

# The Prosecution of Pirates and the Enforcement of Counter-Piracy Laws Are Virtually Incapacitated by Law Itself

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## ABSTRACT

*The legal framework to fight and suppress piracy is embodied largely in the United Nations Convention on the Law of Sea (“UNCLOS”), 1982, which is supplemented by United Nations Security Council Resolutions, and international conventions and treaties. This Article aims to critique the existing legal framework against piracy and challenge its efficacy in successfully curbing and eradicating piracy around the world throughout history. Unlike the extensive literature on legal studies of piracy, this Article recognizes piracy as a global menace, rather than observing it through the lens of regional differences. Consequently, this Article seeks to identify crevices and holes within the definitional and jurisdictional approach toward counter-piracy laws. The legal requirements under the UNCLOS definition of piracy, such as the violence requirement, the private ends requirement, the private ship requirement, the two-ship requirement, and the high seas requirement will be comprehensively explored in this Article. These characteristics of the definition of piracy will be examined as impediments to the enforcement of counter-piracy laws. Likewise, in addition to the definitional approach, the jurisdictional concerns that impair the execution of the counter-piracy legal framework will be extensively discussed. Within this context, legislative issues, law enforcement issues, and adjudicative concerns, with special regard to particular matters of valid arrest requirements, TFG consent, and human rights perspectives, will be scrutinized in depth as obstructions to the prosecution of pirates and the enforcement of counter-piracy laws.*

## INTRODUCTION

Although piracy is an international menace, it is specifically associated with the increased activities off the coast of Somalia and in the Gulf of Aden, particularly during the first decade of this century.<sup>1</sup> In contrast, the combined efforts of the relevant regional authorities have successfully curbed piracy incidents in Southeast Asia.<sup>2</sup>

Since the 1990s, pirates have increasingly ransomed ships and their crews in territorial seas close in proximity to Somalia’s coasts and the Gulf of Aden, while also looting assets and shipments.<sup>3</sup> These pirates have, at

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1. See U.N. OFF. DRUGS & CRIME, THE GLOBALIZATION OF CRIME: A TRANSNATIONAL ORGANIZED CRIME THREAT ASSESSMENT, at 268, U.N. SALES NO. E.10.IV.6 (2010).

2. Tamara Renee Shie, *Maritime Piracy in Southeast Asia: The Evolution and Progress of Intra-ASEAN Cooperation*, in PIRACY, MARITIME TERRORISM AND SECURING THE MALACCA STRAITS 163, 175–75 (Graham Gerard Ong-Webb ed., 2006).

3. See Melissa Simpson, *An Islamic Solution to State Failure in Somalia?*, in TERRORISM IN AFRICA: THE EVOLVING FRONT IN THE WAR ON TERROR 9, 14 (John Davis ed., LEXINGTON BOOKS, 2010).

times, also claimed that they are defending Somalia's interests through piracy.<sup>4</sup> This avowal holds some truth, since Somalia's sea territory has been used as a dumping ground for toxic waste and has been exploited by foreign fisheries due to ineffective and impotent governmental control.<sup>5</sup> Weak authoritative governance, the non-enforcement of laws, increasing plunder, and internal political turmoil in Somalia have increased the numbers of pirates and the occurrence of piracy in general.<sup>6</sup> New recruits into these armed groups have largely included fine fishermen, who are adept at sailing.<sup>7</sup> This threat creates unnavigable regions, mainly in the "Suez Canal, [including the] Gulf of Aden [and between the] Horn of [the] African Continent [and the] Arabian Peninsula."<sup>8</sup> In fact, pirates have even gone far off the coasts of Somalia to capture ships.<sup>9</sup> This loot and unnavigable waters crawling with parasitic pirates have made international shipping through these watercourses nearly impossible,<sup>10</sup> and has notoriously developed a category of humankind, classified by the disparaging term "pirates."<sup>11</sup> This classification is comparable to "terrorists," which is used to classify particular human beings as a detestable subspecies of mankind.<sup>12</sup>

In a number of instances, the Security Council ("SC") has maintained that pirates and piracy in general are a threat to international peace and security.<sup>13</sup> In its own words, the SC has stated that pirates and piracy "exacerbate the situation in Somalia which continues to constitute a threat to international peace and security in the region."<sup>14</sup> To reinforce that the matter of piracy is not substantially resolved and continues to pose a great threat to the global community, SC Resolution 1816 of 2008 added that:

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4. See Victoria Ellen Collins, *Somali pirates: victims of perpetrators or both?*, in TOWARDS A VICTIMOLOGY OF STATE CRIME 66, 73 (Dawn L. Rothe & David Kauzlarich eds., 2014).

5. See *id.* at 73–74.

6. JADE LINDLEY, SOMALI PIRACY: A CRIMINOLOGICAL PERSPECTIVE 48–50 (2016).

7. Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20 EUR. J. OF INT'L L. 400, 400 (2009).

8. See *id.*

9. ANDREW PALMER, THE NEW PIRATES: MODERN GLOBAL PIRACY FROM SOMALIA TO THE SOUTH CHINA SEA 167 (2014).

10. See Treves, *supra* note 7, at 400.

11. See *id.*

12. See *id.*

13. E.g., ROBIN GEISS & ANNA PETRIG, PIRACY AND ARMED ROBBERY AT SEA: THE LEGAL FRAMEWORK FOR COUNTER-PIRACY OPERATIONS IN SOMALIA AND THE GULF OF ADEN 180 (2011); S.C. Res. 1816 (June 2, 2008).

