

2013

Applicability of Combatant Status to Pirates

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PEACE NEGOTIATIONS
POST-CONFLICT CONSTITUTIONS
WAR CRIMES PROSECUTION

APPLICABILITY OF COMBATANT STATUS TO PIRATES

Legal Memorandum

Prepared by the

Public International Law & Policy Group

March 2013

APPLICABILITY OF COMBATANT STATUS TO PIRATES

Executive Summary

Under international law, piracy is a private act perpetrated by private individuals for private gains. Accordingly, pirates are considered as suspected criminals. They are required to be treated under human rights rules applicable in peacetime. International law rules applicable to the repression of piracy are contained in the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”). Under UNCLOS every state has the right to arrest, capture, and prosecute pirates under its domestic law. Pirates are not considered combatants under UNCLOS.

Combatant status is available under the law of armed conflict and applicable only in an international armed conflict. The Geneva Conventions of 1949 and Additional Protocol I of 1977 set out the criteria that must be satisfied in order for combatant status to be applicable. Combatants are entitled to directly participate in hostilities and have the right to be treated as prisoners of war if captured. Currently, international law does not view acts of piracy as reaching the level of an armed conflict. In the absence of an armed conflict that is international in nature, combatant status is not available.

Treating pirates as combatants would be counter-productive. It would defeat the purpose of the fight against piracy as it would entail giving pirates the right to directly participate in hostilities, the right to be immune from prosecution for taking up arms, and the right to be treated as prisoners of war if captured.

The Security Council resolutions adopted in response to piracy off the coast of Somalia demonstrate the law enforcement nature of authorisations to repress piracy off the coast of Somalia. These resolutions addressing the repression of piracy fit within the framework of UNCLOS. They do not transform the situation into that of an armed conflict whereby combatant status would be available. Therefore, as the law and acts of piracy currently stand, pirates are still considered as suspected criminals. The law of armed conflict does not apply and combatant status is not applicable to pirates.

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APPLICABILITY OF COMBATANT STATUS TO PIRATES

Statement of Purpose

The purpose of this memorandum is to clarify whether combatant status is applicable to pirates under existing international law regimes, or whether they are to be considered as suspected criminals.

Introduction

Pirate attacks against vessels continue to be of concern to the international community. The international community has made several attempts to combat the menace, ranging from the recognition of universal jurisdiction for the arrest and prosecution of pirates, the enactment of domestic legislation to criminalize piracy, and the recent Security Council resolutions to combat piracy off the coast of Somalia. The authorisation to use “all necessary means” against pirates, including military force, raises several issues on how pirates are to be treated under international law. Particularly, whether pirates are to be treated as combatants under the law of armed conflict or suspected criminals under a law enforcement paradigm.

This memorandum provides an overview of the current definition of piracy under international law and when an act will amount to piracy. As combatant status is specific to the law of armed conflict, this memorandum will also provide an overview of the law of armed conflict, the criteria for establishing whether an armed conflict is international or non-international in nature, and the criteria for establishing combatant status. Finally, the resolutions adopted by the Security Council in relation to piracy off the coast of Somalia will be discussed.

Piracy

Pirates have long been considered enemies of mankind and states have struggled to combat the crime of piracy through the adoption of different means and methods. As pirates make no distinction between the vessels they target, piracy is a global problem and states generally consider piracy as a crime subject to universal jurisdiction.¹ Some states have enacted domestic legislation

¹ Sergei Oudman, *Piracy Jure Gentium & International Law*, (Feb. 24, 2010), available at <http://www.e-ir.info/?p=3290>.

criminalising piracy and providing for its prosecution. Recently, a multinational coalition approach is being undertaken to combat the crime.

Definition

The current legal framework for the repression of piracy is UNCLOS. UNCLOS defines piracy and provides for actions that may be undertaken to repress it. Article 101 defines piracy as:²

- (a) 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, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Several states have also adopted domestic legislation that defines piracy by incorporating or expanding the UNCLOS definition. Differences in the definition have implications, for example, on the ingredients necessary for the establishment of the offence of piracy, as well as the jurisdiction for prosecuting pirates. This memorandum uses the definition contained in UNCLOS as is it considered to reflect customary international law.³

Under the UNCLOS definition, any illegal act of violence, detention, or depredation against a ship, aircraft, or against persons or property on board of a ship or aircraft, will amount to piracy under three conditions:⁴

- (1) it is committed by the crew or passengers of another ship or aircraft (two-vessel requirement);
- (2) it is committed for by private ends; and

² United Nations Convention on the Law of the Sea, art. 101, Dec. 10, 1982, 1833 UNTS 3; 21 ILM 1261 (1982) available at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

³ Martin D. Fink and Richard J. Galvin, *Combating Pirates off The Coast of Somalia: Current Legal Challenges*, 56 NETHERLANDS INTERNATIONAL LAW REVIEW 367, 369 (2009).

⁴ United Nations Convention on the Law of the Sea, art. 101 and 58, Dec. 10, 1982, 1833 UNTS 3; 21 ILM 1261 (1982) available at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

(3) it takes place on the high seas, including the Exclusive Economic Zone (“EEZ”).

