ccs.org/news/836-piracy-falls-in-2012-but-seas-off-east-and-west-africa-remain-dangerous-says-imb> [hereinafter *Piracy Falls in 2012*].

including one hijacking.⁹ The IMO's 2012 Annual Report also shows a dramatic decline in the number of Somalia-based piracy attacks from 286 incidents in 2011 to 99 incidents in 2012, while the number of attacks in West Africa increased from 61 incidents in 2011 to 64 in 2012.¹⁰

During the first six months of 2013, the IMB Piracy Reporting Center recorded 138 incidents, including seven hijackings worldwide, a decrease from 177 such incidents, including 20 hijackings in the first half of 2012.¹¹ One hundred twenty-seven sailors were taken hostage during the first half of 2013, compared with 334 sailors in the same period of 2012.¹² However, in the Gulf of Guinea, the number of piracy incidents, including hijackings, has increased along with the number of kidnappings, and "a wider range of ship types [are] being targeted," which the report considers to be "a new cause for concern in a region already known for attacks against vessels in the oil industry and theft of gas oil from tankers."¹³ Armed pirates in the Gulf of Guinea took 56 sailors hostage and kidnapped 30 crew members, killing one person and injuring another five in the first half of 2013.¹⁴ Further, as of June 30, 2013, Somali pirates were holding 57 crew members for ransom on four vessels and 11 kidnapped crew members on land.¹⁵ The IMO's Global Integrated Shipping Information System report of recent incidents from April 2013 to July 2013 shows a similar pattern to that occurring in the Gulf of Guinea, with more such incidents taking place in West Africa and the South China Sea.¹⁶

Outside of East and West Africa, Indonesia recorded the highest number of attacks—81 in 2012, with 73 vessels boarded and 47 crew members taken hostage—accounting for more than a quarter of global incidents that year. These attacks in Southeast Asia have increased

9. *ICC July 2013 Report*, *supra* note 6.

10. IMO 2012 ANNUAL REPORT, *supra* note 4, at 2.

11. *IMB Piracy Report Highlights Violence in West Africa*, ICC COMMERCIAL CRIME SERVS. (July 15, 2013), <http://www.icc-ccs.org/news/865-imb-piracy-report-highlights-violence-in-west-africa> [hereinafter *IMB July 15 Report*].

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *See Piracy and Armed Robbery – Recent Incidents*, GLOBAL INTEGRATED SHIPPING INFO. SYS., <http://gisimo.org/Public/Default.aspx> (last visited Mar. 22, 2014).

every year since 2009.¹⁷ During the first half of 2013, Indonesia accounted for 48 attacks, with 43 vessels boarded.¹⁸

Current trends indicate the need for concerted and coordinated international, regional, bilateral, national, and industry efforts to combat global piracy. The underlying causes of piracy persist: poverty and unemployment in Somalia, especially among the youth, coupled with the complex security, political, economic, and cultural landscape of the country and the need for a functioning government with effective rule of law, which has yet to be realized. Consequently, the Somali piracy threat, though diminished, still remains grave, as on April 15, 2013, the IMB reported an incident up to 400 nautical miles east of Mogadishu.¹⁹

Commenting on the recent reduction in Somali piracy attacks, IMB Director Pottengal Mukundan aptly stated:

Although the number of acts of piracy reported in Somalia has significantly decreased, there can be no room for complacency. The drop in reported attacks is due to proactive naval actions against suspect Pirate Action Groups, the employment of privately contracted armed security personnel and the preventive measures used by the merchant vessels (as per latest Best Management Practices recommendations). The attacks will rise to past levels if the naval presence is reduced or vessels relax their vigilance.²⁰

BMP²¹—which is now in its fourth version—has been effective in deterring pirate attacks and should be continued. BMP measures include “a proactive 24 hour lookout; reporting suspicious activities to authorities; removing access ladders; protecting the lowest points of access; the use of deck lighting, netting, razor wire, electrical fencing, fire hoses and surveillance and detection equipment; engaging in evasive maneuvering and speed during a pirate attack; and joining group transits.”²²

17. *Piracy Falls in 2012*, *supra* note 8.

18. *IMB July 15 Report*, *supra* note 11.

19. *IMB Advises Continued Vigilance as Maritime Piracy Attacks Decline*, ICC COMMERCIAL CRIME SERVS. (Apr. 15, 2013), <http://www.icc-ccs.org/news/841-imb-advises-continued-vigilance-as-maritime-piracy-attacks-decline>.

20. *Id.*

21. BMP4, *supra* note 1.

22. *CTF-151: Counter-Piracy*, COMBINED MAR. FORCES, <http://combinedmaritimeforces.com/ctf-151-counter-piracy/> (last visited Mar. 22, 2014).

III. THE ROLE OF INTERNATIONAL ORGANIZATIONS

Numerous international organizations have been involved in the complex process of combating piracy. Only a few selected ones will be covered here. These are: (A) the U.N. Secretary-General and Security Council; (B) the IMO; (C) NATO; (D) the EU; (E) CGPCS; (F) Combined Task Force 151 (CTF-151); and (G) the U.N. Office on Drugs and Crime (UNODC).

A. *The U.N. Secretary-General and Security Council*

The U.N. Secretary-General regularly issues statements pursuant to requests from the Security Council and General Assembly and presents periodic reports addressing key developments in piracy off the coast of Somalia. To illustrate, on June 26, 2013, Secretary-General Ban Ki-moon welcomed the successful conclusion of the Summit of the Gulf of Guinea Heads of State and Government on Maritime Safety and Security, and the adoption by the summit leaders of the regional strategy against piracy in West and Central Africa.²³ The summit included member states of the region, the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), and the Gulf of Guinea Commission (GGC).²⁴ At the meeting, participants adopted the Code of Conduct Concerning the Prevention and Repression of Piracy, Armed Robbery Against Ships and Illegal Maritime Activities in West and Central Africa.²⁵ Moreover, on April 18, 2013, in a message at a conference on regional responses to global threats in Dubai, the Secretary-General reiterated the U.N. commitment to work with the international community, as well as the Somali authorities, to implement a comprehensive strategy for a sustainable solution to the menace of piracy.²⁶

The Secretary-General's reports cover a wide range of issues related to piracy, including major developments.²⁷ For example, on

23. *Ban Welcomes Anti-Piracy Strategy Adopted by Leaders from West, Central Africa*, UN NEWS CTR. (June 27, 2013), <http://www.un.org/apps/news/printnewsAr.asp?nid=45281>.

24. *Id.*

25. *Id.*

26. Press Release, U.N. Secretary-General, *Holistic Anti-Piracy Efforts Must Be Woven into Overall Solution for Somalia*, U.N. Press Release SG/SM/13511, AFR/2165 (Apr. 18, 2011).

27. *See, e.g.*, U.N. Secretary-General, *Rep. of the Secretary-General on Somalia*, ¶ 1, U.N. Doc. S/2012/643 (Aug. 22, 2012); U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Security Council Resolution 1897 (2009)*, ¶ 1, U.N. Doc. S/2010/556 (Oct. 27, 2010).

October 22, 2012, Secretary-General Ban Ki-moon reported on international and regional cooperative measures taken by international organizations and Member States, including naval activities off the coast of Somalia, legal issues such as prosecution, detention, and prisoner transfers, the root causes of piracy off the coast of Somalia, and the Trust Fund to Support Initiatives of States Countering Piracy off the Coast of Somalia (“Trust Fund”).²⁸

The Secretary-General has reported on specific issues including the Trust Fund; the possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia;²⁹ the modalities for the establishment of specialized Somali anti-piracy courts;³⁰ the legal issues related to piracy off the coast of Somalia;³¹ and specialized anti-piracy courts in Somalia and other states in the region.³²

Having declared piracy off the coast of Somalia a “threat to international peace and security” under Chapter VII of the U.N. Charter in 2008,³³ the Security Council has since adopted several resolutions to counter piracy and armed robbery at sea. Resolution 2077 adopted on November 21, 2012, renewed for one year the Security Council’s authorization to Member States and regional organizations cooperating with Somali authorities to take action against pirates in Somalia’s coastal and territorial waters.³⁴ Resolution

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28. U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Security Council Resolution 2020 (2011)*, ¶¶ 20–22, 33–39, 44–58, U.N. Doc. S/2012/783 (Oct. 22, 2012) [hereinafter *SG’s Oct. 2012 Report*].
 29. U.N. Secretary-General, *Rep. of the Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea off the Coast of Somalia*, U.N. Doc. S/2010/394 (July 26, 2010) [hereinafter *Possible Options Report*].
 30. U.N. Secretary-General, *Rep. of the Secretary-General on the Modalities for the Establishment of Specialized Somali Anti-Piracy Courts*, U.N. Doc. S/2011/360 (June 15, 2011).
 31. Special Advisor to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, Annex Rep. to the Letter dated Jan. 24, 2011 from the Secretary-General to the President of the Security Council, ¶ 30, U.N. Doc. S/2011/30 (Jan. 25, 2011) (by Jack Lang) [hereinafter *Lang Report*].
 32. U.N. Secretary-General, *Rep. of the Secretary-General on Specialized Anti-Piracy Courts in Somalia and Other States in the Region*, U.N. Doc. S/2012/50 (Jan. 20 2012).
 33. S.C. Res. 1846, U.N. Doc. S/RES/1846, at 2 (Dec. 2, 2008); see also *UN Documents for Piracy*, SEC. COUNCIL REPORT, <http://www.securitycouncilreport.org/un-documents/piracy/> (last visited Mar. 22, 2014) (providing a list of all resolutions).
 34. S.C. Res. 2077, U.N. Doc. S/RES/2077, at 2 (Nov. 21, 2012). For earlier resolutions concerning the piracy situation in Somalia, see S.C. Res.

1897 of November 30, 2009, further broadened the definition of piracy to include certain land-based operations on the Somali mainland.³⁵

While stressing the need for a comprehensive response from the international community to combat piracy and address its underlying causes, the Security Council, under Resolution 2077,³⁶ underlined the primary responsibility of Somali authorities in the fight against piracy and requested them to pass a complete set of anti-piracy laws without further delay and to declare an EEZ in accordance with the U.N. Convention on the Law of the Sea (UNCLOS).³⁷ The Security Council also called on Member States to criminalize piracy under their domestic laws³⁸ and reiterated its decision to continue considering the establishment of specialized anti-piracy courts in Somalia and other states in the region with substantial international participation and/or support.³⁹ It also commended the establishment of the Trust Fund and the IMO Djibouti Code Trust Fund and urged states as well as non-state actors, especially the international shipping community, to contribute to these funds.⁴⁰

On February 29, 2012, the Security Council adopted Resolution 2039,⁴¹ applicable only to the situation in the Gulf of Guinea—the region where piracy attacks had risen as the pirates shifted their attention to West Africa. The Council stressed the primary responsibility of the Gulf of Guinea states to counter piracy and urged them through ECCAS, ECOWAS, and the GGC to plan a joint summit of the Gulf of Guinea states in cooperation with the AU, to develop a regional anti-piracy strategy.⁴² Further, the Council urged the Gulf of Guinea states to establish “a legal framework for the prevention, and repression of piracy and armed robbery at sea . . . as well as prosecution of persons engaging in those crimes, and punishment of those convicted of those crimes and encourage[d] regional cooperation in this regard.”⁴³

1816, U.N. Doc. S/RES/1816 (June 2, 2008); S.C. Res. 1846, *supra* note 33. These early resolutions were extended in 2009, 2010, and 2011. S.C. Res. 1897, U.N. Doc. S/RES/1897 (Nov. 30, 2009); S.C. Res. 1950, U.N. Doc. S/RES/1950 (Nov. 23, 2010); S.C. Res. 2020, U.N. Doc. S/RES/2020 (Nov. 22, 2011).

35. S.C. Res. 1897, *supra* note 34, ¶ 11.

36. S.C. Res. 2077, *supra* note 34, at 1.

37. *Id.* ¶ 4.

38. *Id.* ¶ 18.

39. *Id.* ¶ 19.

40. *Id.* ¶ 26.

41. S.C. Res. 2039, U.N. Doc. S/RES/2039 (Feb. 29, 2012).

42. *Id.* ¶ 3.

43. *Id.* ¶ 5.