14. E.g., GEISS & PETRIG, *supra* note 13; S.C. Res. 1816, *supra* note 13.

[T]he long-term delay in the settlement of the Somali issue is posing a serious threat to international peace and security, while the rampant piracy off the Somali coast has worsened the security situation in Somalia.<sup>15</sup>

Accordingly, this Article explores whether the existing legal framework, which seeks to suppress and fight piracy, is sufficient. This Article is divided into three sections. Section I will address the international legal framework to suppress piracy by first discussing the development of the international conventions, treaties, and UNSC resolutions. Then, attention will turn to the United Nations Convention on the Law of the Sea (“UNCLOS”) of 1982 and its leading role as a global instrument against piracy. Section II.A. will discuss the definitional concerns of piracy as practical impediments to the execution of counter-piracy laws. Five requirements under the UNCLOS piracy definition will be considered, along with the criticism it has received. Finally, Section III will inspect the jurisdictional concerns in the prosecution of pirates and is divided into three subsections. Section III.A. will deal with legislative issues. Section III.B. will cover law enforcement issues, with special regard to the specific matters of valid arrest requirements, TFG consent, and human rights perspectives. Finally, Section III.C will address the adjudicative concerns over the enforcement of counter-piracy laws.

## I. COUNTER-PIRACY INTERNATIONAL LAW

This section of the Article discusses international laws against piracy. First, it starts with a brief anatomical development of counter-piracy international laws. Then, it proceeds to explain the legal framework to curb piracy under the UNCLOS. Within this context, the legal machinery to fight terrorism is set out concisely to give a glimpse of the existing legal framework to curb piracy, so that the later sections of this Article can build upon the previously established legal notions.

In the initial stage of codifications regarding piracy, the preliminary report against piracy was prepared by the League of Nations.<sup>16</sup> But, because Member States did not consider piracy a widespread problem, the report

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15. Tullio Treves, *Piracy and the international law of the sea*, in MODERN PIRACY: LEGAL CHALLENGES AND RESPONSES 117, 123–24 (Douglas Guilfoyle ed., 2013); Tullio Treves & Cesare Pitea, *Piracy, International Law and Human Rights*, in THE FRONTIERS OF HUMAN RIGHTS: EXTRATERRITORIAL AND ITS CHALLENGES 89, 91 (Nehal Bhuta ed., 2016); see also S.C. Res. 1816, *supra* note 13.

16. See MD SAIFULLAH KARIM, MARITIME TERRORISM & THE ROLE OF JUDICIAL INSTITUTIONS IN THE INTERNATIONAL LEGAL ORDER 49 (Robin Churchill & Alex Oude Elferink eds., 2016); see *Report to the Council of the League of Nations on the Questions which Appear Ripe for International Regulation* (1927) 22 AM. J. INT’L L. 4, 4–38 (Supp. 1928).

did not receive the attention it needed.<sup>17</sup> Later, in 1932, the *Harvard Research Draft* introduced the first ever customary law against piracy, empowering each state with jurisdiction to combat piracy.<sup>18</sup> In 1958, the Geneva Convention on the High Seas (“GCHS”) occurred and Articles 14–21 were established.<sup>19</sup> After, the *Harvard Research Draft* formed the foundations of the International Law Commission’s work concerning piracy in the GCHS,<sup>20</sup> and subsequently, the UNCLOS codified eight provisions, Articles 100–107, which relate to piracy.<sup>21</sup> These articles mirrored Articles 14–21 of the GCHS.<sup>22</sup> However, the UNCLOS does not cover the regulations suggested in a 1970 report by the International Law Association.<sup>23</sup>

In addition to the GCHS and the UNCLOS, there are two other areas of international law that cover “piracy.” The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988 (“SUA Convention”) suppresses acts of piracy, but goes one step further than the UNCLOS by including political offenses within the scope of piracy.<sup>24</sup> The SUA Convention has 166 parties as of 2017, but only sixteen ratifications.<sup>25</sup>

17. Vladimir Golitsyn, *Maritime Security (Case Piracy)*, in 2 COEXISTENCE, COOPERATION & SOLIDARITY 1157, 1159 (Holger P. Hestermeyer et al. eds., 2012).

18. See Eugene Kontorovich, *Pirate ‘Gaobalisation’: Dividing Responsibility Among States, Companies, and Criminals*, in DISTRIBUTION OF RESPONSIBILITIES IN INTERNATIONAL LAW 386, 388 (André Nollkaemper et al. eds., 2015); see also Draft Convention on Piracy, with Comment (1932), reprinted in 26 AM. J. INT’L L. 739, 743–48 (Supp. 1932).

19. See PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 189 (7th rev. ed. 2002); see also Geneva Convention on the High Seas, arts. 14–21, opened for signature Apr. 29, 1958, 450 U.N.T.S. 11 (entered into force Sept. 30, 1962).

20. PROF. K. R. SINGH, *COASTAL SECURITY: MARITIME DIMENSIONS OF INDIA’S HOMELAND SECURITY* 66 (2012); see similarities between Draft Convention on Piracy, with comment, *supra* note 18 and Geneva Convention on the High Seas, *supra* note 19.

21. JAMES KRASKA, *CONTEMPORARY MARITIME PIRACY: INTERNATIONAL LAW, STRATEGY & DIPLOMACY AT SEA* 127 (2011); see U.N. Convention on the Law of the Sea art. 100-07, opened for signature Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).

22. SINGH, *supra* note 20; see Geneva Convention on the High Seas, *supra* note 19.

23. See SINGH, *supra* note 20, at 63–70; Compare U.N. Convention on the Law of the Sea, *supra* note 21, with Int’l L. Ass’n Report on the Fifty-Fourth Hague Conference, at 706–71 (1970).

24. Ke Xu, *Piracy and Energy Security in Southeast Asian Waters*, in ASIAN ENERGY SECURITY: THE MARITIME DIMENSION 183, 197 (Hongyi Lai ed., 2009); see also Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation art. 3, Mar. 10, 1988, 1687 U.N.T.S. 221 [hereinafter SUA Convention].