Acts committed within the territorial jurisdiction of a state are governed by the domestic laws of the coastal state and are not subject to universal jurisdiction.⁵ Under current international law and state practice, pirates who have escaped into the territorial waters of a coastal state after having committed piratical acts on the high seas are subject to the jurisdiction of that coastal state.⁶ Unless otherwise consented to, the notion of “reverse hot pursuit” (pursuit from the high seas into territorial waters of a coastal state to assert universal jurisdiction) does not apply.⁷

The second vessel requirement is demonstrated by the 1985 hijacking of the *Achillo Lauro*. The ship was hijacked by four members of the Palestine Liberation Front who were already on-board. The failure to satisfy the second ship rule meant that the situation did not constitute an act of piracy.⁸

An act of piracy must be committed by a private ship. If warships or government aircrafts are used by pirates they are considered as private ships for the duration used by the pirates.⁹ The motive for the commission of the piratical acts must be pursuit of private gains or private ends. Piracy must be for self-enrichment rather than to further a governmental or ideological policy or the pursuit of political power.¹⁰ This requirement was included in the definition to differentiate between acts of insurgency, in which insurgents solely attack vessels of the government they seek to overthrow.¹¹ The United States Supreme Court in the case of *United States v The Brig Malek Adhel* considered a piratical act to be an act of aggression which is without the sanction of public or sovereign authority.¹² Differentiating between public acts (acts authorised by a state or could be attributed to a state) from acts of piracy is important as acts that have no state

⁵ Martin D. Fink and Richard J. Galvin, *Combating Pirates off The Coast of Somalia: Current Legal Challenges*, 56 NETHERLANDS INTERNATIONAL LAW REVIEW 367, 371 (2009).

⁶ United Nations Convention on the Law of the Sea, art. 101, Dec. 10, 1982, 1833 UNTS 3; 21 ILM 1261 (1982) available at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

⁷ Martin D. Fink and Richard J. Galvin, *Combating Pirates off The Coast of Somalia: Current Legal Challenges*, 56 NETHERLANDS INTERNATIONAL LAW REVIEW 367, 372 (2009).

⁸ Martin D. Fink and Richard J. Galvin, *Combating Pirates off The Coast of Somalia: Current Legal Challenges*, 56 NETHERLANDS INTERNATIONAL LAW REVIEW 367, 374 (2009).

⁹ United Nations Convention on the Law of the Sea, art. 102, Dec. 10, 1982, 1833 UNTS 3; 21 ILM 1261 (1982) available at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

¹⁰ Martin D. Fink and Richard J. Galvin, *Combating Pirates off The Coast of Somalia: Current Legal Challenges*, 56 NETHERLANDS INTERNATIONAL LAW REVIEW 367, 374 (2009).

¹¹ Robin Geiss and Anna Petrig, PIRACY AND ARMED ROBBERY AT SEA: THE LEGAL FRAMEWORK FOR COUNTER-PIRACY OPERATIONS IN SOMALIA AND THE GULF OF ADEN, 61 (2011).

¹² *United States v. The Brig Malek Adhel*, 43 U.S. 2 How. 210, 210 (1844).

sanction or involvement are regarded as in pursuance of private ends and will be regarded as acts of piracy.¹³

These conditions have been criticized for being too restrictive and several loopholes can be identified in the international piracy regime contained in UNCLOS. Firstly, it does not cover situations involving only one ship or aircraft, such as when the attack is carried out by crew members or passengers already on-board the ship. Secondly, it excludes territorial waters, where piracy, in the form of armed robbery against ships, is most frequently taking place.¹⁴ Thus, the duty to co-operate in combating piracy enunciated in UNCLOS is limited to the high seas and EEZs and ceases the moment a suspect ship enters into territorial waters. Thirdly, it does not cover attacks motivated by factors other than private gains. Attacks against ships or aircrafts have also taken place for political or ideological motives, such as terrorism or environmental protest.¹⁵

Status of Pirates under International Law

International instruments relevant to the repression of piracy are the Convention on the High Seas 1958,¹⁶ UNCLOS, and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (“the SUA Convention”).¹⁷ The rules contained in the Convention on the High Seas were adopted without modification by UNCLOS. This section will therefore consider UNCLOS and the SUA Convention.

¹³ Robin Geiss and Anna Petrig, PIRACY AND ARMED ROBBERY AT SEA: THE LEGAL FRAMEWORK FOR COUNTER-PIRACY OPERATIONS IN SOMALIA AND THE GULF OF ADEN, 61 (2011).

¹⁴ See for e.g. H. E. José Luis Jesus, *Protection of Foreign Ships Against Piracy and Terrorism at Sea: Legal Aspects*, 18 INTERNATIONAL JOURNAL OF MARITIME & COASTAL LAW 363, 383 (2003), (noting that, as reported by the IMB and IMO, “two-thirds [of piracy incidents] consistently take place inside coastal states’ territorial waters”), as quoted in Joseph M. Isanga, *Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes*, 59 AMERICAN UNIVERSITY LAW REVIEW 1267, footnote 133 (2009-2010).

¹⁵ Many contemporary commentators argue against a definition of piracy that does not include references to terrorist or political activity, in a world where such activities pose an equal threat to safety at sea. See for e.g. Tina Garmon, *International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th*, 27 TULANE MARITIME LAW JOURNAL 257, 264 (2002) and Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AMERICAN JOURNAL OF INTERNATIONAL LAW 269, 272 n.12 (1988), as quoted in Joseph M. Isanga, *Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes*, 59 AMERICAN UNIVERSITY LAW REVIEW 1267, footnotes 105-106 (2009-2010).

¹⁶ Convention on the High Seas, art. 15, Apr. 29, 1958, 450 U.N.T.S. 11; 13 U.S.T 2312 (1958), available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf.

¹⁷ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 UNTS 221; 27 ILM 668 (1988), available at <http://treaties.un.org/doc/db/Terrorism/Conv8-english.pdf>.

UNCLOS

UNCLOS provides details on the rules applicable to the high seas and the rights and duties of states with respect to the high seas. Specific rules applicable to piracy are contained in Articles 100 to 107 and 110. These rules address piracy in terms of the need to regulate the safety of maritime activities. The UNCLOS approach to piracy and its repression is in the context of law enforcement. Pirates are treated as private individuals who are arrested for suspected criminal activity and prosecuted in domestic courts. UNCLOS does not address the law of armed conflict nor regulate how hostilities are to be conducted.