In Resolution 1918, adopted on April 27, 2010, the Security Council called on Member States to criminalize piracy under their domestic laws and to favorably consider the prosecution and imprisonment of suspected pirates.⁴⁴ The Council requested the Secretary-General to present a report on the following possible options to further the aim of prosecuting and imprisoning those responsible for acts of piracy off the coast of Somalia: (1) enhanced U.N. assistance to build the capacity of regional states to prosecute and imprison suspected pirates; (2) establishment of a Somali court sitting extraterritorially that applies Somali law, either with or without U.N. participation; (3) establishment of a special chamber within the national jurisdiction of a state or states in the region without U.N. participation; (4) establishment of a special chamber within the national jurisdiction of a state or states in the region with U.N. participation; (5) establishment of a regional tribunal, not embedded in a national jurisdiction but established on the basis of a multilateral agreement among regional states and with U.N. participation; (6) establishment of an international tribunal based on an agreement between the U.N. and a state in the piracy-affected region; and (7) establishment of an international tribunal created by a Security Council resolution under Chapter VII of the U.N. Charter.⁴⁵ As noted above, after extensive deliberations, the preferred solution is to establish specialized anti-piracy courts in Somalia and other states in the region.⁴⁶

In addition to the U.N. Secretary-General and Security Council, other entities responsible for U.N. initiatives include the General Assembly, which has repeatedly expressed its “grave concern” at the threats piracy poses;⁴⁷ the IMO; UNODC; the U.N. Political Office for

44. S.C. Res. 1918, ¶ 2, U.N. Doc. S/RES/1918 (Apr. 27, 2010).

45. *Possible Options Report*, *supra* note 29, ¶¶ 55–104.

46. See S.C. Res. 2077, *supra* note 34, ¶ 19 and accompanying text (stating the U.N. Security Council “[r]eiterates its decision to continue its consideration, as a matter of urgency, of the establishment of specialized anti-piracy courts in Somalia and other States in the region with substantial international participation and/or support”).

47. Among several annual resolutions addressing piracy, the U.N. General Assembly adopted G.A. Res. 67/78, U.N. Doc. A/RES/67/78 (Dec. 11, 2012). The Resolution took note of continued bilateral, trilateral and regional initiatives, along with the work of U.N. entities, including the IMO and UNODC, and the General Assembly called upon all states to work in cooperation with international organizations and to take effective action including becoming parties to the applicable conventions. *Id.* ¶¶ 92, 96. The U.N. Secretary-General presents periodic reports on piracy and armed robbery at sea pursuant to requests from the General Assembly. See, e.g., U.N. Secretary-General, *Oceans and the Law of the Sea*, ¶¶ 102–22, U.N. Doc. A/65/69/Add.2 (Aug. 31, 2010).

Somalia (UNPOS), which has acted as the U.N. focal point for efforts to counter piracy off the coast of Somalia and has since been replaced by the U.N. Assistance Mission to Somalia; the U.N. Development Programme; and the U.N. High Commissioner for Human Rights. Several other U.N. entities continue to assist Somalia in building capacity related to human rights, security, and justice.

B. International Maritime Organization

As a specialized agency of the U.N., the IMO works in cooperation with the shipping industry and nongovernmental organizations.⁴⁸ It began its piracy-related activities in 1983, when the IMO Assembly adopted a resolution on measures to prevent acts of piracy and robbery against ships.⁴⁹ Since then the IMO has actively and effectively addressed the question of maritime piracy through various initiatives.

Among those initiatives was the establishment of several regional and sub-regional arrangements designed to prevent, deter, and repress piracy⁵⁰: the 2007 Singapore Statement, resulting from the IMO's efforts to improve maritime security, safety, and environmental protection in the Strait of Malacca in Singapore;⁵¹ the 2008 Sub-Regional Coast Guard Network for the West and Central African regions, under the auspices of the Maritime Organization for West and Central Africa;⁵² and the 2009 Djibouti Code of Conduct.⁵³

48. *See Introduction to IMO*, INT'L MAR. ORG., <http://www.imo.org/About/Pages/Default.aspx> (last visited Mar. 25, 2014) (giving a brief history of the IMO and its connection to the shipping industry).

49. Int'l Maritime Org. [IMO], *Measures to Prevent Acts of Piracy and Armed Robbery Against Ships*, IMO Assemb. Res. A. 545 (13) (Nov. 17, 1983).

50. *See, e.g.*, Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia art. 2(1), Nov. 11, 2004, 2398 U.N.T.S. 199 (entered into force Sept. 4, 2006) ("The Contracting Parties shall, in accordance with their respective national laws and regulations and subject to their available resources or capabilities, implement this Agreement, including preventing and suppressing piracy and armed robbery against ships, to the fullest extent possible.").

51. Int'l Maritime Org. [IMO], *Singapore Statement on Enhancement of Safety, Security and Environmental Protection in the Straits of Malacca and Singapore*, IMO/SGP 1/4 (Sept. 6, 2007) (stating "[t]he purpose of the Singapore Meeting was to provide a follow-up forum to build on the outcome of the Meeting on the Straits of Malacca and Singapore: Enhancing Safety, Security and Environmental Protection").

52. *See* Alain Michel Luvambano, *The Great Maritime Appointments*, MAR. ORG. OF W. & CENTRAL AFR., <http://www.omaoc.org/EN/texte.php> (last visited Mar. 23, 2014).

53. Int'l Maritime Org. [IMO], *Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian*

Since 2009, the IMO has also taken the initiative to draft a set of guidelines for effectively fighting piracy. Specifically, following counter-piracy efforts in 2009, the IMO adopted a guidance document called the Code of Practice for the Investigation of Crimes and Piracy and Armed Robbery Against Ships, which was aimed at fostering regional cooperation and coordinating governments' actions.⁵⁴ In September 2011, the IMO circulated the fourth version of the BMP document for the protection against Somali-based piracy.⁵⁵

In 2011, the legal committee of the IMO also provided useful information and guidance on elements of international law relating to piracy,⁵⁶ including the key piracy provisions of UNCLOS,⁵⁷ the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("1988 SUA Convention")⁵⁸ that complements the universal jurisdiction provisions of UNCLOS, and other pertinent conventions. Among the IMO's 2012 initiatives were recommendations

Ocean and the Gulf of Aden, ¶ 7, IMO Council Doc. C 102/14 (Apr. 3, 2009), available at <http://www.imo.org/OurWork/Security/PIU/Documents/DCoC%20English.pdf>.

54. Int'l Maritime Org. [IMO], *Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships*, ¶ 4, IMO Assemb. Res. A. 1025 (26) (Dec. 2, 2009) [hereinafter *Code of Practice*].
55. BMP4, *supra* note 1; IMO, *supra* note 1.
56. See Int'l Maritime Org. [IMO], *Circular Letter Concerning Information and Guidance on Elements of International Law Relating to Piracy*, IMO Circular Letter No. 3180 (May 17, 2011). This document's annex contains the following additional documents: (1) IMO, *Piracy: Elements of National Legislation Pursuant to the United Nations Convention on the Law of the Sea, 1982*, IMO Legal Comm. Doc. LEG 98/8/1, LEG 98/8/3 (Feb. 18, 2011) (submitted by the U.N. Division for Ocean Affairs and the Law of the Sea); (2) IMO, *Piracy: Establishment of a Legislative Framework to Allow for Effective and Efficient Piracy Prosecutions*, IMO Legal Comm. Doc. LEG 98/8/2 (Feb. 18, 2011) (submitted by UNODC); (3) IMO, *Piracy: Uniform and Consistent Application of the Provisions of International Conventions Relating to Piracy*, IMO Legal Comm. Doc. LEG 98/8 (Feb. 18, 2011) (submitted by the IMO Secretariat); and (4) IMO, *Establishment of a Legislative Framework to Allow for Effective and Efficient Piracy Prosecutions*, IMO Legal Comm. Doc. LEG 98/8/4 (Feb. 25, 2011) (submitted by Ukraine).
57. U.N. Convention on the Law of the Sea arts. 100–07, *open for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].
58. See Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation art. 6, *opened for signature* Mar. 10, 1988, 1678 U.N.T.S. 221 (entered into force Mar. 1, 1992) [hereinafter 1988 SUA Convention].

for flag states, port and coastal states,⁵⁹ ship owners, ship operators, ship masters,⁶⁰ and PMSCs, on the use of privately contracted armed security personnel that are onboard ships in the high risk areas.⁶¹ The IMO also provided interim guidance for flag states on measures to prevent and mitigate Somalia-based piracy.⁶²

C. North Atlantic Treaty Organization

Since 2008, NATO has protected vessels and assisted to enhance the general level of security in the Gulf of Aden and off the Horn of Africa.⁶³ Pursuant to the request of U.N. Secretary-General Ban Ki-moon, NATO started to provide escorts to U.N. World Food Programme (WFP) vessels transiting through this region in late 2008.⁶⁴ NATO's deterrence patrols have prevented pirate hijacking of vessels and hostage taking. Since March 2012, NATO has also taken the initiative to "erode the pirates' logistics and support base by, among other things, disabling pirate vessels or skiffs, attaching tracking beacons to mother ships and allowing the use of force to disable or destroy suspected pirate or armed robber vessels."⁶⁵

NATO's activities are undertaken by its ongoing initiative Operation Ocean Shield. The initiative's capacity building projects assist regional states in developing their own abilities to combat

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59. Int'l Maritime Org. [IMO], *Revised Interim Recommendations for Flag States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area*, IMO MSC.1/Circ.1406/Rev. 2 (May 25, 2012) [hereinafter IMO MSC Cir. 1406]; Int'l Maritime Org. [IMO], *Revised Interim Recommendations for Port and Coastal States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area*, IMO MSC.1/Circ.1408/Rev.1 (May 25, 2012) [hereinafter IMO MSC Cir. 1408].
60. Int'l Maritime Org. [IMO], *Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area*, IMO MSC.1/Circ.1405/Rev.2 (May 25, 2012) [hereinafter IMO MSC Cir. 1405].
61. Int'l Maritime Organization [IMO], *Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area*, IMO MSC.1/Circ.1443 (May 25, 2012) [hereinafter IMO MSC Cir. 1443].
62. Int'l Maritime Org. [IMO], *Interim Guidance for Flag States on Measures to Prevent and Mitigate Somalia-Based Piracy*, IMO MSC.1/Circ.1444 (May 25, 2012).
63. See *Counter-Piracy Operations*, NATO, http://www.nato.int/cps/en/natolive/topics_48815.htm [hereinafter *NATO Counter-Piracy Operations*] (last visited Mar. 23, 2014).
64. *Id.*
65. *Id.*

piracy.⁶⁶ Several countries, including Italy, the U.S., Denmark, the Netherlands, Turkey, the U.K., Portugal, Greece, and Canada, provide ships on a rotating basis to carry out its counter-piracy operations.⁶⁷ In its 2012 Annual Report, NATO's Secretary-General warned:

The progress made in 2012 needs to be consolidated in the medium to long term. A deterrence presence, however effective and necessary in the short term, cannot bring a lasting solution to the problem of piracy. The countries in the region, including Somalia, need to develop the capacity to fight piracy themselves. During 2012, NATO offered capacity-building support . . . includ[ing] the training of coast guards. NATO is also helping to fight the root problem of piracy onshore by continuing to support the African Union Mission in Somalia (AMISOM), at the African Union's request, in terms of sea- and airlift and also with the provision of subject-matter experts on the ground.⁶⁸

NATO has extended its operation until the end of 2014.⁶⁹

D. European Union

The EU conducts its EU Naval Force Somalia (EU NAVFOR) Operation Atalanta, launched on December 8, 2008, in accordance with several U.N. Security Council resolutions. Its aim is to help deter, prevent, and repress maritime piracy; protect WFP vessels of the African Union Mission on Somalia (AMISOM) and humanitarian aid shipping; protect vulnerable shipping; and monitor fishing activities off the coast of Somalia.⁷⁰ This operation permanently liaises with the Combined Maritime Forces (CMF) and NATO as well as units from several countries, including China, India, Japan, and Russia.⁷¹ The operation usually has five to ten surface combat vessels and conducts counter-piracy operations in the Gulf of Aden, the

66. *See Operation Ocean Shield (Counter Piracy Operations)*, NATO SHIPPING CTR., <http://www.shipping.nato.int/operations/OS/Pages/default.aspx> (last visited Mar. 23, 2014).

67. *See NATO Counter-Piracy Operations*, *supra* note 63.

68. *Secretary-General's Annual Report 2012*, NATO (Jan. 31, 2013), www.nato.int/cps/en/natolive/opinions_94220.htm.

69. *Anti-Piracy Activity off the Horn of Africa*, NATO WATCH (Apr. 1, 2012), <http://www.natowatch.org/node/659>.

70. *European Union Naval Force (EU NAVFOR) Somalia – Operation ATALANTA*, MAR. SECURITY CTR. HORN OF AFR., <http://www.mschoa.org/on-shore/about-us/eu-operation-atalanta> (last visited Mar. 23, 2014).