25. See, Int’l Mar. Org., *Statuses of Conventions*, IMO.ORG (AUG. 11, 2017), <http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx> [<https://perma.cc/5AEG-FA7R>].

Unlike the UNCLOS, it criminalizes other maritime offenses, such as the presence of explosives or dangerous material that can destroy or harm ships.<sup>26</sup> It further allows searches of vessels or ships on reasonable grounds of suspicion regarding performances of offenses enlisted under the SUA Convention.<sup>27</sup>

The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia of 2006 (“RECAAP”) curbs piracy in Asia.<sup>28</sup> This convention only has a handful of ratifications and sixteen signatories, due in part to it deliberately targeting only victim coastal states in Asia.<sup>29</sup> This tool obliges Member States to employ their available resources to seize pirate ships and to cooperate with other States with the best possible approaches.<sup>30</sup> More recently, UNSC resolutions such as Resolution 1897 (2009) and Resolution 1976 (2011) have respectively urged States to bring their domestic laws into conformity with the UNCLOS to suppress piracy and to prosecute pirates in an effort to enforce counter-piracy laws effectively.<sup>31</sup>

Finally, the remainder of this section discusses articles 100, 107, and 110 of the UNCLOS of 1982, also known as the Law of the Sea Convention (“LOSC”).<sup>32</sup> Almost all major States, 168 in total, are parties to the UNCLOS, which is why the UNCLOS is the governing law against piracy globally.<sup>33</sup> However, a few of the most influential states are not parties; the United States of America, Iran, North Korea, the United Arab Emirates, and nine

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26. James Kraska, *America’s maritime challenges and priorities: The Asian dimension*, in *MARITIME CHALLENGES & PRIORITIES IN ASIA: IMPLICATIONS FOR REGIONAL SECURITY* 239 (Joshua H. Ho & Sam Bateman eds., 2013); *see also* SUA Convention, *supra* note 24.

27. MD SAIFULLAH KARIM, *supra* note 16, at 62; *see also* SUA Convention, *supra* note 24, at art. 8.

28. Nur Jale Ece, *The Maritime Dimension of International Security: Piracy Attacks*, in *MARITIME SECURITY AND DEFENCE AGAINST TERRORISM* 11, 26 (F. Bora Uzer ed., 2012); *The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia* (2006) [hereinafter RECAAP].

29. *See* Ece, *supra* note 28, at 26.

30. RAMSES AMER ET AL., *THE SECURITY–DEVELOPMENT NEXUS: PEACE, CONFLICT & DEVELOPMENT* 70–71 (2013); *see also* RECAAP, *supra* note 28, at art. 2–3.

31. ANNA PETRIG, *HUMAN RIGHTS & LAW ENFORCEMENT AT SEA: ARREST, DETENTION & TRANSFER OF PIRACY SUSPECTS* 29 (2014); *see also* S.C. Res. 1976, ¶ 13 (2011); S.C. Res. 1897, ¶ 6 (2009).

32. Clive R. Symmons, *Use of the Law of Piracy to Deal with Violent Inter-Vessel Incidents at Sea beyond the 12-Mile Limit: The Irish Experience*, in *SELECTED CONTEMPORARY ISSUES IN THE LAW OF THE SEA* 169, 186 (Clive R. Symmons ed., 2011); *see generally* U.N. Convention on the Law of the Sea, *supra* note 21. The relevant articles of UNCLOS are 100–107 and 110, which address piracy. *Id.*

33. MD SAIFULLAH KARIM, *supra* note 16, at 160; to see the chronology of ratification and detailed information regarding the United Nations Convention on the Law of the Sea (1982), visit: [http://www.un.org/depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm) [<https://perma.cc/K4VT-8VGJ>].

other states are only signatories.<sup>34</sup> Additionally, Israel, Turkey, Venezuela, Syria, Peru, and ten other countries are neither parties nor signatories,<sup>35</sup> though it is a distinction without any difference but in theory, as being a signatory gives you a little additional power from being a concurring party.<sup>36</sup> Nevertheless, the wordings of the UNCLOS against piracy are an exact reproduction of Articles 14–22 of the GCHS.<sup>37</sup> Almost all States that are not parties to the UNCLOS are parties to the GCHS,<sup>38</sup> which is why the rules and regulations set out in the UNCLOS remain governing law.<sup>39</sup> Furthermore, the legal framework against piracy in the UNCLOS is in force, and it is deemed customary international law against states that remain outside the scope of either convention, the UNCLOS or the GCHS.<sup>40</sup> Thus, undeniably, the UNCLOS regulates the legal machinery against piracy globally.<sup>41</sup>

Specifically, this Article will look specifically at Articles 100 through 106 of the UNCLOS in its analysis. First, Article 100 of the UNCLOS mandates every Member State to cooperate with other nations to repress piracy in the high seas, including all waters outside the internal waters of

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34. HOUSE OF COMMONS FOREIGN AFFAIRS COMMITTEE, PIRACY OFF THE COAST OF SOMALIA, 2011, HC 1318, at 86–87 (UK). To see the chronology of ratification and detailed information regarding United Nations Convention on the Law of the Sea (1982), visit: [http://www.un.org/depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm) [<https://perma.cc/K4VT-8VGJ>].

35. *Id.*

36. THOMAS F. KING, SAVING PLACES THAT MATTER: A CITIZEN'S GUIDE TO THE NATIONAL HISTORIC PRESERVATION ACT 195 (2007).

37. PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 189 (7th ed. 2002); Geneva Convention on the High Seas, *supra* note 19, at art. 14–22.