The piracy provisions in UNCLOS commence with the recognition of the common duty of all states to co-operate in the repression of piracy.¹⁸ Under Article 5, every state has universal jurisdiction, on the high seas, to arrest piracy suspects, seize the ship and the property on board, and prosecute the pirates in its domestic courts in accordance with its legislation.¹⁹ This underscores the obligation of every state to contribute to the fight against a common enemy and not against an enemy of a specific or particular state. The obligation is contextual, as it is based on the application of relevant laws for the arrest and prosecution of suspected criminals. Article 106 addresses the liability of states where enforcement (the seizure of a pirate ship or aircraft) is carried out without adequate grounds.²⁰ The terms and language used in UNCLOS are typical of the law enforcement paradigm.

Warships, military aircrafts, and other government authorised ships or aircrafts with clear identification marks are in principle the only means to be used in seizing pirate ships.²¹ The use of military means must be seen in the context and in the unique nature of the situation. Most states do not have naval police or police specially trained for high seas law enforcement operations. The use of military means is logical and necessary. The commentary to Article 45 of the earlier 1956 Convention on the Law of the Sea provides that because pirates are to be treated “with great circumspection, so as to avoid friction between States”, it was

¹⁸ United Nations Convention on the Law of the Sea, art. 100, Dec. 10, 1982, 1833 UNTS 3; 21 ILM 1261 (1982) available at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

¹⁹ United Nations Convention on the Law of the Sea, art. 105, Dec. 10, 1982, 1833 UNTS 3; 21 ILM 1261 (1982) available at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

²⁰ United Nations Convention on the Law of the Sea, art. 106, Dec. 10, 1982, 1833 UNTS 3; 21 ILM 1261 (1982) available at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

²¹ United Nations Convention on the Law of the Sea, art. 107, Dec. 10, 1982, 1833 UNTS 3; 21 ILM 1261 (1982) available at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

considered suitable for warships and military aircrafts to be used.²² The text of Article 45 of the 1956 Convention is identical to Article 107 of UNCLOS.

Similarly, interpretation of the use of military means in pirate arrest and seizure must take note of other UNCLOS provisions regulating the treatment of pirates. International law, as reflected in UNCLOS, does not authorise or allow for the sinking of pirate ships and does not expressly permit attacks against pirates.²³ This further underscores the suspected criminal status of pirates as opposed to a status as combatants under the law of armed conflict, against whom international law allows engagement and elimination in armed conflict situations. Treating pirates as combatants would render several provisions of UNCLOS, including the definition, contradictory and redundant.

Additionally, undertaking law enforcement operations is not confined exclusively to police forces. The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (“BPUFF”) defined a law enforcement officer as:²⁴

...all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention. In countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition of law enforcement officials shall be regarded as including officers of such services.

International law, therefore, does not prohibit the use of military or paramilitary forces in law enforcement operations. Seized pirate ships may continue to retain their nationality which further reinforces the law enforcement nature of the situation.²⁵ Since piracy has become a subject of national and international concern, it has been recognised as a serious crime and pirates have been treated as suspected criminals subject to arrest and prosecution. Although combating piracy is primarily done through military means and methods, it does not alter the status of pirates from suspected criminals to combatants.²⁶ Piracy “[i]s still a reaction

²² International Law Commission, *Articles concerning the Law of the Sea with commentaries*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (Vol. II) 1956, available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/8_1_8_2_1956.pdf.

²³ Robin Geiss and Anna Petrig, PIRACY AND ARMED ROBBERY AT SEA: THE LEGAL FRAMEWORK FOR COUNTER-PIRACY OPERATIONS IN SOMALIA AND THE GULF OF ADEN, 69 (2011).

²⁴ United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (Sep. 7, 1990), available at <http://www2.ohchr.org/english/law/firearms.htm>.

²⁵ United Nations Convention on the Law of the Sea, art. 104, Dec. 10, 1982, 1833 UNTS 3; 21 ILM 1261 (1982) available at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

²⁶ Martin D. Fink and Richard J. Galvin, *Combating Pirates off The Coast of Somalia: Current Legal Challenges*, 56 NETHERLANDS INTERNATIONAL LAW REVIEW 367, 388 (2009).

against an international criminal offence and must legally be dealt within that legal framework.”²⁷

The SUA Convention

The SUA Convention was designed to suppress criminal activities committed against ships which threatened the safety of maritime navigation.

The SUA Convention addresses acts related to terrorism, as well as more general unlawful acts which threaten the safety of ships and security of passengers. Article 3 of the SUA Convention makes it unlawful to:²⁸

- (a) seize or take control of a ship by force or the threat force;
- (b) perform an act of violence against a person on board a ship if it is likely to endanger safe navigation of that ship;
- (c) destroy or damage a ship or its cargo if it is likely to endanger safe navigation;
- (d) place devices or substances on a ship that are likely to destroy that ship;
- (e) knowingly communicate false information to a ship that would endanger safe navigation; and
- (f) injure or kill any person in connection with any of the above acts.

The SUA Convention requires persons who have committed any of these offences to be brought before a court for prosecution.²⁹ Persons who have committed acts falling under Article 3 are considered suspected criminals and their treatment is to be in accordance with human rights rules applicable in peacetime. There is nothing in the provisions of the SUA Convention to suggest that an individual accused of an offence would have a status other than as a suspected criminal.

The preamble to the SUA Convention makes reference to the impact of terrorism, including terrorism aboard or against a ship, and calls for the elimination

²⁷ Martin D. Fink and Richard J. Galvin, *Combating Pirates off The Coast of Somalia: Current Legal Challenges*, 56 NETHERLANDS INTERNATIONAL LAW REVIEW 367, 388 (2009).

²⁸ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, art. 3, Mar. 10, 1988, 1678 UNTS 221; 27 ILM 668 (1988), available at <http://treaties.un.org/doc/db/Terrorism/Conv8-english.pdf>.