71. *Id.*

Indian Ocean, and the Arabian Sea to protect the 45,000 ships undergoing annual transits through those waters.⁷²

As the President of the Council of the EU stated in February 2012:

Fighting piracy and its root causes is a priority of our action in the Horn of Africa. Operation Atalanta has made a significant contribution to this effort, in coordination with our international partners. Today's important decision extends Atalanta's mandate for two more years and allows it to take more robust action on the Somali coast. Despite pressure on defence budgets, EU member states thereby demonstrate their renewed commitment to this successful operation.⁷³

Operation Atalanta has an admirable record insofar as it has had a 100 percent success rate in safely escorting WFP vessels delivering food and aid to Somali people. Similarly, the operation has protected AMISOM shipments and other vulnerable shipping within the International Recommended Transit Corridor (IRTC).⁷⁴ One of its special initiatives has been, in partnership with the shipping industry, to establish the Maritime Security Centre Horn of Africa (MSCHOA), whose objective is to improve coordination between international military forces in the region and commercial shipping. MSCHOA provides constant manned monitoring of vessels passing through the Gulf of Aden and supplies anti-piracy guidance to shipping companies and operators.⁷⁵

EU NAVFOR works in cooperation with military and merchant navy personnel from several countries.⁷⁶ To cite two recent incidents of Operation Atalanta's successful operations, on April 12, 2013, the EU NAVFOR ocean patrol vessel's helicopter crew spotted a skiff being launched off the Somali coast. The crew photographed the pirates aboard and watched as the skiff headed out to sea. Seeing that it was under surveillance, the skiff eventually returned to shore. The commanding officer of the EU NAVFOR vessel stated afterward, "One of the greatest challenges we face in such a huge sea area is to

72. *Id.*

73. Press Release, Council of the European Union, Council Extends EU Counter-Piracy Operation Atalanta, 7216/12 (Mar. 23, 2012), *available at* http://europa.eu/rapid/press-release_PRES-12-92_en.htm.

74. *European Union Naval Force (EU NAVFOR) Somalia – Operation ATALANTA*, *supra* note 70.

75. *Id.*

76. For the activities of Operation Atalanta forces, see *Countering Piracy off the Coast of Somalia*, EU NAVFOR, <http://www.eunavfor.eu/> (last visited Mar. 23, 2014).

be in the right place at the right time to apprehend suspect pirates and their vessels. . . . We remain ever watchful of the threat.”⁷⁷

In another incident, on June 5, 2013, an EU counter-piracy warship closed in on pirates who had taken control of an Indian cargo vessel in the Gulf of Aden and forced them to abandon their attack.⁷⁸ Following the operation, the operation commander of EU NAVFOR said: “What is important is that fourteen Indian sailors are now safe and able to return to their families, after what must have been a terrifying ordeal. This latest attack once again shows that the threat from piracy is real. We must all remain vigilant.”⁷⁹

E. The Contact Group on Piracy off the Coast of Somalia

In 2013 the United States took the lead and chaired CGPCS, which was created on January 14, 2009.⁸⁰ This was pursuant to Security Council Resolution 1851, which encouraged

all States and regional organizations fighting piracy and armed robbery at sea off the coast of Somalia to establish an international cooperation mechanism to act as a common point of contact between and among states, regional and international organizations on all aspects of combating piracy . . . off Somalia’s coast.⁸¹

As a voluntary international forum, CGPCS coordinates political, military, and NGO efforts toward this goal. It is open to any country or organization that contributes to counter-piracy efforts or is affected by piracy.⁸² Currently, more than eighty nations, organizations, and industry groups sharing this common interest work together within the CGPCS.⁸³ It also supports law enforcement and the judiciary

77. *EU Naval Force Ensures There Is No Hiding Place for Suspect Pirates*, EU NAVFOR (Apr. 16, 2013), <http://eunavfor.eu/eu-naval-force-ensures-there-is-no-hiding-place-for-suspect-pirates/>.

78. *See Indian Sailors Safe After EU NAVFOR Warship HSwMS Carlskrona Forces Pirates to Abandon Attack on Cargo Vessel*, EU NAVFOR (June 6, 2013), <http://eunavfor.eu/indian-sailors-safe-after-eu-navfor-warship-hswms-carlskrona-forces-pirates-to-abandon-attack-on-cargo-vessel/>.

79. *Id.*

80. *See Contact Group on Piracy off the Coast of Somalia: Quarterly Update - Fact Sheet*, U.S. DEP’T. OF STATE (July 18, 2013), <http://www.state.gov/t/pm/rls/fs/2013/212140.htm> [hereinafter *Contact Group Fact Sheet*].

81. S.C. Res. 1851, ¶ 4, U.N. Doc. S/RES/1851 (Dec. 16, 2008).

82. *Contact Group Fact Sheet*, *supra* note 80.

83. *Id.*

system in their investigations of piracy networks and in prosecutions of pirates in the region.⁸⁴

At its first meeting, CGPCS established four working groups, subsequently adding a fifth.⁸⁵ Working Group (WG) 1 focuses on operational naval coordination, information sharing, and capacity building.⁸⁶ WG 2 addresses legal and judicial issues and provides guidance to CGPCS, states, and organizations on all legal aspects of counter-piracy.⁸⁷ WG 3 works with the shipping industry and has been instrumental in developing the BMP measures, which include providing guidelines to owners, masters, and crews to protect themselves against hijacking.⁸⁸ WG 4 aims at raising public awareness of the dangers of piracy,⁸⁹ and WG 5 coordinates international efforts to identify and disrupt the private criminal enterprises ashore, including the financial network of pirate leaders and their financiers.⁹⁰

At its twelfth meeting on April 10-11, 2013, in Copenhagen, Denmark, WG 2 focused on three areas:

- (1) prosecution and in-depth review of current legal challenges and solutions, including with regard to human rights issues;
- (2) implementation of the post trial-transfer system and prosecution, including the legal framework for prosecuting piracy organizers and the handling of child pirates; and
- (3) use of privately contracted armed security personnel and Vessel Protection Detachments.⁹¹

CGPCS meets in plenary sessions for one day three times per year at the U.N., while the working groups meet regularly to develop and implement counter-piracy policy and programs.⁹² At its Thirteenth

84. *See Mission*, CGPCS, <http://www.thecgpcs.org/about.do?action=mission> (last visited Mar. 23, 2014) (identifying four priorities for 2013).

85. *Working Groups*, CGPCS, <http://www.thecgpcs.org/work.do?action=work> (last visited Mar. 23, 2014).

86. *Contact Group Fact Sheet*, *supra* note 80.

87. *Id.*; *Working Group 2*, CGPCS, <http://www.thecgpcs.org/work.do?action=workSub2> (last visited Mar. 23, 2014).

88. *Working Group 3*, CGPCS, <http://www.thecgpcs.org/work.do?action=workSub3> (last visited Mar. 23, 2014).

89. *Contact Group Fact Sheet*, *supra* note 80.

90. *Id.*

91. *Id.*

92. *International Response: Contact Group*, U.S. DEP'T. OF STATE, <http://www.state.gov/t/pm/ppa/piracy/contactgroup/index.htm> (last visited Mar. 23, 2014).

Plenary Session, on December 11, 2012, the CGPCS “reiterated the importance of an early declaration of an Exclusive Economic Zone off the Coast of Somalia, in accordance with the 1982 UN Convention of the Law of the Sea, which will promote the effective governance of waters off the Coast of Somalia.”⁹³ It noted that the Trust Fund, which was established in January 2010 and is one of its initiatives that has supported piracy trials in several countries in the region,⁹⁴ stood at U.S.\$16.5 million, while \$12.12 million had been disbursed.⁹⁵ CGPCS called on the international community to provide strong support and assistance, including financial contributions to the Trust Fund and regional countries to prosecute and imprison pirates.⁹⁶

At its Fourteenth Plenary Session, CGPCS decided to focus on four specific areas during 2013, in addition to the work of the five working groups: (1) communication with the international community; (2) better integration with related programs and actors, including the Federal Government of Somalia; (3) strengthened legal efforts to disrupt networks ashore and their illicit financial flows; and (4) proactive discussion of policy and legal issues associated with the use of armed security on commercial ships.⁹⁷

Noting that more than 1,200 pirates are currently facing prosecution or have been prosecuted worldwide in more than twenty countries, CGPCS recognized the valuable contribution of prosecuting states in the region such as Kenya, Seychelles, and Mauritius.⁹⁸

93. Contact Group on Piracy off the Coast of Somalia, 13th Plenary Sess., Communiqué, ¶ 7 (Dec. 11, 2012) [hereinafter Thirteenth Plenary Session], available at <http://www.state.gov/t/pm/rls/othr/misc/202270.htm>.

94. See Press Conference on Work of Contact Group on Piracy off Somali Coast, U.N. (Jan. 28, 2010), http://www.un.org/news/briefings/docs/2010/100128_Somalia.doc.htm. The Trust Fund was established to help countries in the region fight piracy and its main objective is to “build capacity in their criminal-justice systems so they could prosecute” suspected pirates. *Id.* Subsequently, in April 2010, the Board of the Trust Fund decided to undertake five projects focused primarily on efforts to prosecute suspected pirates. Four of these projects were designed to help strengthen institutions in Seychelles and the autonomous Somali regions of Puntland and Somaliland, and the fifth project was aimed at helping local media “disseminate anti-Piracy messages within Somalia.” *UN Trust Fund Backs Projects in Fight Against Piracy off Somali Coast*, UN NEWS CTR. (Apr. 23, 2010), <http://www.un.org/apps/news/printnewsAr.asp?nid=34472>.

95. Thirteenth Plenary Session, *supra* note 93, ¶ 47.

96. *Id.*

97. *Fourteenth Plenary Session of the Contact Group on Piracy off the Coast of Somalia*, U.S. DEP’T OF STATE (May 1, 2013), <http://www.state.gov/t/pm/rls/othr/misc/208936.htm>.

98. *Id.*

Welcoming the work of UNODC, while specially noting its progress in its Piracy Prisoner Transfer Program and the continued implementation of the Post Trial-Transfer system, CGPCS reasserted:

the need for all States to implement the relevant provisions of international law into their national systems, including to ensure that conspiracy to commit piracy is punishable under national law and that national law, procedures, and practices are geared to contribute to the disruption of piracy networks ashore, including through extradition and mutual legal assistance.⁹⁹

CGPCS also welcomed the Special Meeting of Piracy Prosecutors and Investigators hosted by INTERPOL and the WG 2 and WG 5 chairs. CGPCS called upon the two chairs to continue facilitating increased information exchange and cooperation aimed at strengthening investigations “into common high-value targets and urged the practitioners to continue and enhance their cooperation.”¹⁰⁰

As this brief review shows, CGPCS acts proactively and effectively, notwithstanding its being an informal and ad hoc forum. As it has no budget and no secretariat, it costs little to function. The strength of CGPCS lies in its flexibility and its coordinating role. It supports governments, international organizations, and the shipping industry in their fight against piracy and has successfully served as an information sharing and cooperation mechanism.

F. Combined Task Force 151

CTF-151 is one of three task forces operated by the CMF, a twenty-nine nation naval partnership voluntarily joined under U.S. leadership, with its mission “to disrupt piracy and armed robbery at sea and to engage with regional and other partners to build capacity and improve relevant capabilities in order to protect global maritime commerce and secure freedom of navigation.”¹⁰¹ Established in January 2009 under the authority of several U.N. Security Council Resolutions and in cooperation with non-member forces, CTF-151’s command is rotated between participating nations on a four- to six-month basis; its force flow constantly changes as vessels, aircrafts, and personnel from several countries are assigned to the task force. Along with NATO, the EU NAVFOR, and independently deployed naval ships, CTF-151 patrols the IRTC in the Gulf of Aden.¹⁰²

99. *Id.*

100. *Id.*

101. *CTF-151: Counter-Piracy*, *supra* note 22.

102. *Id.* Combined Maritime Forces “exists to promote security, stability and prosperity across approximately 2.5 million square miles of international

CTF-151 also undertakes “regional and key leader engagement, strategic communication and proactive public affairs,” and supports BMP.¹⁰³

G. United Nations Office on Drugs and Crime

The UNODC's Counter Piracy Programme (CPP), which was launched in 2009 and confined to helping Kenya, has now extended its operations to include Seychelles, Mauritius, Tanzania, Maldives, and Somalia.¹⁰⁴ CPP supports efforts to detain and prosecute piracy suspects in compliance with international standards of rule of law and respect for human rights.¹⁰⁵ The focus of the program is to ensure that the piracy trials are fair and efficient and that detention facilities are humane and secure for suspected and convicted pirates in Somalia as well as in other regional centers. The program assists these countries with capacity building programs for the judiciary system, prosecutors, and police, providing the countries with law books, specialist coast guard equipment, and office equipment.¹⁰⁶

CPP's goal is to assist Somalia in upgrading its prisons and courts so Somali pirates convicted in other countries can serve their sentences in Somalia. The program has also undertaken construction and renovation of prisons in Somaliland and Puntland.¹⁰⁷ CPP supports the criminal justice professionals of several states who are working on Somali piracy cases. To illustrate, Kenya has tried 147 suspects in 18 trials, while Seychelles has tried 118 suspects in 14 cases; the program's support ensured the transfer of convicted pirates from Seychelles to Somaliland.¹⁰⁸

waters, which encompass some of the world's most important shipping lanes.” *About CMF*, COMBINED MAR. FORCES, <http://combinedmaritimeforces.com/about> (last visited Mar. 23, 2014).