38. To see the chronology of ratification and detailed information regarding the Geneva Convention on the High Seas (1958), visit: <http://legal.un.org/avl/ha/gclos/gclos.html> [<https://perma.cc/EY5Z-VAGW>].

39. Treves, *Piracy*, *supra* note 7, at 401.

40. *Id.*

41. *See id.*

any sovereign state.<sup>42</sup> Notably, Exclusive Economic Zones<sup>43</sup> (“EEZs”) are included in the high seas only for these purposes.<sup>44</sup>

Second, Article 101 defines piracy, charting various prerequisites and criteria providing a complete analysis as to what constitutes piracy.<sup>45</sup> The definition of piracy and its characteristics, coupled with the criticism of the limitations it offers, is expanded upon in the next section, but for the purposes of this section, piracy under the UNCLOS includes illicit actions committed by offenders in private vessels or ships against any ship or vessel or property for private ends in the high seas.<sup>46</sup> Additionally, voluntary participation or intentional assistance of these activities is also considered piracy.<sup>47</sup>

Third, Article 102 explains that, if pirates or offenders take over a government ship or warship is taken over by pirates or offenders by harming the original crew, the ship will be considered a pirate ship.<sup>48</sup>

Fourth, to resolve any confusion, Article 103 defines a pirate ship.<sup>49</sup> In a comprehensive explanation, it states that if the controlling agents of a ship intend to carry out the offenses of piracy listed in Article 101, the vessel or ship in question is said to be a pirate ship.<sup>50</sup>

Fifth, Article 104 delimits the retention or loss of nationality of a ship. It sets forth that the nationality of a vessel may remain intact even after

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42. Eric A. Heinze, A “Global War on Piracy?” *International Law and the Use of Force against Sea Pirates*, in *MARITIME PIRACY & THE CONSTRUCTION OF GLOBAL GOVERNANCE* 47, 52 (Michael J. Struett et al. eds., 2013); *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 100.

43. An exclusive economic zone is the area beyond, but adjacent to territorial seas and subject to the specific legal regime established in the UNCLOS. *See* U.N. Convention on the Law of the Sea art. 55, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).

44. GEISS & PETRIG, *supra* note 13, at 65; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 58, 100–01.

45. KRASKA *supra* note 21, at 128–32; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 101.

46. *See* KRASKA, *supra* note 21, at 128–32; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 101.

47. NEIL BOISTER, *AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW* 30 (2012); *see also* KAMAL-DEEN ALI, *MARITIME SECURITY COOPERATION IN THE GULF OF GUINEA* 117 (2015); *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 101.

48. *International Maritime Organization Circular 3180*, in 125 *TERRORISM: COMMENTARY ON SECURITY DOCUMENTS: PIRACY & INTERNATIONAL MARITIME SECURITY—DEVELOPMENTS THROUGH 2011* 483, 490 (Kristen E. Boon, Aziz Huq & Douglas C. Lovelace, Jr. eds., 2012); *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 102.

49. *See* GEISS & PETRIG, *supra* note 13, at 65; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 103.

50. *See* GEISS & PETRIG, *supra* note 13, at 65; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 103.

the ship has transformed into a pirate ship.<sup>51</sup> This Article further clarifies that the principle of retention is dependent on the national laws of the concerned ship or vessel, which will determine whether there is retention or loss of nationality.<sup>52</sup>

Finally, Articles 105 and 106 relate to the arrest and seizure of pirates and pirate ships,<sup>53</sup> which is discussed in depth in Section III of this Article. Article 105 provides universal jurisdiction to every state of the world, stating every State can seize a pirate ship and arrest its crew members.<sup>54</sup> It adds that the policing State is free to determine the sanctions, fines, or retaliatory actions to be implemented against pirates and pirate ship.<sup>55</sup> However, it also offers a particular regulation, holding special consideration should also be given to safeguarding the rights of third parties involved in good faith, such as the vendors of shipments.<sup>56</sup> Article 106 offers protection to the interests of neutral parties: if the policing State seizes a ship without reasonable grounds, it shall be liable to pay for damage caused to a non-pirate ship.<sup>57</sup>

In conclusion, several international conventions have codified laws against piracy,<sup>58</sup> however, the UNCLOS is the governing law toward Member States as a Convention, and toward non-Member States as customary international law.<sup>59</sup> In addition, certain UN resolutions play a beneficial

51. See KRASKA, *supra* note 21 at 131–32; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 104.

52. See KRASKA, *supra* note 21 at 131–32; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 104.

53. Robert C. Beckman, *The piracy regime under UNCLOS: problems and prospects for cooperation*, in PIRACY AND INTERNATIONAL MARITIME CRIMES IN ASEAN: PROSPECTS FOR COOPERATION 17, 26 (Robert C. Beckman & J. Ashley Roach eds., 2012); *see* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 105–06.

54. See GEISS & PETRIG, *supra* note 13, at 65; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 105.

55. See GEISS & PETRIG, *supra* note 13, at 65; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 105.

56. See GEISS & PETRIG, *supra* note 13, at 65; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 105.

57. See Beckman, *supra* note 53, at 26; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 106.

58. See generally U.N. Convention on the Law of the Sea, *supra* note 21; *see* Geneva Convention on the High Seas, *supra* note 19; SUA Convention, *supra* note 24.