²⁹ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, arts. 5 and 10, Mar. 10, 1988, 1678 UNTS 221; 27 ILM 668 (1988), available at <http://treaties.un.org/doc/db/Terrorism/Conv8-english.pdf>.

of its underlying causes.³⁰ Whether piracy could be linked to terrorism depends on the analysis of each situation. In terms of a substantive offence, there is an important distinction between piracy and terrorism. Terrorism requires the existence of a political or ideological motive while piracy is for private ends. However, that does not mean that terrorism cannot be waged from the sea as practice has shown.³¹ Maritime terrorism has been used by Al Qaeda both before and after the September 11 attacks. However, there is currently no evidence showing a direct link between piracy and terrorism. During an expert meeting on combating piracy, it was found that “[t]here is to date no evidence of a link between piracy and terrorism in Somalia. This has confirmed by all major institutions and entities operating in the region.”³²

Combatant Status under the Law of Armed Conflict

Applicability of the Law of Armed Conflict

International humanitarian law (the law of armed conflict) regulates the conduct of hostilities during an armed conflict. The relevant international instruments are the Geneva Conventions of 1949 and the Additional Protocols of 1977. An armed conflict must be classified as international or non-international in order to ascertain which rules of international humanitarian law are applicable to the situation. Importantly, combatant status is only available in an international armed conflict.³³

The existence of an armed conflict is a question of fact to be determined on a case by case basis. There is no treaty provision defining what would amount to an armed conflict. The criteria are found in judicial decisions of international criminal tribunals. According to these tribunals, an international armed conflict exists whenever there is resort to the use of armed force between states, while a non-international armed conflict exists when there is protracted armed violence between governmental authorities and organised armed groups or between groups within a state.³⁴ Situations not amounting to a non-international armed conflict are

³⁰ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, preamble, Mar. 10, 1988, 1678 UNTS 221; 27 ILM 668 (1988), available at <http://treaties.un.org/doc/db/Terrorism/Conv8-english.pdf>.

³¹ The terrorist attack in Mumbai in 2008 came from the Sea.

³² Emiliano Alessandri, *Report of the Conference on “Addressing the Resurgence of Sea Piracy: Legal, Political and Security Aspects”*, p. 4 (Jul. 16, 2009), available at <http://www.iai.it/pdf/DocIAI/iai0916.pdf>.

³³ Robert Kolb and Richard Hyde, AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICT, 69 (2008).

³⁴ *Prosecutor v. Tadić*, Case No. ICTY-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Oct. 2, 1995).

not governed by the law of armed conflict; they are to be treated under the laws applicable in peacetime.³⁵ In order for combatant status to be available, an armed conflict must first exist.

International Armed Conflict

An international armed conflict exists where there is resort to the use of force between states.³⁶ Article 2 common to the Geneva Conventions of 1949 provides that:³⁷

“..., the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The International Committee for the Red Cross commentary on the provision explains that:³⁸

Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to the human person as such is not measured by the number of victims.

Where there is recourse to the use of force between the armed forces of states, the law of armed conflict is triggered. In particular, the Geneva Conventions of 1949 become applicable and potentially also Additional Protocol I. This Additional Protocol extends the definition of an international armed conflict to include situations where peoples are fighting against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination (wars of national liberation).³⁹ In order for combatant status to be available under the law of armed conflict, the armed conflict must be an international armed conflict.

³⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1(2), Jun. 8, 1977, 1125 U.N.T.S. 609; 26 I.L.M. 568 (1977), available at <http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument>.

³⁶ *Prosecutor v. Tadić*, Case No. ICTY-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Oct. 2, 1995).

³⁷ For instance Geneva Convention Relative to the Treatment of Prisoners of War, art. 2, Aug. 12, 1949, 75 U.N.T.S. 135; 6 U.S.T. 3316 (1949), available at <http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument>.

³⁸ International Committee of the Red Cross, *Commentary on the Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Aug. 12, 1949, p. 20-21, available at <http://www.icrc.org/ihl.nsf/COM/380-600005?OpenDocument>.

³⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1(4), Jun. 8, 1977, 1125 U.N.T.S. 3 (1977), available at <http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument>.

Non-International Armed Conflict

A non-international armed conflict exists when there is protracted armed violence between governmental authorities and organized armed groups, or between organized groups within a state.⁴⁰ Situations of internal disturbance, such as riots and isolated and sporadic acts, do not meet the threshold of a non-international armed conflict.⁴¹

Article 3 Common to the Geneva Conventions and Article 1 of Additional Protocol II determine the law applicable in a non-international armed conflict. Common Article 3 provides a minimum core of mandatory rules applicable to all situations of armed conflict (whether international or non-international). Additional Protocol II supplements Common Article 3 and extends the mandatory rules specifically to situations of a non-international armed conflict. For Additional Protocol II to be applicable, the non-international armed conflict requires the involvement of a state's armed forces and dissident armed forces or other organized armed groups that can exercise control over part of the territory of the state, enabling them to carry out sustained and concerted military operations.⁴² Combatant status is not available under a non-international armed conflict.

Criteria for Combatant Status

Combatant status is a special status under the law of armed conflict which is accorded to certain privileged individuals. It entitles them to certain rights and privileges as well as subjecting them to the obligations of observing certain rules in the conduct of hostilities. The category of persons entitled to this status is restricted. Members of the armed forces of a state who is party to an international armed conflict have the status of combatants.⁴³ The armed forces consist of all organized armed forces, groups, and units which: are under a command responsible for the conduct of its subordinates to a party to the conflict; are subject to an internal disciplinary system which enforces compliance with the law of armed

⁴⁰ *Prosecutor v. Tadić*, Case No. ICTY-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Oct. 2, 1995).

⁴¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1(2), Jun. 8, 1977, 1125 U.N.T.S. 609; 26 I.L.M. 568 (1977), available at <http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument>.

⁴² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1(1), Jun. 8, 1977, 1125 U.N.T.S. 609; 26 I.L.M. 568 (1977), available at <http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument>.