103. *CTF-151: Counter-Piracy*, *supra* note 22; *see also Combined Maritime Forces Improve Piracy Awareness*, COMBINED MAR. FORCES (Nov. 29, 2012), <http://combinedmaritimeforces.com/2012/11/29/combined-maritime-forces-improve-piracy-awareness/> (collaborating with Yemen to collect data to learn pirates' habits and deter their activities); *CCTF 151 Reinforces Support in Seychelles*, COMBINED MAR. FORCES (Dec. 4, 2012), <http://combinedmaritimeforces.com/2012/12/04/cctf-151-reinforces-support-in-seychelles/> (citing “the adoption of best management practices by merchant vessels” as one reason for reduced piracy attacks).
104. *See UNODC and Piracy*, UNODC (Mar. 2013), <http://www.unodc.org/unodc/en/piracy/index.html?ref=menuaside>.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*

With UNODC's support, the Somalia Law Reform Group, comprising experts from all three Somali regions, has been working on counter-piracy legislation to be introduced across Somalia. It has already produced the draft laws on the following: criminalizing piracy; providing for and regulating prison transfers; regulating the management and operation of prisons; and creating prison regulations, all of which complement the draft prison laws.¹⁰⁹

With over 1,200 suspected or convicted pirates detained in twenty-one countries around the world,¹¹⁰ UNODC also provides extensive support to law enforcement and legal systems as they face the challenge of investigating and prosecuting piracy. The EU and UNODC work jointly with a prosecuting state—recently in January 2013, twelve suspected pirates were detained by EU NAVFOR and transferred to Mauritius for trial. Similar assistance was given earlier to Kenya and to Seychelles.¹¹¹ In just four years since its creation, CPP has impressive accomplishments to report: four courtrooms constructed or under construction; support to six piracy prosecuting centers; nine prisons constructed, refurbished, or underway; forty-six hostages helped to return home; 300 Somali pirates prosecuted or awaiting trial in Seychelles, Kenya, or Mauritius; 350 judicial and law enforcement officials who have participated in UNODC-organized learning exchanges; 400 Somali prison staff trained; 500 days of interpretation provided; 1,400 international standard prison spaces provided; and 600 prisoners provided with welfare support.¹¹²

As the prosecution of pirates presents an immense legal and logistical challenge, UNODC has indeed played an important role in ensuring that the rule of law undergirds the process.

IV. THE UNITED STATES' RESPONSE TO PIRACY

In 2007, in response to the rise of piracy off the coast of Somalia, President George W. Bush signed the U.S. policy on piracy and armed robbery at sea.¹¹³ Subsequently, in December 2008, the U.S. National Security Council released an action plan, implementing a

109. *SG's Oct. 2012 Report*, *supra* note 28, ¶ 54.

110. U.N. OFFICE ON DRUGS & CRIME, COUNTER-PIRACY PROGRAMME: SUPPORT TO THE TRIAL AND RELATED TREATMENT OF PIRACY SUSPECTS, ISSUE 11, at 1 (2013), *available at* http://www.unodc.org/documents/easternafrika//piracy/UNODC_Brochure_Issue_11_wv.pdf.

111. *Id.* at 6.

112. *Id.* at 2.

113. *See Press Release, Memorandum from the President on Maritime Security (Piracy) Policy*, GEORGE W. BUSH-WHITE HOUSE ARCHIVES (June 14, 2007), <http://georgewbush-whitehouse.archives.gov/news/releases/2007/06/20070614-3.html>.

policy, among others, which seeks to involve all nations, international organizations, and industry that are interested in taking steps to repress piracy off the Horn of Africa.¹¹⁴ The plan focuses on operational measures for prevention, disruption, and punishment of acts of Somali pirate organizations.¹¹⁵

Article 1 of the U.S. Constitution grants Congress power to “define and punish Piracies and Felonies committed on the high Seas and Offences against the Law of Nations.”¹¹⁶ Enacted in 1891, the statute defining piracy reads: “Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”¹¹⁷ In a 2010 case, *United States v. Said*, a federal district court construed this statute and dismissed the piracy count against defendant Said and his co-defendants, all of whom were passengers aboard a skiff from which shots were fired on the USS *Ashland* in the Gulf of Aden in April 2010.¹¹⁸ The court concluded that “the discernible definition of piracy as ‘robbery or forcible depredations committed on the high seas’ under § 1651 has remained consistent and has reached a level of concrete consensus in United States law.”¹¹⁹ The court then dismissed the count because as the defendants had not boarded, taken control, or otherwise robbed the *Ashland*, the defendants had not committed the offense of piracy as defined by the U.S. Supreme Court in 1820 in *United States v. Smith*.¹²⁰

In *United States v. Hasan*,¹²¹ which was decided soon after *Said*, another federal district court, unlike the *Said* court, distinguished “municipal piracy,” that is, piracy in violation of U.S. law, which requires a jurisdictional nexus with the U.S., from “general piracy,” which can be prosecuted by any nation without a jurisdictional nexus.¹²² In doing so, the court interpreted 18 U.S.C. § 1651 (the piracy statute) as a demonstration of congressional intent “to

114. U.S. NAT’L SECURITY COUNCIL, COUNTERING PIRACY OFF THE HORN OF AFRICA: PARTNERSHIP & ACTION PLAN 3 (2008), *available at* http://www.marad.dot.gov/documents/Countering_Piracy_Off_The_Horn_of_Africa_-_Partnership_Action_Plan.pdf.

115. *Id.* at 3–4.

116. U.S. CONST. art. I, § 8, cl. 10.

117. 18 U.S.C. § 1651.

118. *United States v. Said*, 757 F. Supp. 2d 554, 556–57 (E.D. Va. 2010), *vacated*, 680 F.3d 374 (4th Cir. 2012).

119. *Id.* at 560.

120. *Id.* at 562; *see* *United States v. Smith*, 18 U.S. 153, 162 (1820) (holding “that piracy, by the law of nations, is robbery upon the sea”).

121. *United States v. Hasan*, 747 F. Supp. 2d 599 (E.D. Va. 2010).

122. *Id.* at 606.

incorporate . . . any subsequent developments in the definition of general piracy under the law of nations.”¹²³ Thus, the *Hasan* court determined that the defendants’ violent conduct in attacking the U.S. naval frigate on the high seas, even if they did not seize or rob the ship, constituted piracy under the law of nations.¹²⁴ The Fourth Circuit Court of Appeals upheld the holding of *Hasan* in 2012 in *United States v. Dire*,¹²⁵ agreeing with “the conception of the law outlined by the court below.”¹²⁶ The *Dire* court held, “[b]ecause the district court correctly applied the UNCLOS definition of piracy as customary international law, we reject the defendants’ challenge” to their conviction of piracy.¹²⁷

Subsequently, on June 11, 2013, the District of Columbia Circuit Court of Appeals in *United States v. Ali*¹²⁸ interpreted Article 101(c) of UNCLOS to suggest that “a facilitative act need not occur on the high seas so long as its predicate offense has,”¹²⁹ and hence there is “no indication international law limits the liability of aiders and abettors to their conduct on the high seas.”¹³⁰ Thus, an aider and abettor need not have acted on the high seas for such an act to be considered piracy.

The defendant in *Ali*, a Somali national who had helped negotiate the ransom of a merchant vessel and its crew after their capture in the Gulf of Aden, was charged with “aiding and abetting” piracy.¹³¹ He argued that as his acts were committed on land and in territorial waters and not upon the high seas, he was not a pirate.¹³² Based upon his defense, the district court restricted the charge of “aiding and abetting” piracy to conduct on the high seas, and hence dismissed the piracy charge.¹³³ As noted above, the D.C. Circuit reversed the district court, determining that the charge could stand, as the facilitative act

123. *Id.* at 623.

124. *Id.* at 640–41.

125. *United States v. Dire*, 680 F.3d 446, 469 (4th Cir. 2012), *aff’g* 747 F. Supp. 2d 599 (2010) (agreeing with the district court’s analysis of the piracy definition).

126. *Id.* at 467.

127. *Id.* at 469.

128. *United States v. Ali (Ali I)*, 718 F.3d 929 (D.C. Cir. 2013).

129. *Id.* at 937.

130. *Id.* at 938.

131. *United States v. Ali (Ali II)*, 870 F. Supp. 2d 10, 16, 18 (D.C. Cir. 2012).

132. *Ali I*, 718 F.3d at 932.

133. *United States v. Ali (Ali III)*, 885 F. Supp. 2d 17, 32 (D.D.C. 2012).

of aiding and abetting does not need to occur on the high seas.¹³⁴ However, the D.C. Circuit held that UNCLOS' plain language did not include conspiracy to commit piracy.¹³⁵

V. THE REGULATION OF PRIVATE MARITIME SECURITY COMPANIES

The use of PMSCs by ship owners and operators has been one of the most important factors leading to the decline in successful pirate attacks off the Horn of Africa,¹³⁶ as evidenced by the correlation between the rise of PMSC employment and the fall of pirate attacks that occurred in the second half of 2011.¹³⁷ States initially rejected the use of PMSCs, but the practice has gained increased acceptance due to the effectiveness of the firms in deterring attacks.¹³⁸ Today, PMSCs are regulated to various degrees at the national and international levels, but there are still reports that PMSCs are not held accountable

134. *Ali I*, 718 F.3d at 941.

135. *Id.* at 942 (citing Ved P. Nanda, *Maritime Piracy: How Can International Law and Policy Address This Growing Global Menace?*, 39 DENV. J. INT'L L. & POL'Y 177, 181 (2011)) (holding that unlike aiding and abetting, conspiracy is not part of the UNCLOS definition of piracy).

136. *See What Happened to Somalia's Pirates*, THE ECONOMIST (May 19, 2013), <http://www.economist.com/blogs/economist-explains/2013/05/economist-explains-11> (noting that more than 60 percent of vessels carry armed guards, which has led to a decline in pirate attacks); *see also* David Smith & Clar Ni Chonghaile, *Somali Pirates Hijacking Fewer Merchant Ships*, THE GUARDIAN (Oct. 23, 2012), <http://www.theguardian.com/world/2012/oct/23/somali-piracy-declines>.

137. JAMES BROWN, LOWY INST. FOR INT'L POL'Y, *PIRATES AND PRIVATEERS: MANAGING THE INDIAN OCEAN'S PRIVATE SECURITY BOOM* 7 (2012), *available at* http://www.lowyinstitute.org/files/brown_pirates_and_privateers_web.pdf (noting that the vast majority of PMSCs were created in 2011); Jonathan Bellish, *The Economic Cost of Piracy 2012*, at 7 (2013) (working paper) (on file with Oceans Beyond Piracy & One Earth Future Found.) (providing a chart that shows the decline in pirate attacks beginning in late 2011 and continuing through 2012).

138. *See, e.g.*, Adjoa Anyimadu, *Somalia: Moving Beyond Piracy?*, MAR. SECURITY REVIEW (May 9, 2013), <http://www.marsecreview.com/2013/05/somalia-moving-beyond-piracy/> ("An increasing acceptance of the presence of private armed guards aboard vessels has been one of the most controversial counter-piracy methods introduced in the Indian Ocean. But it seems to have been an effective deterrent and, despite concerns about the risk to innocent fishermen and other seafarers who may be mistaken for pirates, some governments, including the US and UK administrations, have been reassured by the oft-repeated phrase that no ship with private armed guards on board has been successfully hijacked.").

for their actions.¹³⁹ Part of moving past the crisis management stage and towards a sustainable solution to piracy off the coast of Somalia is continued suppression at sea while efforts on shore progress. PMSCs will surely be a part of that suppression. It is therefore important to provide accountability in a way that allows PMSCs and their clients to accomplish their goals, while simultaneously respecting human rights and the rule of law.

This section proceeds from the premise that there should be two primary goals for regulating the private maritime security industry: (1) ensuring the effective provision of maritime security for the client; and (2) protecting the lives of innocent civilians—local fishermen and tradesmen—who might be mistaken for pirates or otherwise caught in the crossfire. The first goal is achieved by ensuring that the roles of the PMSC and client are properly defined, that maritime security providers are properly insured, vetted, and trained, and that PMSCs have adequate procedures in place related to the carriage of weapons and the use of force. The second goal is best achieved by ensuring that private security providers follow the procedures in place, that the misuse of force is properly criminalized, and that providers are held accountable if and when force is misused.

After reviewing the national, international, and non-governmental regulatory regimes currently applicable to the private maritime security industry, this section concludes that ongoing efforts are relatively effective at furthering the first goal, and any shortcomings related to the second are not the result of inadequate regulation on the books, but a lack of incident reporting and accountability at sea.

A. *Ongoing Regulatory Efforts in the Private Maritime Security Industry*

The private maritime security industry is currently regulated at the national, international, and nongovernmental levels. While this system of regulations has moved the industry forward in terms of its ability to provide effective security services to clients in a transparent manner, it has done much less to actively deter operations that might result in the grave injury or death of innocent civilians.