59. Robert Beckman, *Jurisdiction over Pirates and Maritime Terrorists*, in THE LIMITS OF MARITIME JURISDICTION 349, 351 (Clive H. Schofield et al. eds., 2013).

role in curbing piracy, such as UN Resolutions 1816 and 1851.<sup>60</sup> The UNCLOS mainly defines what piracy is,<sup>61</sup> what kind of ships can be considered pirate ships,<sup>62</sup> when hijacked national ships can be retained, and the interests of third parties.<sup>63</sup> It also sets out regulations regarding the apprehension of pirates and the seizure of pirate ships.<sup>64</sup> These notions of piracy and the arrest and seizure of pirates and pirate ships is discussed in Section III in detail. The notion of hot pursuit against pirates and the role of UN resolutions coupled with other jurisdictional issues involved in fighting piracy is also discussed in Section III. Accordingly, Section II discusses definitional concerns of piracy.

## II. DEFINITIONAL CONCERNS

The primary question at issue in this section is what piracy is, and what constitutes piracy within the defined limits within the legal framework of international law. Article 101 of the UNCLOS defines piracy. It reads as follows:

Piracy consists of any of the following acts:

- (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;

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60. DOUGLAS GUILFOYLE, *SHIPPING INTERDICTION & THE LAW OF THE SEA* 153 (2009); *see also* S.C. Res. 1816, *supra* note 13; S.C. Res. 1851 (Dec. 16, 2008).

61. BOISTER, *supra* note 47, at 30; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 101.

62. GEISS & PETRIG, *supra* note 13, at 64–65; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 104.

63. KRASKA, *supra* note 21, at 128–32; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 104.

64. *See* Beckman, *supra* note 53, at 26; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 105–06.

- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).<sup>65</sup>

The aspects and criteria within this UNCLOS definition can be divided into five categories, referred to as Factors 1, 2, 3, 4, and 5 in the following discussion.

This section examines the requirements presented in the UNCLOS definition of piracy. Five requirements—namely the violence, private ends, private ship, two-ship, and high seas requirements—will be discussed in the course of identifying the impediments to the execution of counter-piracy laws.<sup>66</sup> Thereafter, criticism against the UNCLOS piracy definition will also be briefly discussed.

#### *A. Violence Requirement*

Factor 1 suggests that, as a minimum, illicit activities of violence, detention, or depredation must exist as a prerequisite to constitute piracy. The use of the word “or” suggests that the activities of violence, detention, and depredation can each dispositively establish an act of piracy.<sup>67</sup> However, these terms are not explained in any greater detail or specification.<sup>68</sup> Nevertheless, academics have pointed out that these activities can be targeted against personnel or property on board.<sup>69</sup> Furthermore, it is also evident that *attempts* to undertake such activities are not covered within the ambit of this definition.<sup>70</sup> Similarly, an important question is what happens if piracy is committed without depredation, violence, or detention. This remains unanswered. For example, what if the whole crew of a victim ship becomes accomplices of the pirates and agreeably helps them in the execution of their plan? Would it be considered piracy? In such a situation, there are real pirates, who are lucratively looting the ship. So, while, arguably,

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65. U.N. Convention on the Law of the Sea, *supra* note 21, at art. 101; *see also* KAMAL-DEEN ALI, *supra* note 47, at 117; *see also* KRASKA, *supra* note 21, at 128–32; *see also* BOISTER, *supra* note 47, at 30.

66. BOISTER, *supra* note 47, at 30; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 101 (for definitional requirements of piracy).

67. KAMAL-DEEN ALI, *supra* note 47, at 117; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 101.

68. KRASKA, *supra* note 21, at 128–32; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 101.

69. YOSHIFUMI TANAKA, *THE INTERNATIONAL LAW OF THE SEA* 379 (2015).

70. *See id.* at 379–82.

this scenario should be considered an act of piracy, it cannot be deemed piracy under the UNCLOS.

### *B. Private Ends Requirement*

Factor 2 of the UNCLOS definition requires that the illicit activities are attributed towards personal or private gain.<sup>71</sup> This means that in order to bring any illegal activity within the definition of piracy, it must be committed for personal or private gain.<sup>72</sup> This factor is divided into two schools of thought. The first suggests that illegal activities that are executed for governmental, political, or insurgent motives do not constitute piracy, as such activities are political in nature and have something to do with the state.<sup>73</sup> To this end, the intention of the accused determines whether an act is one of piracy, which makes this ideology very subjective in practice.<sup>74</sup> The other school of thought considers that “private ends” in the definition includes all activities that are not endorsed by the state, so all activities that are insurgent or political in nature are also covered.<sup>75</sup> However, there is an unsettling implication in this theory because all private ships with mere imagined intentions would no longer fall within the definition of piracy.<sup>76</sup>

This confusion is more eloquently clarified through the renowned incident of the ship *Santa Maria*. In 1961, a political rebel named Captain Galvão captured the Portuguese ship *Santa Maria*.<sup>77</sup> It is important to note that Captain Galvão and his other associates were passengers of the *Santa Maria*, and they hijacked the ship for their own political interests.<sup>78</sup> Captain Galvão claimed the insurgency was a stepping-stone toward rebellion against the state.<sup>79</sup> Portuguese authorities declared this activity as piracy, but the accused sailed the ship to Brazil, where they were granted political asylum.<sup>80</sup> The Portuguese government did not endorse the hijacking of the ship; rather, it was taken for private ends, as required by the definition

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71. BOISTER, *supra* note 47, at 30; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 101.

72. KAMAL-DEEN ALI, *supra* note 47, at 117 (BRILL, 2015); *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 101.

73. *See* TANAKA, *supra* note 69, at 379–82.

74. *See id.*

75. *See id.*

76. *See id.*

77. TOR SELLSTROM, SWEDEN AND NATIONAL LIBERATION IN SOUTHERN AFRICA: FORMATION OF A POPULAR OPINION [1950–1970] 392 (1999).

78. RUPERT HERBERT-BURNS, SAM BATEMAN, & PETER LEHR, LLOYD’S MIU HANDBOOK OF MARITIME SECURITY 67 (2008).

79. *See* SELLSTROM, *supra* note 77, at 392–93.