⁴³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 43(2), Jun. 8, 1977, 1125 U.N.T.S. 3 (1977), available at <http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument>.

conflict;⁴⁴ and whose members, at least when deployed on military operations, wear uniform or combat gear that distinguishes them from the civilian population.⁴⁵ Medical and religious personnel of the armed forces are not deemed to be combatants. Members of a “*levée en masse*” are also considered combatants. These are inhabitants of a non-occupied territory who have taken up arms to resist the invading forces without having had time to form themselves into a regular armed unit. However, they will only be considered as combatants if they carry arms openly and respect the laws and customs of war.⁴⁶ A person who is not a combatant is considered a civilian and his/her treatment will be in accordance with laws applicable to civilians.⁴⁷

Rights and Privileges of Combatants

There are rights and obligations flowing from the recognition of combatant status. Combatants are entitled to immunity from prosecution under criminal law for taking direct part in the hostilities unless they have committed offences recognised under the law of armed conflict.⁴⁸ Combatants are entitled to directly participate in the hostilities, to kill, and be killed without warning. This sharply distinguishes the paradigm of hostilities from the paradigm of law enforcement. In law enforcement warning must first be given before force is used unless the circumstances do not permit. Even then, the force used must be strictly necessary to subdue the suspected criminal.⁴⁹ Combatants have the right to capture enemy combatants and detain them as prisoners of war (“POWs”) and conversely, if captured, to be treated as POWs and to be released and repatriated at the end of

⁴⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 43(1), Jun. 8, 1977, 1125 U.N.T.S. 3 (1977), available at <http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument>.

⁴⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 44(3), Jun. 8, 1977, 1125 U.N.T.S. 3 (1977), available at <http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument>.

⁴⁶ Geneva Convention Relative to the Treatment of Prisoners of War, art. 4(A)(6), Aug. 12, 1949, 75 U.N.T.S. 135; 6 U.S.T. 3316 (1949), available at <http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument>.

⁴⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 50(1), Jun. 8, 1977, 1125 U.N.T.S. 3 (1977), available at <http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument>.

⁴⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 43(2), Jun. 8, 1977, 1125 U.N.T.S. 3 (1977), available at <http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument>; Robert Kolb and Richard Hyde, AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICT, 203 (2008); *Osman Bin Haji Mohamed Ali and Another v. Public Prosecutor* [1969] 1 A.C. 430. Also, H. Lauterpacht (ed.) L. Oppenheim, INTERNATIONAL LAW: A TREATISE, 7th Edition, Vol. II, 575 (1952).

⁴⁹ United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (Sep. 7, 1990), available at <http://www2.ohchr.org/english/law/firearms.htm>.

hostilities.⁵⁰ The failure to observe and respect the laws applicable for the treatment of POWs is considered a serious breach of the law of armed conflict and exposes the violating party to liability.⁵¹

*“Unlawful Combatant” Theory*⁵²

Recently, the Government of the United States of America has formulated a third category referred to as “unlawful combatant” in the context of war against terror. It defines an unlawful combatant as:⁵³

- (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
- (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

The unlawful combatant theory was formulated during the war on terror against the Taliban and Al-Qaeda in Afghanistan. Due to the unique nature of the conflict, the way it was fought, and the parties involved, the United States Government considered that some captured individuals were not entitled to the status of combatant. This was on the basis that they either belonged to a party that was not eligible for the status of combatant or their failure to satisfy some obligations necessary for the status, such as distinguishing themselves from the civilian population. The unlawful combatant theory effectively denies certain rights and privileges available to a regular combatant, such as the right to be treated as a prisoner of war, the right not to be prosecuted or imprisoned on account of taking part in the hostility, and the right to be repatriated after the conflict. Further, in some situations, the United States Government has adopted the method of “targeted killing” against certain persons that it has characterised as terrorist.

⁵⁰ Geneva Convention Relative to the Treatment of Prisoners of War, art. 5, and 118-119, Aug. 12, 1949, 75 U.N.T.S. 135; 6 U.S.T. 3316 (1949), available at <http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument>.

⁵¹ Geneva Convention Relative to the Treatment of Prisoners of War, arts. 13, Aug. 12, 1949, 75 U.N.T.S. 135; 6 U.S.T. 3316 (1949), available at <http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument>.

⁵² “Persons who belong to an armed group, but do not fulfil the (collective or individual) requirements for combatant status”; Knut Dormann, *The Legal Situation of Unlawful/Unprivileged Combatants*, 85 No. 849 INTERNATIONAL REVIEW OF THE RED CROSS 45 (2003).

⁵³ United States of America, Military Commissions Act of 2006, s. 948a (2006), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s3930enr.txt.pdf.

Pirates and Combatant Status

The circumstances surrounding piracy and piratical acts do not meet the requirements of an international armed conflict. Piratical acts do not amount to the use of force between two or more states. International law currently views piracy as being motivated by private ends and pirates are considered as private actors. Pirates are not described as *de facto* or *de jure* agents of any government. Similarly, attributing piratical acts to a state, for example even in the context of Somali, seems unlikely at present.

In perpetrating their acts of piracy, pirates often use violence to gain control over a vessel and its crew. The Security Council has noted the heavier weapons used by pirates and the growing sophistication in their organisation and method of attack. However, the situation would only qualify as a non-international armed conflict when the violence is protracted or its level of intensity has reached the threshold and when the group has organised themselves along military lines with a clear chain of command.⁵⁴ The violence would also have to take place within a state's territory.⁵⁵ Under the current nature and practice of pirates, it is difficult to reach the conclusion that piracy has reached the level required to be qualified as a non-international armed conflict. Current practice has demonstrated that when an encounter takes place between pirates and naval forces, it is usually sporadic, brief, and involves only small-scale fire.⁵⁶ More importantly, even if piratical acts do rise to the level of being able to be classified as a non-international armed conflict; pirates could not obtain the status of combatants. This is because combatant status is only available in the context of an international armed conflict.