1. National regulation

At one time a rarity, Private Contracted Armed Security Personnel (PCASP) teams have been gaining popularity among shipping companies. As demand for these specialized contractors increased, flag states began devising legislation to regulate their operation. A notable increase in the creation of state regulatory regimes occurred between 2008 and 2010, in step with the increase of pirate attacks off the coast of Somalia and, presumably, the demand

139. See *infra* notes 173–75 & accompanying text.

for security teams. The severity of regulation varies greatly by state, with some states even banning the use of PCASP teams outright.¹⁴⁰ Others, such as Italy, restrict their use to those instances when the state cannot provide protection on its own.¹⁴¹ However, most states with PCASP laws permit the operation of PCASP teams subject to regulation.¹⁴²

Though the regulations are diverse, a few common threads run through the majority of the rules. Most flag states require that the teams register themselves and their weapons with the flag state.¹⁴³ Many states also require teams to be from companies that have been specially certified by the state.¹⁴⁴ Regulations that require security incident reporting are also common, and some states take an additional step of requiring adherence to agreed-upon rules governing the use of force.¹⁴⁵

While these are positive steps, the degree to which state regulations shape the actual behavior of PCASP teams is unclear. Because of the international nature of the modern shipping industry, PMSCs and their clients are able to “shop around” to find a jurisdiction with regulations that offer them the best chance of financial success. This generally means that the nations with the least stringent regulatory regimes remain attractive to increasing numbers of private security teams, effectively offering a haven for those groups who would prefer to avoid more taxing rules. Since it is not possible to restrict state selection by PCASP companies, we risk a “race to the bottom,” in which those states that wish to attract the business of

140. Oceans Beyond Piracy, PCASP Regulation and Oversight (discussion paper) (on file with the authors) [hereinafter OBP Discussion Paper]. The following countries have banned PCASP teams: China, France, Japan, Lithuania, the Netherlands, and Portugal. *See also Comparison of Flag State Laws on Armed Guards and Arms on Board*, INT’L CHAMBER OF SHIPPING (2013), <http://www.ics-shipping.org/docs/default-source/Piracy-Docs/flag-state-rules-and-requirements-on-arms-and-private-armed-guards-on-board-vessels-11-13.pdf> [hereinafter *ICS Comparison*].

141. OBP Discussion Paper, *supra* note 140; *see also ICS Comparison*, *supra* note 140.

142. OBP Discussion Paper, *supra* note 140. The following states permit PCASP teams to operate subject to regulation: Antigua/Barbuda, the Bahamas, Bermuda, Belgium, Canada, Cyprus, Denmark, Finland, Germany, Greece, Hong Kong, India, the Isle of Man, Italy, Jamaica, Liberia, Lithuania, Malta, Marshall Islands, Norway, Panama, Poland, Singapore, Spain, the U.K., and the U.S. *Id.*; *see also ICS Comparison*, *supra* note 140.

143. *ICS Comparison*, *supra* note 140 (noting Spain and Italy as examples).

144. *Id.* (citing Hong Kong and Cyprus as examples).

145. *Id.* (indicating Germany and Belgium as examples).

these organizations develop increasingly lax regulations—or choose not to stringently enforce their regulations—in order to compete.

2. International regulation

Intuitively, international regulation seems like a reasonable solution to this problem. PMSCs would be forced to comply at least with the international standard, even if the state in which they operated had less stringent regulations. There have been attempts to formulate such a regime. The IMO has released a series of circulars that make recommendations concerning the use of PCASP teams that are directed at different actors in the shipping and security community.¹⁴⁶ IMO MSC circular 1405 is directed at ship owners, operators, and masters, and advises on how PCASP teams should be trained and selected. It also recommends that rules for the use of force be put in place and that record-keeping occur.¹⁴⁷ IMO MSC circular 1406 offers advice to flag states on how to set up a PCASP regulatory regime. IMO MSC circular 1408 gives recommendations to coastal states that may find themselves compelled to write laws governing PCASP teams that transit their waters or embark or disembark in their ports.¹⁴⁸ IMO MSC circular 1443 advises PCASP companies themselves and recommends that they adopt many of the proposals outlined in IMO MSC circular 1405.¹⁴⁹ Unfortunately, the IMO-outlined standards are offered as voluntary recommendations and do not have binding force on any PCASP teams.

This leaves the international community in an uncomfortable position. Though states have the power to enforce their regulations, companies can avoid them by moving to jurisdictions with more favorable rules. Conversely, while international regulations are inescapable, to date they are purely voluntary and therefore difficult or impossible to enforce. This has left the industry and other interested stakeholders with the task of developing a diverse and fragmented system of nongovernmental regulation to help fill the gaps.

3. Nongovernmental regulation

In addition to national and international regulation, there have been several attempts to regulate PMSCs outside of the governmental sphere. These nongovernmental regulations have come in the form of industry associations, model contracts, and standards-making

146. See IMO MSC Cir. 1405, *supra* note 60; IMO MSC Cir. 1406, *supra* note 59; IMO MSC Cir. 1443, *supra* note 61.

147. IMO MSC Cir. 1405, *supra* note 60, Annex § 4.

148. IMO MSC Cir. 1406, *supra* note 59, Annex ¶ 5; IMO MSC Cir. 1408, *supra* note 59, Annex ¶ 6.

149. IMO MSC Cir. 1443, *supra* note 61, Annex ¶ 1.6.

processes, and each effort has been met with varying degrees of success.

One avenue for PMSC regulation is through the development of industry associations. The most prominent example of these associations is the Security Association for the Maritime Industry (SAMI).¹⁵⁰ As of March 2014, SAMI was comprised of 185 members¹⁵¹ and has a multi-tiered certification scheme consisting of internal due diligence, an audit, and an operational site visit.¹⁵² However, an inherent flaw in regulating an industry through industry associations is that the association relies on dues paid by PMSCs to continue operations. Thus, if the standards emanating from these associations are overly stringent, the association risks losing members as well as the dues that allow the association to operate. This makes industry associations less than ideal sources of regulation.

Another regulatory tool stemming from the private sector is GUARDCON, a model contract developed by the Baltic and International Maritime Council (BIMCO) for use by shipping companies when negotiating terms of employment with PMSCs.¹⁵³ There are a number of GUARDCON provisions that could potentially regulate the behavior of PMSCs, including the requirements that teams be comprised of four members¹⁵⁴ and use “all reasonable skill and care” in performing security services,¹⁵⁵ as well as requirements dealing with the minimum resources that must be available to PMSCs.¹⁵⁶ Nonetheless, the primary purpose of GUARDCON is to clarify the relationship between PMSCs and ship owners, not to

150. Certified PMSCS Members, SAMI, http://www.seasecurity.org/directory_categories/certified-pmscs/ (last visited Mar. 23, 2014). *See also* IAMSP: INT’L ASS’N OF MAR. SECURITY PROFESSIONALS, <http://iamsponline.org/> (last visited Mar. 23, 2014) (noting that its mission is to provide an association for private security professionals).

151. Certified PMSCS Members, *supra* note 150.

152. *SAMI Certification for PMSCs*, SAMI, <http://www.seasecurity.org/sami-certification-for-pmscs/> (last visited Mar. 23, 2014).

153. BIMCO, GUARDCON CONTRACT FOR THE EMPLOYMENT OF SECURITY GUARDS ON VESSELS (last updated Apr. 1, 2013), *available at* <https://www.bimco.org/Chartering/Documents/Security/GUARDCON.aspx>.

154. *Id.* Annex F § 2(3).

155. *Id.* § 3(6).

156. *See, e.g., id.* § 3(6)(a)(viii) (requiring PMSCs to provide and maintain adequate resources); *id.* § 3(6)(a)(ix) (requiring a PMSC to have an onshore operational point of contact available 24 hours a day to provide support, intelligence, and backup); *id.* § 3(6)(b)(i)(1)–(9) (requiring that PMSC personnel are adequately trained, experienced, insured, and credentialed).

regulate PMSCs.¹⁵⁷ For example, clients are free to modify the contract as they see fit, and BIMCO specifically states that developing rules for the use of force are “outside [its] remit.”¹⁵⁸ Accordingly, like industry associations, model contracts such as GUARDCON are not likely to provide the sort of comprehensive regulation that leads to increased accountability.

The third avenue that has been pursued to regulate PMSCs is open standards with independent auditing. On this particular front, three processes are under development: (1) the ASIS/ANSI PSC Standards;¹⁵⁹ (2) the International Code of Conduct for Private Security Providers (ICoC);¹⁶⁰ and (3) the ISO PAS 28007 standard.¹⁶¹ Although each standard is in different stages of development, none are fully operational. Nonetheless, these standards touch on issues of company certification, personnel vetting, team and weapon check-in, use of force, and incident reporting.¹⁶² While the ISO PAS 28007 and the PSC Standards will use external and independent auditing to measure compliance,¹⁶³ the ICoC is developing a tripartite governance structure that will meet annually in Geneva to manage the implementation of the standard.¹⁶⁴

157. See BIMCO, EXPLANATORY NOTES TO GUARDCON STANDARD CONTRACT FOR THE EMPLOYMENT OF SECURITY GUARDS ON VESSELS 1, available at https://www.bimco.org/Chartering/Documents/Security/~media/Chartering/Document_Samples/Sundry_Other_Forms/Explanatory_Notes_GUARDCON.ashx (“The use of GUARDCON is not in any way intended to be a substitute for the proper exercise of due diligence by ship owners as part of the pre-contractual process when selecting a security company to provide unarmed or armed guards for a ship.”).

158. *Id.* at 2.

159. Michael J. Stack, *ASIS Completes Work on PSC Series of ANSI Standards*, ASIS INT’L (Apr. 11, 2013), <https://www.asisonline.org/News/Press-Room/Press-Releases/2013/Pages/East.aspx>.

160. INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS (2010) [hereinafter ICoC], available at http://www.icocpsp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf.

161. See Liz McMahon, *Pilot Launched for PMSC Benchmark*, 25 CURRENT AWARENESS BULL. (Int’l Mar. Org., London, U.K.), Mar. 2013, at 14, available at <http://www.lloydslist.com/ll/sector/regulation/article/418223.ece>.

162. OBP Discussion Paper, *supra* note 140.

163. See McMahon, *supra* note 161, at 14; Stack, *supra* note 159 (mentioning the standard for “Conformity Assessment and Auditing Management Systems for Quality of Private Security Company Operations”).

164. See ICoC, *supra* note 160, ¶ 7(b) (establishing the tripartite governance structure based on certification of compliance with the Code, auditing

The final set of privately-developed international standards is the 100 Series Rules on the Use of Force, created by British maritime attorney David Hammond and endorsed by many members of the shipping and private security industries.¹⁶⁵ Unlike the ICoC, ASIS PSC Standards, and ISO PAS 28007, the 100 Series Rules have no external enforcement mechanism. While these rules are not legally binding and provide no legal immunity,¹⁶⁶ they do purport to set out “how and under which circumstances force may be used in self-defence in the context of maritime piracy, armed robbery or hijacking.”¹⁶⁷ These rules describe a situation where the vessel master retains nominal control over security team members, but any member is free to use force if he or she personally feels a threat of death or imminent bodily harm.¹⁶⁸ In other words, the rules describe a use of force regime that would exist even in the absence of all regulatory oversight.

This sort of nongovernmental regulation, however, has done more to institutionalize good behavior than shape it. Becoming a member of an industry association, utilizing a model contract, or signing on to open standards with independent auditing does indeed send a signal to potential clients that PMSCs meet certain criteria. These schemes will not, however, effectively shape the behavior of would-be irresponsible PMSCs until clients make employment conditional on adherence to one or more of these standards. For this reason, regulation to date has done a better job of furthering the goal of providing effective security services to clients who value such services rather than protecting innocent life from less responsible PMSCs.

B. Criminal Jurisdiction at Sea and the Case of Mistaken Identity

The second goal of private maritime security regulation described above—the protection of innocent life—is a central objective of criminal law in general.¹⁶⁹ This proposition appears to be almost self-evident, as homicide has been criminalized since at least

and monitoring of work in the field, and a mechanism for addressing alleged violations).

165. See 100SERIESRULES, <https://100seriesrules.com> (last visited Mar. 23, 2014).

166. THE 100 SERIES RULES: AN INTERNATIONAL MODEL SET OF MARITIME RULES FOR THE USE OF FORCE (RUF) ¶ 11, *available at* https://100seriesrules.com/uploads/20130503-100_Series_Rules_for_the_Use_of_Force.pdf.

167. *Id.* ¶ 1.

168. See *id.* ¶ 17.3.

169. See *R v. Howe*, [1987] A.C. 417 (H.L.) 430 (appeal taken from Eng.) (“The overriding objects of the criminal law must be to protect innocent lives and to set a standard of conduct which ordinary men and women are expected to observe if they are to avoid criminal responsibility.”).

2050 B.C.¹⁷⁰ Yet there is evidence that innocent life is being lost at sea, sometimes with impunity. The most prominent example is the case of mistaken identity, in which two Italian marines aboard the MV *Enrica Lexie* allegedly shot and killed two Indian fishermen and are now currently on trial in India.¹⁷¹ Additionally, soldiers have killed at least five Yemeni fishermen since 2009, mistaking them for pirates.¹⁷²

Although these reported incidents were allegedly perpetrated by soldiers as opposed to private armed guards, there have been anecdotal reports that private security companies have paid the families of Somali victims to avoid being hauled into court.¹⁷³ Combine that anecdotal evidence with the general problem of underreporting incidents of piracy¹⁷⁴ and the many videos online depicting what appears to be less than responsible use of force,¹⁷⁵ and it is not hard to imagine that at least some collateral damage goes unreported.