80. *See id.*; *see also* HERBERT-BURNS, *supra* note 78, at 392–67.

of piracy.<sup>81</sup> Ultimately, the incident was not considered piracy, as the two-ship requirement was not completed.<sup>82</sup> However, academics such as Yoshifumi Tanaka and Professor Brownlie have assessed this case and the motivations of the offenders, explaining that material motives are defining facets in establishing the offense of piracy, including the offenders' inspirations and the relationship of the offenders with the state and the victims in light of political agendas.<sup>83</sup> Through this, they believe that political and insurgent behavioral activities cannot be considered acts of piracy.<sup>84</sup> Of course, this does not mean that offenders cannot be sanctioned for any offense at all, since the debate specifically discusses piracy within the true confines of the definition under Article 101 of the UNCLOS.<sup>85</sup> It does, however, raise an interesting debate about whether intentions or motivations of an offender can deem a ship public in a true sense. In addition, contrary to this case, the question is answered in the *Sea Shepherd Case* of 2013,<sup>86</sup> which will be discussed later in detail.

In another instance, the case of *Castle John v. NV Babeco* in 1986 raised an issue about whether certain violent activities by environmental activists can be considered piracy.<sup>87</sup> In this case, Greenpeace associates captured and damaged two Dutch ships that were polluting the seawater.<sup>88</sup> In these specific circumstances of these activities, the Cassation Court of Belgium maintained that, since the actions of activists were committed for private ends, the offenses came under the definition of piracy and, indeed, the accused had committed piracy.<sup>89</sup>

Furthermore, in a similar and recent case in 2013 between the Institute of Cetacean Research Group and the Sea Shepherd Conservation Society

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81. TANAKA, *supra* note 69, at 379–82.

82. *See id.*

83. *See id.*

84. *See id.*

85. KAMAL-DEEN ALI, *supra* note 47, at 117 (BRILL, 2015); *see also* the definition of piracy in U.N. Convention on the Law of the Sea, *supra* note 21, at art. 101.

86. MONIKA AMBUS & RAMSES A. WESSEL, NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 201: PREDICTABILITY: TEMPORARINESS IN INTERNATIONAL LAW 377 (2015); *see also* Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y, 708 F.3d 1099 (9th Cir. 2013).

87. TANAKA, *supra* note 69, at 356; *see also* *Castle John v. NV Babeco*, 77 I.L.R. 537 [Cass.] [Court of Cassation], Dec. 19, 1986 (Belg.).

88. *See* TANAKA, *supra* note 69, at 356; *see also* *Castle John v. NV Babeco*, 77 I.L.R. 537 [Cass.] [Court of Cassation], Dec. 19, 1986 (Belg.).

89. *See* TANAKA, *supra* note 69, at 356; *see also* *Castle John v. NV Babeco*, 77 I.L.R. 537 [Cass.] [Court of Cassation], Dec. 19, 1986 (Belg.).

that involved whale hunting, the United States Ninth Circuit Court of Appeals lucidly defined the private ends aspect.<sup>90</sup> The Sea Shepherd Conservation Society members damaged the ships of a Japanese whale research group in the name of conserving whales' lives.<sup>91</sup> In this case, the court defined private ends as follows: "[P]rivate ends include those pursued on personal, moral, or philosophical grounds, such as Sea Shepherd's professed environmental goals. That the perpetrators believe themselves to be serving the public good does not render their ends public."<sup>92</sup> The court maintained that the activists' violent activities were the very embodiments of piracy.<sup>93</sup> Despite these respective cases in the national courts of two separate States,<sup>94</sup> the true meaning of the "private ends" as a requirement of constructing piracy<sup>95</sup> remains open to interpretation by the international community. It is pertinent to note that the outcomes of these cases oppose the rule established in the *Santa Maria* case, where the mere intentions of the offenders were sufficient to establish the pirate ship as a public vessel.<sup>96</sup> Such conflicting principles in case law construct a legal safe haven for pirates, allowing them to use the existing legal framework to suit their own interests.

### C. Private Ship Requirement

Moving on to Factor 3, this characteristic of the piracy definition states that the presence of a private ship or aircraft and the offending personnel is another prerequisite for piracy.<sup>97</sup> Article 102 of the UNCLOS supplements

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90. AMBUS & WESSEL, *supra* note 86, at 377; *see also* Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y, 708 F.3d 1099 (9th Cir. 2013).

91. CARLOS ESPOSITO ET AL., OCEAN LAW & POLICY: TWENTY YEARS OF DEVELOPMENT UNDER THE UNCLOS REGIME 182 (2016); *see also* Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y, 708 F.3d 1099 (9th Cir.2013).

92. Anthony Bergin, *Southern Ocean Pirates: What's in a name?*, AUSTRALIAN STRATEGIC POLICY INSTITUTE: THE STRATEGIST (Mar. 21, 2013), <https://www.aspistrategist.org.au/southern-ocean-pirates-whats-in-a-name/> [<https://perma.cc/5TFJ-JNES>]; *see also* Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y, 708 F.3d 1099 (9th Cir. 2013).

93. GERRY NAGTZAAM, FROM ENVIRONMENT ACTION TO ECOTERRORISM?: TOWARDS A PROCESS THEORY OF ENVIRONMENTAL & ANIMAL RIGHTS ORIENTAL POLITICAL VIOLENCE 264 (EDWARD ELGAR PUB., 2017); *see also* Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y, 708 F.3d 1099 (9th Cir. 2013).

94. *See* TANAKA, *supra* note 69, at 356; *see also* Castle John v. NV Babeco, Belgium Court of Cassation, 77 I.L.R. 537 [Cass.] [Court of Cassation], Dec. 19, 1986 (Belg.); *see also* Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y, 708 F.3d 1099 (9th Cir. 2013).