Treating pirates as combatants would also be counter-productive and would defeat the purpose of the UNCLOS provisions and the concept of universal jurisdiction. The status would accord pirates the right to use force and fire arms lawfully, kill, capture, and detain enemy combatants, and make them immune from criminal prosecution unless they had violated the law of armed conflict. Similarly, if pirates were captured, they could not be prosecuted for participating in hostilities

⁵⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1(1), Jun. 8, 1977, 1125 U.N.T.S. 609; 26 I.L.M. 568 (1977), available at <http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument>; *Prosecutor v. Tadić*, Case No. ICTY-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Oct. 2, 1995).

⁵⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1(1), Jun. 8, 1977, 1125 U.N.T.S. 609; 26 I.L.M. 568 (1977), available at <http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument>.

⁵⁶ Douglas Guilfoyle, *The Laws of War and the Fight Against Somali Piracy: Combatants or Criminals?*, 11 MELBOURNE JOURNAL OF INTERNATIONAL LAW 1, 4 (2010).

or imprisoned. Instead, they would have to be detained in a camp and treated as POWs with accompanying rights and privileges, including repatriation at the end of hostilities.

Status of Pirates under Security Council Resolutions

The frequent and sophisticated situations of piracy off the coast of Somalia and around the Gulf of Aden prompted the international community, through the United Nations Security Council, to adopt several resolutions aimed at repressing and combating acts of piracy and prosecuting pirates. Between 2008 and 2012 the Security Council adopted 13 resolutions on piracy. Eleven relate to piracy off the coast of Somalia⁵⁷ and two relate to the Gulf of Guinea.⁵⁸ The Security Council considers the situation in Somalia to constitute a threat to international peace and security in the region.⁵⁹

Chapter VII Resolutions

Eight of the 11 Security Council resolutions relating to piracy off the coast of Somalia were adopted under Chapter VII of the United Nations Charter.⁶⁰ The Security Council affirmed or reaffirmed “that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982, sets out the legal framework applicable to combating piracy”.⁶¹ While the Security Council

⁵⁷ Security Council Resolution 1816, U.N. Doc. S/RES/1816 (Jun. 2, 2008); Security Council Resolution 1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008); Security Council Resolution 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008); Security Council Resolution 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008); Security Council Resolution 1897, U.N. Doc. S/RES/1897 (Nov. 30, 2009); Security Council Resolution 1918, U.N. Doc. S/RES/1918 (Apr. 27, 2010); Security Council Resolution 1950, U.N. Doc. S/RES/1950 (Nov. 23, 2010); Security Council Resolution 1976, U.N. Doc. S/RES/1976 (Apr. 11, 2011); Security Council Resolution 2015, U.N. Doc. S/RES/2015 (Oct. 24, 2011); Security Council Resolution 2020, U.N. Doc. S/RES/2020 (Nov. 22, 2011); Security Council Resolution 2077, U.N. Doc. S/RES/2077 (Nov. 21, 2012).

⁵⁸ Security Council Resolution 2018, U.N. Doc. S/RES/2018 (Oct. 31, 2011); Security Council Resolution 2039, U.N. Doc. S/RES/2039 (Feb. 29, 2012).

⁵⁹ Security Council Resolution 1816, U.N. Doc. S/RES/1816 (Jun. 2, 2008); Security Council Resolution 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008); Security Council Resolution 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008); Security Council Resolution 1897, U.N. Doc. S/RES/1897 (Nov. 30, 2009); Security Council Resolution 1950, U.N. Doc. S/RES/1950 (Nov. 23, 2010); Security Council Resolution 1976, U.N. Doc. S/RES/1976 (Apr. 11, 2011); Security Council Resolution 2015, U.N. Doc. S/RES/2015 (Oct. 24, 2011); Security Council Resolution 2020, U.N. Doc. S/RES/2020 (Nov. 22, 2011); Security Council Resolution 2077, U.N. Doc. S/RES/2077 (Nov. 21, 2012).

⁶⁰ Security Council Resolution 1816, U.N. Doc. S/RES/1816 (Jun. 2, 2008); Security Council Resolution 1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008); Security Council Resolution 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008); Security Council Resolution 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008); Security Council Resolution 1897, U.N. Doc. S/RES/1897 (Nov. 30, 2009); Security Council Resolution 1950, U.N. Doc. S/RES/1950 (Nov. 23, 2010); Security Council Resolution 2020, U.N. Doc. S/RES/2020 (Nov. 22, 2011); Security Council Resolution 2077, U.N. Doc. S/RES/2077 (Nov. 21, 2012).

⁶¹ Security Council Resolution 1816, U.N. Doc. S/RES/1816 (Jun. 2, 2008); Security Council Resolution 1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008); Security Council Resolution 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008); Security

acted under its Chapter VII mandate to combat piracy off the coast of Somalia, it is not considered as action in response to a case of armed conflict against a non-state actor.⁶² The resolutions do not suggest that the situation off the coast of Somalia has reached a level similar to that of an armed conflict. Adoption of the resolutions under Chapter VII of the United Nations Charter does not mean authorisation to use military means or the application of laws governing the conduct of war in the fight against piracy. The mere authorisation under Chapter VII does not make a situation fall within the law of armed conflict.

The Security Council resolutions call upon states to criminalize piracy in their domestic legislations and to prosecute pirates in their domestic courts.⁶³ This further reinforces the law enforcement nature of the fight against piracy under international law. The Security Council specifically urges states and international organisations to share evidence and information for anti-piracy law enforcement purposes to ensure effective prosecution of suspected pirates and imprisonment of convicted pirates.⁶⁴ Therefore, the Security Council resolutions do not change the enforcement regime provided by UNCLOS with respect to the treatment of pirates as suspected criminals under a law enforcement paradigm. Instead, the resolutions reiterate that any force used be consistent with law enforcement, and extend the operation of UNCLOS to the areas within the jurisdiction of Somalia. Although enforcement is by military and naval forces in and around Somalia, it does not alter the law enforcement regime or change the situation into that of an armed conflict whereby the law of armed conflict would be applicable.