Unlike the first goal of providing effective security services, protecting innocent life does not require much if any new regulation. Rather, because the required jurisdictional and substantive criminal provisions are largely in place, ensuring the safety of innocent

170. See THE CODE OF UR-NAMMU art. 1, available at http://www.hammurapi.ch/ressources/Codex_Ur_Nammu_en.pdf?PH_PSESSID=89d16c4077d3057923163aed99c7305e (“If a man commits a murder, that man must be killed.”). The Code is believed to have been written around 2050 BC. See Douglas B. Ammar, *Forgiveness and the Law—A Redemptive Opportunity*, 27 FORDHAM URB. L.J. 1583, 1589 n.13 (2000).

171. *India, Italy in Talks to Speed Up Marines Trial*, NEWS TRACK INDIA (Jul. 15, 2013), <http://www.newstrackindia.com/newsdetails/2013/07/15/361--India-Italy-in-talks-to-speed-up-marines-trial-.html>.

172. Alan Katz, *Fighting Piracy Goes Awry with Killings of Fishermen*, BLOOMBERG (Sept. 17, 2012), <http://www.bloomberg.com/news/2012-09-16/fighting-piracy-goes-awry-with-killings-of-fishermen.html>.

173. Michael Frodl, C-LEVEL Maritime Risks Weekly Express News Update (TM), Vol. IV, No. 349 (Aug. 4, 2013) (on file with the author).

174. See Michelle Wiese Bockmann, *Ships with Armed Guards Seen Not Reporting Somali Pirate Strikes*, BLOOMBERG (Oct. 23, 2012), <http://www.bloomberg.com/news/2012-10-23/ships-with-armed-guards-seen-not-reporting-somali-pirate-strikes.html> (quoting IMB Director Pottengal Mukundan as saying, “[v]essels with private armed security are not reporting the attempted attacks that other vessels were reporting before”).

175. See, e.g., PCASP Network, *Maritime Security Guards Shoot Somali Pirates.mp4*, YOUTUBE (Apr. 26, 2012), <http://www.youtube.com/watch?v=EirA1h3W76w>; PCASP Network, *Pirate Attack Against Russian Maritime Security Team*, YOUTUBE (Apr. 26, 2012), <http://www.youtube.com/watch?v=2rkia1dlas>.

fishermen and tradesmen who might be mistaken for pirates is best accomplished through adequate incident reporting and law enforcement.

1. Criminal jurisdiction at sea

Traditionally, the flag state has exclusive criminal jurisdiction over individuals aboard its ships.¹⁷⁶ The principle of exclusive flag state jurisdiction is related to the doctrine of *mare liberum*, more commonly known as “freedom of the seas.” The doctrine refers to the equal right of all states to make beneficial use of the world’s oceans beyond the territorial seas and was well articulated by Sir William Scott in *Le Louis*:

In places where no local authority exists, where the subjects of all States meet upon a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another. . . . [N]o nation can exercise a right of visitation and search upon the common and unappropriated parts of the sea, save only on the belligerent claim.¹⁷⁷

This principle was codified and made subject to expressly defined exceptions in Article 6 of the 1958 Geneva Convention on the High Seas (“1958 High Seas Convention”).¹⁷⁸

UNCLOS provides an excellent starting point to discuss the modern state of criminal jurisdiction at sea, as it is binding on 166 countries and considered authoritative even by states that have not ratified it.¹⁷⁹ However, state practice suggests a willingness to assert criminal jurisdiction beyond the scope of UNCLOS.

176. *See* *R v. Lewis*, (1857) 169 Eng. Rep. 968, 970 (holding that a crime committed by a U.S. citizen aboard a U.S.-flagged ship is *ultra vires* U.K. jurisdiction).

177. *Le Louis*, (1817) 165 Eng. Rep. 1464, 1475–76.

178. Convention on the High Seas art. 6, *opened for signature* Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962), [hereinafter 1958 High Seas Convention] (stating that vessels are under the exclusive jurisdiction of the flag state except in certain cases enumerated in the treaty).

179. *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as at 29 October 2013*, UN, http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm (last updated Sept. 20, 2013) [hereinafter *Chronological Lists*] (listing the 166 states who have ratified UNCLOS); *see* *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, 1985 I.C.J. 13, ¶¶ 29–34 (June 3) (accepting certain provisions of UNCLOS as evidence of customary international law); *see also* IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 214 (5th ed. 1998) (citing the *Continental Shelf* opinion and explaining how certain treaty

As noted above, under UNCLOS, only the flag state or the national state of the alleged perpetrator may institute penal or disciplinary proceedings regarding any incident of navigation on the high seas, and only the flag state may detain a ship for the purposes of a criminal investigation.¹⁸⁰ In the EEZ, those principles are limited, as the coastal state retains sovereign rights over natural resources and jurisdiction over artificial installations, scientific research, and the protection of the maritime environment.¹⁸¹ Under UNCLOS, even in the territorial waters of another state, the flag state's criminal jurisdiction can only be undermined by the coastal state if the effects of the crime extend to the coastal state; the crime disturbs the peace of the coastal state or its territorial sea; the flag state requests the coastal state's assistance; or the coastal state suspects drug trafficking.¹⁸²

Despite the primacy afforded to criminal jurisdiction on the high seas based on the flag state and the nationality of the perpetrator, states have successfully asserted criminal jurisdiction on the high seas through other jurisdictional theories. For example, in *United States v. Neil*, the court found jurisdiction under the passive personality principle for a sexual assault committed by a citizen of St. Vincent and the Grenadines against a U.S. national aboard a Panamanian-flagged ship.¹⁸³ A similar rationale was employed by Canadian courts in extradition hearings concerning the murders of stowaways aboard the *Maersk Dubai*.¹⁸⁴ Perhaps more creatively, in 1995 the Cour de Cassation exercised jurisdiction over the murder of eight African stowaways by Ukrainian nationals on a Bahamian-flagged ship outside French territorial waters.¹⁸⁵ The French court relied on the territorial principle, holding that because one stowaway escaped, and the crew was searching for him when the

provisions are universally accepted and become part of customary international law); DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 111 (Elizabeth R. Wilcox ed., 2010) (“[T]he actions and statements of the Executive Branch over more than six decades reflect the consistent U.S. view that [the UNCLOS piracy] definition is both reflective of customary international law and universally accepted by states.”).

180. UNCLOS, *supra* note 57, art. 97, 1833 U.N.T.S. at 435.

181. *Id.* arts. 56, 60, 1833 U.N.T.S. at 418, 419–20.

182. *Id.* art. 27, 1833 U.N.T.S. at 407–08.

183. *United States v. Neil*, 312 F.3d 419, 423 (9th Cir. 2002).

184. See Elissa Steglich, *Hiding in the Hulls: Attacking the Practice of High Seas Murder of Stowaways Through Expanded Criminal Jurisdiction*, 78 TEX. L. REV. 1323, 1327–29 (2000).

185. Cour de cassation [Cass.] [supreme court for judicial matters] crim., May 3, 1995, Bull. crim., No. 152 (Fr.).

ship entered French territorial waters, the crime was a continuing one that partially occurred inside France's territory.¹⁸⁶ Thus, through a non-traditional interpretation of the territorial principle of jurisdiction, the French courts provided yet another avenue to assert criminal jurisdiction over foreign-flagged merchant ships.

In sum, treaty law and state practice suggest that states can successfully assert jurisdiction over violent crimes committed on the high seas through traditional applications of the territorial principle (applying the law of the flag state), non-traditional applications of the territorial principle (in the case of a continuing crime), the nationality principle, and the passive personality principle. These options provide states broad latitude to pursue acts of violence committed at sea.

2. Criminal law in a case of mistaken identity at sea

Given the wide latitude of states to attach criminal jurisdiction to crimes committed on the high seas, initiating a prosecution for an alleged case of mistaken identity should be a relatively straightforward proposition—at least in theory. An alleged case of mistaken identity in the context of a private security guard and fishermen or tradesmen would simply be prosecuted by a court with jurisdiction as a homicide charge asserted by the victim or the victim's estate and met with a claim of imperfect self-defense by the security team member.¹⁸⁷

To illustrate the availability of jurisdiction for mistaken identity crimes, open registries, sometimes known as “flags of convenience,” are considered attractive options because they lack strict regulations.¹⁸⁸ Each of the top five open registry states by volume—Panama, Marshall Islands, Liberia, Malta, and the Bahamas¹⁸⁹—has all the necessary law in place to prosecute a case of mistaken identity. Each state explicitly asserts jurisdiction over its flagged vessels,¹⁹⁰

186. *Id.*

187. See BLACK'S LAW DICTIONARY 1390 (8th ed. 2004) (defining “imperfect self-defense” as “[t]he use of force by one who makes an honest but unreasonable mistake that force is necessary to repel an attack”).

188. See Brian Baker, *Flags of Convenience and the Gulf Oil Spill: Problems and Proposed Solutions*, 34 HOUS. J. INT'L L. 687, 695 (2012) (noting, for example, the ease of maritime vessel registration in these states); see also H. Edwin Anderson, III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 TUL. MAR. L.J. 139, 157–58 (1996).

189. U.N. CONFERENCE ON TRADE & DEV., REVIEW OF MARITIME TRANSPORT, at 48, U.N. Doc. UNCTAD/RMT/2012, U.N. Sales No. E.12.II.D.17 (2012).

190. See El Código Penal de Panamá [The Penal Code of Panama][CPP] tit. 1, ch. 2, art. 18; The Maritime Act 1990 [TMA] § 711 (Marsh. Is.); Liber. Code of Laws [LCL] tit. 21, ch. 2, § 84; Malta Criminal Code [MCC] art. 5(1)(b); Bah. Penal Code [BPC], tit. 1, § 10.

criminalizes homicide in its criminal code,¹⁹¹ and each state save one explicitly outlines its rules on self-defense in its criminal code.¹⁹² If these countries, often criticized for their lack of regulatory power over their vessels, have sufficient law in place to handle a case of mistaken identity, it seems reasonable to assume that other states with tougher regulatory requirements would be similarly situated.

Thus despite the fact that many have suggested that PMSCs exist in a legal “grey area” or “vacuum,”¹⁹³ this is not the case as it relates to prosecuting cases of mistaken identity. Many states possess the required jurisdictional and substantive provisions to prosecute such a case, which they may exercise concurrently. Thus, in the situations described above, any lack of deterrence is not the result of inadequate codified regulation, but rather a lack of incident reporting and law enforcement at sea.

VI. ESTABLISHING SOMALIA’S EXCLUSIVE ECONOMIC ZONE

In addition to increased accountability for PMSCs, the establishment of a Somali EEZ will be a critical step in the transition from piracy’s crisis management phase at sea to its sustainable solution on shore. Declaring an EEZ is an important step in helping Somalia move beyond piracy for several reasons. First, an oft-stated motive of the pirates, especially in the early days, was to protect Somalia’s maritime resources from illegal fishing and dumping, likely caused by international ships.¹⁹⁴ Establishing an EEZ would create protections over maritime resources, thus removing the need for pirates to take protective measures on their own. Second, declaring an EEZ is an important first step towards Somalia’s ability to provide

191. CPP, tit. 1, ch. 1, art. 131; 31 MIRC § 131 (Marsh. Is.); LCL, tit. 26, ch. 14, § 14.1; MCC, tit. 8, art. 211; BPC, tit. 20, § 289.

192. CPP, tit. 2, ch. 4, art. 31; LCL, tit. 26, ch. 14, art. 14.1; MCC, tit. 8, art. 223; BPC, tit. 7, § 107.

193. See, e.g., Jonathan Saul, *Facing Piracy, Ship Security Firms Set Ethics Code*, REUTERS (May 9, 2011), www.reuters.com/article/2011/05/09/uk-shipping-security-piracy-idUSLNE74804X20110509 (discussing how deployment of armed teams on ships is a legal grey area); Carolin Liss, *Privatising the Fight Against Somali Pirates* 13 (Murdoch Univ. Asia Research Ctr., Working Paper No. 152, 2008) (explaining that PSCs providing maritime security often operate in a “grey legal zone”); WORLD BANK REPORT, *supra* note 2, at 11 (“[P]rivate guards operate in a legal vacuum with no rule of engagement against pirates.”).

194. See, e.g., Tristan McConnell, *Somali Pirates’ Rise Linked to Illegal Fishing and Toxic Dumping*, GLOBAL POST (Mar. 16, 2012), <http://www.globalpost.com/dispatch/news/regions/africa/120306/pirate-s-Somalia-how-it-started%20>.

for its own maritime security.¹⁹⁵ Third, declaring an EEZ is an essential move for the Somali people to establish control of their maritime resources, thus benefitting from those resources and providing alternative livelihoods for would-be pirates.