95. GEISS & PETRIG, *supra* note 13, at 62; *see also* the private ends requirement in the U.N. Convention on the Law of the Sea, *supra* note 21, at art. 101.

96. SELLSTROM, *supra* note 77, at 392; *see also* HERBERT-BURNS, *supra* note 78, at 67.

97. KRASKA, *supra* note 21, at 128–29; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 101.

this factor by adding that if pirates take over warships or governmental ships, such ships will no longer be deemed public, but categorically considered a pirate ship.<sup>98</sup> Similarly, Article 103 further untangles this issue by describing the kind of ship that can commit piracy or be considered a pirate ship.<sup>99</sup> It additionally reminds that any ship that commits any of the offenses listed in Article 101 will be considered a pirate ship.<sup>100</sup> This explanation makes it profoundly clear a hijacked ship can be considered a pirate ship in instances where crews commit mutiny on state warships in order to use them against victim ships.<sup>101</sup> However, it still remains unclear whether hijacked ships can commit piracy against themselves, when passengers hijack their own ships. To clear this ambiguity, the UNCLOS established the two-ship rule.<sup>102</sup>

#### *D. Two-Ships Requirement*

Factor 4 requires a minimum of two vessels or ships to constitute piracy—one ship or vessel is the offender; the other is the victim.<sup>103</sup> For this factor, a ship hijacked by its own crewmembers or passengers does not constitute the offense of piracy.<sup>104</sup> A case on point is the *Achille Lauro* affair. In 1985, Palestinian activists boarded the Italian ship *Achille Lauro* as passengers, later hijacked it, and demanded the release of certain Palestinian prisoners.<sup>105</sup> Since there was no pirate ship or any other vessel involved, this was considered an offense of hijacking, not piracy.<sup>106</sup> For the same reason, the *Santa Maria* incident is also considered a hijacking

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98. *International Maritime Organization Circular 3180*, *supra* note 48, at 490; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 102.

99. GEISS & PETRIG, *supra* note 13, at 62–65; U.N. Convention on the Law of the Sea, *supra* note 21, at art. 103.

100. GEISS & PETRIG, *supra* note 13, at 62–65; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at arts. 101, 103.

101. *See* GEISS & PETRIG, *supra* note 13, at 62–65; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at arts. 101, 103.

102. KAMAL-DEEN ALI, *supra* note 47, at 117; U.N. Convention on the Law of the Sea, *supra* note 21, at art. 101.

103. *See* KRASKA, *supra* note 21, at 129; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 101.

104. TANAKA, *supra* note 69, at 379–82.

105. CHRISTOPHER C. JOYNER, *INTERNATIONAL LAW IN THE 21ST CENTURY: RULES FOR GLOBAL GOVERNANCE* 138 (2005).

106. *See id.*

rather than piracy.<sup>107</sup> The requirement of two ships,<sup>108</sup> and the *Santa Maria* incident<sup>109</sup> creates a gray area that pirates can exploit. The requirement of two vessels or ships,<sup>110</sup> and the exclusion of hijacking from the definition of piracy, makes pirates more likely to start hijacking ships as passengers when committing piracy to exploit the loophole. But, this exploitation in reality is highly unlikely and improbable as such an act requires highly organized pirates. Despite this, historical incidents of this sort have occurred, such as an incident that took place near Canton in which pirates posed as genuine passengers of a ship and boarded the ship with weapons.<sup>111</sup>

### *E. High Seas Requirement*

Finally, Factor 5 maintains that piracy can only be committed on the high seas. This means that piracy cannot be committed within the jurisdiction of any country or state in its territorial waters.<sup>112</sup> EEZs are not specifically mentioned in the definition under Article 101,<sup>113</sup> but the cross-reference to EEZs in Article 58 of the UNCLOS confirms that acts of piracy can be committed in the waters of EEZs.<sup>114</sup>

To cover territorial waters, the International Maritime Organization or in the SUA Convention considers all activities committed within territorial waters or internal waters are considered armed robberies or other offenses. For instance, the IMO Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships of 2009 (“IMO Resolution”) defines such offenses.<sup>115</sup> It describes armed robberies against ships as follows:

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107. See TANAKA, *supra* note 69, at 379–81.

108. See GEISS & PETRIG, *supra* note 13, at 62–65; see also U.N. Convention on the Law of the Sea, *supra* note 21, at art. 101, 103.

109. See SELLSTROM, *supra* note 77, at 392; see also HERBERT-BURNS, *supra* note 78, at 67.

110. See GEISS & PETRIG, *supra* note 13, at 62–65; see also U.N. Convention on the Law of the Sea, *supra* note 21, at art. 101.

111. HENRY SZE HANG CHOI, *THE REMARKABLE HYBRID MARITIME WORLD OF HONG KONG AND THE WEST RIVER REGION IN THE LATE QING PERIOD 206* (Gelina Harlaftis et al. eds., 2017).

112. BOISTER, *supra* note 47, at 30; see also United Nations Convention on the Law of the Sea, *supra* note 21, at art. 101.

113. See KAMAL-DEEN ALI, *supra* note 47, at 117; see generally United Nations Convention on the Law of the Sea, *supra* note 21, at art. 101.

114. GEISS & PETRIG, *supra* note 13, at 64; see also U.N. Convention on the Law of the Sea, *supra* note 21, arts. 58, 100–01.

115. Aref Fakhry, *Piracy Across Maritime Law: Is There a Problem of Definition*, in *THE REGULATION OF INTERNATIONAL SHIPPING: INTERNATIONAL & COMPARATIVE PERSPECTIVES* 106 (Aldo Chircop et al. eds., 2012); see also International Maritime Organization [IMO] *Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships*, Res. A.1025(26), at ¶ 2 (Dec. 2, 2009).