Council Resolution 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008); Security Council Resolution 1897, U.N. Doc. S/RES/1897 (Nov. 30, 2009); Security Council Resolution 1950, U.N. Doc. S/RES/1950 (Nov. 23, 2010); Security Council Resolution 2020, U.N. Doc. S/RES/2020 (Nov. 22, 2011); Security Council Resolution 2077, U.N. Doc. S/RES/2077 (Nov. 21, 2012).

⁶² Martin D. Fink and Richard J. Galvin, *Combating Pirates off The Coast of Somalia: Current Legal Challenges*, 56 NETHERLANDS INTERNATIONAL LAW REVIEW 367, 376 (2009).

⁶³ Security Council Resolution 1897, preamble, U.N. Doc. S/RES/1897 (Nov. 30, 2009); Security Council Resolution 1918, para. 2, U.N. Doc. S/RES/1918 (Apr. 27, 2010); Security Council Resolution 1950, para. 13, U.N. Doc. S/RES/1950 (Nov. 23, 2010); Security Council Resolution 1976, paras. 13 and 14, U.N. Doc. S/RES/1976 (Apr. 11, 2011); Security Council Resolution 2015, para. 11, U.N. Doc. S/RES/2015 (Oct. 24, 2011); Security Council Resolution 2020, para. 15, U.N. Doc. S/RES/2020 (Nov. 22, 2011); Security Council Resolution 2077, para. 18, U.N. Doc. S/RES/2077 (Nov. 21, 2012).

⁶⁴ Security Council Resolution 1851, para. 3, U.N. Doc. S/RES/1851 (Dec. 16, 2008); Security Council Resolution 1897, para. 6, U.N. Doc. S/RES/1897 (Nov. 30, 2009); Security Council Resolution 1976, para. 19, U.N. Doc. S/RES/1976 (Apr. 11, 2011); Security Council Resolution 2015, para. 10, U.N. Doc. S/RES/2015 (Oct. 24, 2011); Security Council Resolution 2020, para. 21, U.N. Doc. S/RES/2020 (Nov. 22, 2011); Security Council Resolution 2077, para. 25, U.N. Doc. S/RES/2077 (Nov. 21, 2012).

Use of Force

Resolutions 1816, 1838, 1846, and 1851 dealt with the fight against piracy on the high seas or similar acts in the territorial sea of Somalia. Each authorises states to use “all necessary means”, “all necessary measures”, or “the necessary means”, in accordance with the international law governing action against pirates as set out in the UNCLOS.⁶⁵ One Security Council resolution relating to Somalia refers to international humanitarian law. Resolution 1851 notes that:⁶⁶

...States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia for which advance notification has been provided by the TFG to the Secretary-General may undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG, provided, however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law.

However, the reference cannot be taken to mean that the law of armed conflict is applicable in the absence of a situation of armed conflict.⁶⁷ Instead, it has been suggested that:⁶⁸

The provision appears to be a savings clause included out of abundance of caution. If pirates were also insurgents, or were defended or supplied by insurgents, then any foreign intervention force under *Resolution 1851* might find itself involved in an internal armed conflict where IHL would apply. In such cases, international counter-piracy forces on land might be ‘considered forces intervening in an otherwise internal conflict at the invitation of the [territorial] government’.

The authorisations are more appropriately viewed as permitting the use of *existing powers* under the laws of peace and the extension of those powers to Somalia’s territorial waters, rather than authorisation for the use of force which would trigger the applicability of the law of armed conflict.⁶⁹ Further, the reports of the United Nations Secretary General pursuant to these resolutions reinforces the applicability of human rights laws, as opposed to the laws of war, in guiding the “actions of States in all phases of counter-piracy operations, including the apprehension, detention, and prosecution of suspected pirates, as well as the imprisonment of

⁶⁵ Security Council Resolution 1816, para. 7(b), U.N. Doc. S/RES/1816 (Jun. 2, 2008); Security Council Resolution 1838, para. 3, U.N. Doc. S/RES/1838 (Oct. 7, 2008); Security Council Resolution 1846, para. 10(b), U.N. Doc. S/RES/1846 (Dec. 2, 2008); Security Council Resolution 1851, para. 6, U.N. Doc. S/RES/1851 (Dec. 16, 2008).

⁶⁶ Security Council Resolution 1851, para. 6, U.N. Doc. S/RES/1851 (Dec. 16, 2008).

⁶⁷ Douglas Guilfoyle, *The Laws of War and the Fight Against Somali Piracy: Combatants or Criminals?*, 11 MELBOURNE JOURNAL OF INTERNATIONAL LAW 1, 7 (2010).

⁶⁸ Douglas Guilfoyle, *The Laws of War and the Fight Against Somali Piracy: Combatants or Criminals?*, 11 MELBOURNE JOURNAL OF INTERNATIONAL LAW 1, 7 (2010).

⁶⁹ Douglas Guilfoyle, *The Laws of War and the Fight Against Somali Piracy: Combatants or Criminals?*, 11 MELBOURNE JOURNAL OF INTERNATIONAL LAW 1, 7 (2010).

convicted pirates.”⁷⁰ The authorisation for the use of all necessary means in repressing piracy must be viewed in the context of the Security Council Resolutions. The resolutions were restricted to Somalia and required the consent of the Transitional Federal Government of Somalia. The resolutions expressly provide that they do not establish customary international law.⁷¹

Law enforcement officials may have recourse to force only when all other means of achieving a legitimate objective have failed.⁷² The amount of force to be used must be proportionate to the threat posed.⁷³ The relevant UNCLOS provisions and the Security Council resolutions also recognise the use of force as a matter of necessity only. In the enforcement of UNCLOS provisions, use of reasonable force may be necessary depending on the situation in order to stop, seize a vessel and arrest persons on board.⁷⁴ This may become more justifiable where the situation involves the use of force by the pirates themselves. In the International Tribunal for the Law of the Sea (“the Tribunal”) case of the *M/V “Saiga” (No. 2)*, the issue centred on the use of force in the boarding, stopping and arresting of the ship.⁷⁵ The Tribunal held that the use of force must be avoided as far as possible. It noted that:⁷⁶

[t]he normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force.