This section begins by briefly outlining the character of an EEZ as well as the process for establishing an EEZ, both under UNCLOS and customary international law. This section then goes on to discuss contemporary issues and developments surrounding Somalia's establishment of an EEZ.

A. The Legal Character of the Exclusive Economic Zone

The legal characteristics of a state's EEZ are thoroughly described in Part V of UNCLOS, which establishes a specific legal regime governing the zone.¹⁹⁶ According to UNCLOS, the coastal state enjoys sovereign rights over living and non-living natural resources within its EEZ as well as jurisdiction over the establishment of artificial structures, scientific research, and the protection of the marine environment.¹⁹⁷ However, coastal states with EEZs are also obligated to respect the rights of other states¹⁹⁸ that enjoy the freedom of the high seas and certain rights related to the suppression of maritime piracy.¹⁹⁹ Importantly, UNCLOS also limits the breadth of a state's territorial waters to twelve nautical miles and its EEZ to 200 nautical miles.²⁰⁰

In addition to describing the legal character of the EEZ, UNCLOS mentions the steps states must take to establish their EEZs. Article 75 of UNCLOS states:

[T]he outer limit lines of the exclusive economic zone . . . shall be shown on charts of a scale or scales adequate for ascertaining their position," and that "[t]he coastal State shall give due

195. Cf. Stein Tønnesson, No Maritime Security Without Exclusive Economic Zones (EEZs) 2 (June 20–21, 2011) (draft paper) (on file with Ctr. for Strategic & Int'l Studies), *available at* http://csis.org/files/publication/110629_Tonnesson_South_China_Sea.pdf (asserting that the establishment and delimitation of EEZs in the South China Sea is a necessary first step towards maritime security); see Jan Stockbruegger, *The Mogadishu Roadmap: Towards a Joint Maritime Security Policy for Somalia?*, PIRACY STUDIES (Oct. 15, 2011), <http://piracy-studies.org/2011/the-mogadishu-roadmap-towards-a-joint-maritime-security-policy-for-somalia/> (describing the Mogadishu Roadmap's integration of the EEZ into a maritime security strategy).

196. See UNCLOS, *supra* note 57, art. 55, 1833 U.N.T.S. at 418.

197. *Id.* art. 56, at 418.

198. *Id.* art. 56(2).

199. *Id.* art. 58, at 419.

200. *Id.* arts. 3, 57, at 400, 419.

publicity to such charts or lists of geographical coordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations.²⁰¹

Although residual rights related to an EEZ were clarified in UNCLOS,²⁰² there is contemporary evidence that an EEZ is also a creature of customary international law. First, the UNCLOS provisions dealing with an EEZ were the product of decades of negotiations around coastal state claims outside territorial waters²⁰³ such that, by the time UNCLOS was signed in 1982, the main characteristic of the zone—coastal state sovereignty over natural resources within 200 NM that did not rise to full sovereignty—was already largely undisputed.²⁰⁴ Second, the International Court of Justice explicitly affirmed the proposition that the EEZ provisions of UNCLOS reflect customary international law when it stated, “certain provisions of the Convention, concerning the continental shelf and the exclusive economic zone . . . were adopted without any objections. . . . [and should] be regarded as consonant at present with general international law on the question.”²⁰⁵ Finally, a number of non-signatories to UNCLOS—most notably the U.S.—assert jurisdiction in accordance with the provisions of UNCLOS, arguing that the latter is reflective of customary international law.²⁰⁶ Indeed, UNCLOS’ status as customary international law is frequently

201. *Id.* art. 75, at 428.

202. *Id.*

203. For the earliest example of such a claim, see Proclamation 2667, 10 Fed. Reg. 12,303 (Oct. 2, 1945) (referring to President Truman’s Proclamation on the Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf).

204. See BUREAU OF OCEANS & INT’L ENVTL. & SCIENTIFIC AFFAIRS, U.S. DEP’T OF STATE, LIMITS IN THE SEAS: UNITED STATES RESPONSES TO EXCESSIVE NATIONAL MARITIME CLAIMS 44 (1992), *available at* <http://www.state.gov/documents/organization/58381.pdf> (“The general consensus reached on the exclusive economic zone (EEZ) at the Law of the Sea conference as [sic] been supported by state practice since the mid-1970s. Thus, the concept of the EEZ, including its maximum breadth of 200 miles and the basic rules governing the zone, has been effectively established as customary international law.”).

205. Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), Judgment, 1984 I.C.J. 246, ¶ 94 (Oct. 12).

206. See, e.g., BUREAU OF OCEANS & INT’L ENVTL. & SCIENTIFIC AFFAIRS, *supra* note 204, at 44 (noting that “[t]he exclusive economic zone has gained recognition as customary international law” and that UNCLOS incorporated these pre-existing customs).

advanced as an argument supporting the U.S.'s non-ratification of UNCLOS.²⁰⁷

B. *The Status of Somalia's Exclusive Economic Zone*

Despite the fact that the legal character of an EEZ is clearly described in UNCLOS, and states can rely on UNCLOS provisions even absent ratification, there has been significant uncertainty around the steps Somalia must take to establish an EEZ. This confusion relates primarily to the uncertainty regarding the status of Somali domestic law and differing views as to the steps required for a state to declare an enforceable EEZ.

Common wisdom states that Somalia currently claims 200 NM of territorial waters and that such a claim goes beyond Somalia's rights under international law.²⁰⁸ This conception is based on Somalia's Law No. 37, which was passed by the Somali parliament in 1972.²⁰⁹ Despite the fact that Somalia ratified UNCLOS on July 24, 1989,²¹⁰ the view expressed by many, including the Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, is that unless Somalia's domestic law conforms with UNCLOS, it "is legally deprived of a territorial sea and an exclusive economic zone."²¹¹

207. See, e.g., Stewart M. Patrick, *(Almost) Everyone Agrees: The U.S. Should Ratify the Law of the Sea Treaty*, THE ATLANTIC (Jun. 10, 2012), <http://www.theatlantic.com/international/archive/2012/06/-almost-everyone-agrees-the-us-should-ratify-the-law-of-the-sea-treaty/258301> ("Some have argued that UNCLOS has already become 'customary international law,' and thus the United States has little to gain from formal accession.").

208. See U.N. Chair of the S.C. Comm. Pursuant to Res. 751 (1992) & 1907 (2009), Letter dated July 12, 2013 from the Chair of the Security Council Committee Pursuant to Resolutions 751 (1992) & 1907 (2009) Concerning Somalia & Eritrea addressed to the President of the Security Council, Annex 5.5 ¶ 31, U.N. Doc. S/2013/413 (July 12, 2013) ("Since 1972, Somalia has claimed an extension of its territorial sea from 12 to 200 nautical miles. However, article 3 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) limits coastal States to claim a maximum territorial sea of 12 nautical miles from the coast."); Thilo Neumann & Tim René Salomon, *Fishing in Troubled Waters – Somalia's Maritime Zones and the Case for Reinterpretation*, 16 INSIGHTS (Am. Soc'y of Int'l Law, Washington, D.C.), Mar. 2012, at 2, available at <http://www.asil.org/insights120315.cfm> ("[A]s the 1972 Somali territorial sea claim contravenes public international law, and since there is no Somali EEZ legislation in place, the Somali government arguably lacks exclusive fishing and fishery management rights in the waters off the Somali coast.").

209. Law No. 37 on the Territorial Sea and Ports, arts. 1, 3 (1972) (Somal.), available at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/SOM_1972_Law.pdf.

210. *Chronological Lists*, *supra* note 179.

211. Lang Report, *supra* note 31, ¶ 89.

Yet this view has become somewhat problematic in light of recent developments. In late 2012, the potential existence of a law passed subsequent to Law No. 37 that aligns Somalia's maritime zones to the norms established in UNCLOS came to light.²¹² Two legal documents that have recently been uncovered suggest that Law No. 37 has indeed been superseded.

The first legal instrument is Decree no. 14 of the 9th February: 1989.²¹³ Article 2 of this document states that "[UNCLOS] and its Annexes shall have the force of Law in the Territory of the Somali Democratic Republic."²¹⁴ Decree no. 14 makes reference to "[t]he Law no. 11 of the 9th of February 1989 on the base [sic] of which the People's Assembly has approved the Convention specified in this Decree."²¹⁵ In May 2013, Law no. 11 was found in a file box in Mogadishu.²¹⁶

At 256 pages in length, Law no. 11 is written in Somali and was being translated as of June 2013, but that which has been translated thus far appears to bring Somali law in conformity to UNCLOS. Article 4(3) of Law no. 11 states that the "[w]idth of the Somali Sea Shall be 12 Nautical Miles Drawn from the baseline towards the direction of the Sea."²¹⁷ Article 7 states that "[t]he Exclusive Economic Zone of the Somali Republic shall extend to 200NM drawn from the baseline Sea,"²¹⁸ and goes on to declare its rights over natural resources, the power to supervise exploitative activities occurring within the EEZ, and other rights provided for in UNCLOS.²¹⁹ Most laws passed by the Assembly prior to 1991 are still applicable in Somalia,²²⁰ so Law no. 11 of 1989 could still be in force today.

Despite this recently unearthed evidence, the status of Somalia's EEZ remains unclear. A chief cause of the uncertainty is the Somali Federal Government's continuing reliance on Law no. 37 of 1972, as illustrated by a press release dated June 6, 2013 from the office of the

212. Robert McLoughlin, UNODC, Somali EEZ (Legal Status): Briefing Note for 19 June 2013, ¶ 4 (on file with the author) [hereinafter UNODC Brief].

213. Decree no. 14: Instrument of Ratification (Feb. 9, 1989) (Somal.), available at http://www.somalilandlaw.com/Ratification_of_UNCLOS_1989_Eng_Som.pdf.

214. *Id.* art. 2.

215. *Id.* pmb1.

216. UNODC Brief, *supra* note 212, ¶ 7.

217. Law no. 11, art. 4(3) (Feb. 9, 1989) (Somal.).

218. *Id.* art. 7.

219. *Id.*

220. UNODC Brief, *supra* note 212, ¶ 4.

Prime Minister entitled “Somali Federal Government clarifies its position on territorial waters.”²²¹ That press release somewhat confusingly states: “[t]he government’s position is Somali Law No. 37 on the Territorial Sea and Ports, signed on 10 September 1972, which defines Somali territorial sea as 200 nautical miles and continental shelf. On 24th July 1989 Somali ratified the UN Convention on the Law of the Sea.”²²² However, this statement appears in the context of other declarations regarding a memorandum of understanding between Somalia and Kenya with respect to maritime boundary delimitation.²²³ It is therefore unclear whether the Prime Minister’s statement regarding Law no. 37 was truly meant to reiterate a claim to a 200 NM territorial sea as opposed to an EEZ, or if the statement spoke more to the delimitation issue with Kenya.

Regardless, the state of the Somali EEZ is far from certain. If consensus is reached that Law no. 11 of 1989 and Declaration no. 14 of 1989 are valid law, the Somali government would merely have to publish the coordinates of its EEZ and submit those coordinates to the Secretary-General to be fully in compliance with UNCLOS.²²⁴ If for whatever reason the developments from 1989 are disregarded and Law no. 37 of 1972 stands, Somalia will likely have to conform its laws to UNCLOS for international recognition of its EEZ. Yet the ultimate goal of the Somali people should be clear even if the path towards reaching that goal is uncertain. Somalia should take the steps necessary to declare the largest EEZ allowable under UNCLOS. Somalia will then be integrated into the agreed-upon system for establishing an EEZ, at which point it could resolve any delimitation issues it might have with neighboring states.

VII. APPLICABLE LEGAL FRAMEWORK

Legal issues pertaining to PMSCs and the EEZ have already been discussed. Thus, this section focuses on legal frameworks, especially those in the pertinent provisions of UNCLOS, the 1988 SUA Convention, and other conventions relating to piracy.

UNCLOS, which retains the provisions of the 1958 High Seas Convention²²⁵ as they relate to piracy, provides the legal framework to address piracy issues. Several other international conventions and

221. *Somalia: Somali Federal Govt Clarifies Position on Territorial Waters*, SHABELLE MEDIA NETWORK (June 6, 2013), <http://allafrica.com/stories/201306070252.html>.

222. *Id.*

223. *Id.*

224. *See* UNCLOS, *supra* note 57, art. 75, 1833 U.N.T.S. at 428.

225. 1958 High Seas Convention, *supra* note 178, arts. 13–22, 450 U.N.T.S. at 90–92.

some Security Council and General Assembly resolutions also contribute to this framework. UNCLOS provides the modern definition of piracy, under which “any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft,” constitutes piracy.²²⁶ The geographic limits are that such an act must take place on the high seas or outside the jurisdiction of any state and must be directed against another ship or aircraft or the persons or property on board such a vessel.²²⁷ This definition makes no reference to either an attempt to commit an act of piracy or to conspiracy related to such an act, but it does include voluntary participation or facilitation.²²⁸ Additionally, if criminal acts constituting piracy occur inside the territorial waters of a state, they are not covered by the UNCLOS definition but are called “armed robbery at sea” or “armed robbery against ships.”