⁷⁰ See for instance United Nations, *Report of the Secretary-General pursuant to Security Council Resolution 1950 (2010)*, para. 72 (Oct. 25, 2011), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/544/11/PDF/N1154411.pdf?OpenElement>

⁷¹ Security Council Resolution 1816, para. 9, U.N. Doc. S/RES/1816 (Jun. 2, 2008); Security Council Resolution 1838, para. 8, U.N. Doc. S/RES/1838 (Oct. 7, 2008); Security Council Resolution 1846, para. 11, U.N. Doc. S/RES/1846 (Dec. 2, 2008); Security Council Resolution 1851, para. 10, U.N. Doc. S/RES/1851 (Dec. 16, 2008); Security Council Resolution 1897, para. 8, U.N. Doc. S/RES/1897 (Nov. 30, 2009); Security Council Resolution 1918, preamble, U.N. Doc. S/RES/1918 (Apr. 27, 2010); Security Council Resolution 1950, para. 8, U.N. Doc. S/RES/1950 (Nov. 23, 2010); Security Council Resolution 2020, para. 10, U.N. Doc. S/RES/2020 (Nov. 22, 2011); Security Council Resolution 2077, para. 13, U.N. Doc. S/RES/2077 (Nov. 21, 2012).

⁷² United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, principle 4 (Sep. 7, 1990), available at <http://www2.ohchr.org/english/law/firearms.htm>.

⁷³ United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, principle 5 (Sep. 7, 1990), available at <http://www2.ohchr.org/english/law/firearms.htm>.

⁷⁴ United Nations Convention on the Law of the Sea, art. 105, Dec. 10, 1982, 1833 UNTS 3; 21 ILM 1261 (1982) available at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

⁷⁵ *The M/V “Saiga” (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment, 120 I.L.R. 143 (Jul. 1, 1999).

⁷⁶ *The M/V “Saiga” (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment, 120 I.L.R. 143, para. 156 (Jul. 1, 1999).

While the authorisation to deploy naval vessels and military aircrafts in repressing piracy has prompted a military response to an essentially criminal act, such responses are justified primarily on the basis that they are the means best suited for the situation. These actions must be viewed in the context of the reaffirmation by the Security Council that UNCLOS continues to be the legal framework applicable to combating piracy. The exception is that the resolutions authorised applying UNCLOS beyond its geographical scope to include Somali territorial waters and lands.

Conclusion

From the time of its conception, piracy has always been recognized as a crime under international law and pirates as enemies of mankind. International law has for some time recognised the rights of every state to universal jurisdiction in the prosecution of pirates. The international legal framework for repressing piracy is UNCLOS. Provisions relevant to piracy in UNCLOS were drafted essentially within the law enforcement perspective. Pirates are required to be arrested and prosecuted under domestic laws operating in peace time. The definition and nature of piracy do not provide a ground upon which to conclude that pirates may be treated as combatants. Combatant status is only available in situations of international armed conflict. Further, combatant status is restricted to a certain category of individuals (the armed forces of a state who is party to the armed conflict).

The Security Council has adopted several resolutions in the fight against piracy authorising all necessary means to be used, including the deployment of naval vessels and military aircrafts. However, the resolutions did not provide for the treatment of pirates as combatants. The resolutions specifically reaffirmed the applicability of UNCLOS in repressing acts of piracy. Reasonable force may be used depending on the circumstances, but the rules relevant to the use of such force in peacetime must be observed. Failure to observe these rules would expose the violating state to international responsibility. The authorisations contained in Security Council Resolutions cannot be taken to mean the use of force beyond what is allowed under UNCLOS.

There is no international instrument authorising or recognising pirates as combatants. As the law and acts of piracy currently stand, pirates are to be considered as suspected criminals. Acts of piracy do not meet the threshold of an armed conflict. Therefore, the law of armed conflict does not apply and combatant status is not applicable to pirates.

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The Public International Law & Policy Group, a 2005 Nobel Peace Prize nominee, is a non-profit organization which operates as a global *pro bono* law firm providing free legal assistance to states, governments and groups negotiating and implementing peace agreements, drafting post-conflict constitutions, and prosecuting war criminals. To facilitate the utilization of this legal assistance, PILPG also provides policy formulation advice and training on matters related to conflict resolution.

PILPG's four primary practice areas are:

- **Peacebuilding**
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- **Post-Conflict Political Development**
- **Public International Law**

To provide *pro bono* legal advice and policy formulation expertise, PILPG draws on the volunteer services of over sixty former legal advisors and former Foreign Service officers from the US Department of State and other foreign ministries. PILPG also draws on *pro bono* assistance from major international law firms including Baker & McKenzie; Covington & Burling; Curtis, Mallet-Prevost, Colt and Mosle; DLA Piper; Sullivan & Cromwell; Steptoe & Johnson; Milbank, Tweed, Hadley & McCloy; WilmerHale; Vinson & Elkins; and graduate international affairs and law students at American University and Case Western Reserve Schools of Law. Annually, PILPG is able to provide over \$10 million worth of *pro bono* international legal services.

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PILPG was founded in London in 1995 and moved to Washington, D.C. in 1996, where it operated under the auspices of the Carnegie Endowment for International Peace for two years. PILPG currently maintains an association with American University in Washington, D.C., and Case Western Reserve University in Cleveland, Ohio. In July 1999, the United Nations granted official Non-Governmental Organization status to PILPG.

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