Under the IMO definition of “armed robbery against ships,” the following acts are covered: (1) “any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State’s internal waters, archipelagic waters and territorial sea;”²²⁹ and (2) “any act of inciting or of intentionally facilitating an act described above.”²³⁰

Under Article 105 of UNCLOS, any state is authorized to seize a pirate ship or aircraft and its property on board, arrest the crew, and prosecute them through its own courts, so long as the seizure takes place on the high seas or on waters outside the jurisdiction of any

226. UNCLOS, *supra* note 57, art. 101, 1833 U.N.T.S. at 436.

227. *Id.*

228. *Id.*

229. *Code of Practice*, *supra* note 54, Annex ¶ 2.2.1; *see also* 1988 SUA Convention, *supra* note 58, arts. 3–5, 1678 U.N.T.S. at 224–26 (containing similar language to the IMO definition of armed robbery at sea).

230. *Code of Practice*, *supra* note 54, Annex ¶ 2.2.2. The Code of Practice adopts the UNCLOS definition of piracy. *Id.* ¶ 2.2.1. Earlier, in November 2001, the Twenty-Second Assembly of the IMO adopted a similar definition of “armed robbery against ships” as “any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, directed against a ship or against persons or property on board such ship, within a State’s jurisdiction over such offences.” Compare IMO, *Code of Practice*, *supra* note 54, ¶ 2.2.2, with Int’l Maritime Organization [IMO], *Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships*, IMO Assemb. Res. A. 922 (22) (Nov. 29, 2001).

state.²³¹ Only war ships, military aircrafts, or those on government service are authorized to undertake such seizures.²³² These ships are also authorized “the right of visit,” in which there are reasonable grounds for suspecting that a ship is engaged in piracy.²³³ This right is an exception to the principle of exclusive flag state jurisdiction over ships in the high seas under Articles 92 and 94 of UNCLOS.

It should be noted that the state action mentioned above is also authorized within the state’s own EEZ.²³⁴ Under Article 105 of UNCLOS, any country can execute universal jurisdiction over piracy regardless of the nationality of the suspected offenders, pirate ship or aircraft, victims, or victims’ ship or aircraft. However, it does not make it obligatory for the states to take action.²³⁵ Many provisions of UNCLOS relating to the repression of piracy, especially universal jurisdiction under Article 105, reflect customary international law, but a state needs to implement this universal jurisdiction permitted by international law into its domestic law. Thus, the problem lies not in the jurisdictional issues but in the lack of implementation of the universality principle through national legislation for a state’s courts to assume jurisdiction over piracy cases.

Other pertinent conventions under which some acts of piracy may be considered offenses include the 1988 SUA Convention,²³⁶ which was primarily intended to apply to acts of terrorism, the 1979 Convention Against the Taking of Hostages,²³⁷ and the U.N. Convention Against Transnational Organized Crime.²³⁸

The 1988 SUA Convention fills the gaps left by the rather limited definition of piracy under UNCLOS by not requiring that two ships be involved and by making no distinction between maritime areas.²³⁹

231. UNCLOS, *supra* note 57, art. 105, 1833 U.N.T.S. at 437.

232. *Id.* art. 107, at 437.

233. *Id.* art. 110, at 438.

234. *Id.* art. 58, at 419.

235. *Id.* art. 105, at 437 (providing that every state “may” seize a pirate ship if it is on the high seas or outside the jurisdiction of any state).

236. 1988 SUA Convention, *supra* note 58, arts 3–5, 1678 U.N.T.S. at 224–26 (specifying crimes at sea that could include piracy).

237. International Convention Against the Taking of Hostages, *opened for signature* Dec. 18, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 206 (entered into force June 3, 1983) [hereinafter Hostage Convention].

238. U.N. Convention Against Transnational Organized Crime art. 5, Nov. 15, 2000, T.I.A.S. No. 13,127, 2225 U.N.T.S. 275 [hereinafter Organized Crime Convention] (criminalizing participation in an organized criminal group).

239. 1988 SUA Convention, *supra* note 58, arts. 3–4, 1678 U.N.T.S. at 224–26.

Under Article 3, state parties are to establish a number of criminal offenses, most of which correspond, at least in part, with actions committed by pirates or armed robbers. The Convention also requires state parties to make the offenses set forth in Article 3 punishable by appropriate penalties “tak[ing] into account the grave nature of those offenses.”²⁴⁰ It especially directs states to establish their jurisdiction over the offenses set forth in Article 3 when the offense is committed: “(a) against or on board a ship flying the flag of the State at the time the offense is committed; (b) in the territory of that State, including its territorial sea; or (c) by a national of that State.”²⁴¹

The Convention also authorizes non-state parties to establish jurisdiction when the person “seized, threatened, injured or killed” is that state’s national and when the act is intended to “compel that State to do or abstain from doing any act.”²⁴² Furthermore, the Convention obligates the state, in whose territory the alleged offender is present, to establish jurisdiction and prosecute the alleged offender if it does not extradite the offender to one of the states that has established jurisdiction.²⁴³

In 2005, the state parties to the 1988 SUA Convention adopted a Protocol to the Convention that extensively amended the Convention by adding new offenses aimed at combating terrorism, thus updating its legal framework.²⁴⁴ It also added a new article outlining the procedures for a state party requesting the flag state of a suspect vessel for its authorization to board and search that vessel, its cargo, and persons on board, thus providing the necessary legal basis for states to intercept acts of piracy.²⁴⁵

The 1979 International Convention Against the Taking of Hostages defines the offense of taking of hostages, as follows:

Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person . . . in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or

240. *Id.* art. 5, at 226.

241. *Id.* art. 6(1).

242. *Id.* art. 6(2).

243. *Id.* arts. 6(4), 10–11, at 227, 229.

244. Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *opened for signature* Feb. 14, 2006, IMO Doc. LEG/CONF.15/21 (entered into force July 28, 2010).

245. *Id.* art. 8(2) (adding Article 8*bis* to the 1988 SUA Convention).

implicit condition for the release of the hostage commits the offence of taking of hostages²⁴⁶

States parties to this convention are required to criminalize hostage taking as well as attempts to commit or participate in hostage taking, and to make these offenses “punishable by appropriate penalties which take into account the grave nature of those offenses.”²⁴⁷

The U.N. Convention Against Transnational Organized Crime sets out offenses that could also be relevant to acts of piracy.²⁴⁸ Under Article 5, the Convention requires states parties to criminalize, as a distinct offense, the participation in an organized criminal group. It also requires states parties to criminalize the conversion or transfer of proceeds of crime for the purpose of concealing or disguising their illicit origin or the true nature or source of the proceeds of crime.²⁴⁹ Moreover, while states are also required to impose penalties for the offenses mentioned, they also must take into account the gravity of each offense.²⁵⁰

VIII. RECOMMENDATIONS

Fortunately, the immediate crisis phase of Somalia-based piracy appears to be coming to an end. Although many of the stakeholders engaged in combating the scourge have had their mandates extended through 2014,²⁵¹ uncertainty remains. For if those mandates are not further extended, the fear is that without the active participation of the broader international community, responsibility will fall to the regional nations to carry the burden themselves. Unless the regional nations effectively counter piracy, the problem will not go away. However, an optimist could argue that over the past several years as norms have been established and institutions have been developed, this is the appropriate time to implement a sustainable solution on shore.

An important aspect of the transition from crisis management at sea to a sustainable solution on shore is to continue cost-effective suppression at sea while capacity is built within Somalia. At this

246. Hostage Convention, *supra* note 237, art. 1, 1316 U.N.T.S. at 207.

247. *Id.* art. 1.

248. Organized Crime Convention, *supra* note 238, art. 5, 2225 U.N.T.S. at 276–77.

249. *Id.* art. 6, at 277.

250. *Id.* art. 11, at 280.

251. *E.g.*, *Mission*, EU NAVFOR, <http://eunavfor.eu/mission> (last visited Mar. 23, 2014); *NATO's Counter Piracy Mission Extended*, NATO (Mar. 19, 2012), http://www.nato.int/cps/en/natolive/news_85230.htm.

stage, it appears that private armed security will be a major part of that interim suppression, making the regulatory efforts described in Part V—namely, improved incident reporting—critical to a sustainable transition.²⁵²

What major elements are needed for capacity building on shore to establish the rule of law? As experience tells us, the piracy for ransom business model favored by Somalia-based pirates requires merchant ships to be anchored a few miles from the Somali coast—well within its territorial waters—for many months while pirates negotiate a ransom payment.²⁵³ Accordingly, using law enforcement to create a more secure environment where pirates are unable to operate undisturbed so close to shore for long periods of time would do a great deal to dismantle the pirate business model. Another important aspect of a sustainable solution to Somalia-based piracy is the development of credible alternative livelihoods for the pirates themselves.²⁵⁴

Achieving these twin aims of improving law enforcement capacity and creating economic opportunities along the Somali coast will require a comprehensive strategy that takes into account Somalia's complex politics. One such strategy is currently being developed among the Federal Government and the regions of Somaliland, Puntland, and Galmudug, which have come together to develop a Maritime Security and Resource Management Strategy under the auspices of the Kampala Process.²⁵⁵ The process, facilitated by UNPOS, UNODC, IMO, and the U.N. Food and Agriculture Organization works to devise a comprehensive strategy to enhance maritime security and resource management for the benefit of the Somali people.²⁵⁶ The international community would do well to support such a strategy, as it is the surest way to establish the conditions along the Somali coastline that can best hinder piracy's ability to thrive. Not surprisingly, part of the strategy includes establishing a Somali EEZ.

252. *See supra* pp. 24–30.

253. *See* WORLD BANK REPORT, *supra* note 2, at 6–7.

254. For a comprehensive report on the re-integration of Somali pirates, see INGVLID MAGNÆS GJELSVIK & TORE BJØRGO, CTR. FOR PEACE STUDIES, UNIV. OF TROMSØ, EX-PIRATES IN SOMALIA: DISENGAGEMENT PROCESSES AND REINTEGRATION PROGRAMMING 20 (2013) (describing the Alternative Livelihood to Piracy Project, which involves, among other things, training for jobs in electricity, carpentry, and masonry).

255. *See Kampala Process: A Draft Somali Maritime Strategy – Communiqué No. 1*, U.N. POL. OFFICE FOR SOMAL. (Mar. 14, 2013), <http://unpos.unmissions.org/LinkClick.aspx?fileticket=MLbR1KovAkA%3D&tabid=11461&language=en-US>.

256. *Id.*

An additional challenge in combating Somali piracy is that some leaders and financiers of these piracy groups, who constitute part of the land-based criminal networks, reside outside Somalia. Thus, to disrupt the pirate money flows, they need to be apprehended and prosecuted, with their operations shut down. For this to happen, Michiel B. Hijmans and his colleagues urge the international community to work with the F.B.I., Europol, and INTERPOL to take on these networks.²⁵⁷

In short, the goal of the international community moving forward must be to break the pirate business model.²⁵⁸ This goal is best accomplished through enhancing the rule of law along the Somali coastline while simultaneously working to provide alternative livelihoods to would-be pirates. While these onshore efforts are underway, suppression at sea must continue in a manner that is both cost-effective and in line with international legal norms. These goals will not be easy to achieve, as lawlessness, poverty, and a lack of good governance are all major impediments. Nonetheless, the international community has spent billions of dollars over the past five years treating the symptoms of Somalia-based piracy. Only through a sustainable solution on shore will those funds not have been spent in vain.

IX. CONCLUSION

As the discussion above shows, Somalia-based piracy has declined due to an effective treatment of the symptoms by the shipping industry, navies, international organizations, and private security companies. Yet the underlying causes of piracy—lawlessness and a lack of economic opportunity in Somalia—remain unchanged, rendering the hard-fought gains made to date reversible. Additionally, the rise of piracy in the Gulf of Guinea and its persistence in Southeast Asia show that global piracy will continue to be a menace.

Many of the required norms and institutions necessary to develop a sustainable solution on shore are in place, but the effectiveness of their implementation remains to be seen. In the end, a sustainable solution will require coordination on the international, regional,

257. Michiel B. Hijman et al., *Shutting Down the Piracy Business*, N.Y. TIMES (July 31, 2013), www.nytimes.com/2013/08/01/opinion/global/shutting-down-the-piracy-business.html?_r=0&pagewanted=print.

258. Jason Straziuso, *Piracy Group: Make Sure Somali Pirates Aren't Paid*, ASSOCIATED PRESS (Dec. 12, 2012), <http://bigstory.ap.org/article/piracy-group-make-sure-somali-pirates-arent-paid>; Peter Apps, *Out of Sight, Somali Piracy Fight Gets Rougher*, REUTERS (Feb. 21, 2012), <http://www.reuters.com/article/2012/02/21/us-somalia-pirates-idUSTRE81K0XT20120221>.

bilateral, and national levels. Only then will moving from crisis management to a sustainable solution to maritime piracy be possible.



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