1. Any legal act of violence or detention or any 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;
2. Any act of inciting or of intentionally facilitating an act described above.<sup>116</sup>

Article 101 of the UNCLOS, read alongside Article 105, makes the commission of piracy offenses inside territorial borders impossible,<sup>117</sup> and the IMO Resolution stipulates that all piracy acts committed within territorial waters are considered armed robberies or other defined offenses, such as hijackings.<sup>118</sup> It is understood that such activities that take place in territorial waters of any State are to be dealt with by the forces and laws of that State.<sup>119</sup> For this reason, Somali pirates keep their activities around the territorial waters of Somalia and, even if they practice piracy in the high seas, they try to return to the territorial waters, which act as a safe zone,<sup>120</sup> as law enforcement against Pirates is weak in Somalia.<sup>121</sup> To counter this backlash against the legal incompatibility between the sovereignty of Somalia and counter-piracy laws, UN Resolution 1816, read with Resolution 1851, allows forces to capture pirates in the territorial waters of Somalia, when in hot pursuit and with the consent<sup>122</sup> of the Somali authorities.<sup>123</sup> Critics

116. JADE LINDLEY, *SOMALI PIRACY: A CRIMINOLOGICAL PERSPECTIVE* 94 (Ashgate, 2016); *see also* International Maritime Organization Res. A.1025(26), *supra* note 115, at ¶ 2 (2010).

117. GEISS & PETRIG, *supra* note 13, at 63; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 101, 115.

118. *See* Fakhry, *supra* note 115, at 106; *see also* International Maritime Organization Res. A.1025(26), *supra* note 115, ¶¶ 2, 7.

119. WINSTON C. EXTAVOUR, *THE EXECUTIVE ECONOMIC ZONE; A STUDY OF THE EVOLUTION & PROGRESSIVE DEVELOPMENT OF THE INTERNATIONAL LAW OF THE SEA* 18 (Institut Universitaire De Hautes Études Internationales, 1979).

120. HELMUT TUERK, *REFLECTIONS ON THE CONTEMPORARY LAW ON THE SEA* 90 (Vaughan Lowe & Robin Churchill eds., 2012).

121. PETER T. LEESON, *THE INVISIBLE HOOK: THE HIDDEN ECONOMICS OF PIRATES*, 203 (2009).

122. Scholars argue that consent of 'previous administration,' known as TFG consent, is a shaky ground to 'generate legitimacy' to intervene in the sovereign borders of a state. TFG consent is discussed in detail in a later section of this Article. *See infra* Section III.B.2.

123. Andrew Erickson & Austin M. Strange, *China's Anti-Piracy Mission in the Gulf of Aden: Implications for Anti-Piracy in the South China Sea*, in *NON-TRADITIONAL SECURITY ISSUES & THE SOUTH CHINA SEA: SHAPING A NEW FRAMEWORK FOR COOPERATION* 172

of the admissibility of hot pursuit in counter-piracy laws have argued that such permissibility breaches Somalia's sovereignty.<sup>124</sup> They further back their arguments with claims that such vast powers for the apprehension of pirates are easily exploitable, since the law enforcement agencies of Somalia are weak.<sup>125</sup>

#### F. Criticism of the UNCLOS Definition of Piracy

The first criticism against the definition of piracy under the UNCLOS is in regards to the exclusion of hijacking by ships' passengers within the definition of piracy.<sup>126</sup> A hijack by the passengers of a ship should be considered piracy. In this context, the *Achille Lauro* incident is often cited to for illustration.<sup>127</sup> Similarly, the SUA Convention also does not cover this aspect of the piracy definition; this instrument is another convention that is widely accepted by the international community, with 166 parties as of 2017.<sup>128</sup>

The second criticism against the UNCLOS definition of piracy is that it excludes acts of violence with political motivations, such as insurgent acts against governments.<sup>129</sup> The wording of Article 101 and its concentration on the term "private ends" is very vague and is still open for interpretation by the international community.<sup>130</sup> However, the SUA Convention fills the gap and covers all crimes or offenses committed with political motivations.<sup>131</sup>

The third criticism against the UNCLOS definition is that piracy is limited to the high seas, although EEZs are exceptionally included in this jurisdictional layout. Critics claim that outside forces must also be allowed in the territorial

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(Shicun Wu & Keyuan Zou eds., 2014); see also S.C. Res. 1816, *supra* note 13, at ¶¶ 3, 5, 7; see also S.C. Res. 1851, *supra* note 60, at ¶¶ 2, 3, 6.

124. See GEISS & PETRIG, *supra* note 13, at 84–85.

125. See *id.*

126. Robin Churchill, *The Piracy Provisions of the UN convention on the Law of the Sea – Fit for Purpose?*, in *THE LAW & PRACTICE OF PIRACY AT SEA: EUROPEAN & INTERNATIONAL PERSPECTIVES* 21–23 (Panos Koutrakos & Achilles Skordas eds., 2014).

127. GEISS & PETRIG, *supra* note 13, at 41–43.

128. See GEISS & PETRIG, *supra* note 13, at 41–43; see also IMO STATUSES OF CONVENTIONS, <http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx> (last visited August 1, 2017) [<https://perma.cc/Z4H3-4ACW>].

129. See GEISS & PETRIG, *supra* note 13, at 61.

130. Agustin Blanco-Bazán, *Suppressing Unlawful Acts: IMO Incursion in the Field of Criminal Law*, in *THE LAW OF THE SEA, ENVIRONMENTAL LAW & SETTLEMENT OF DISPUTES: LIBER AMICORUM JUDGE THOMAS A. MENSAH 721* (Tafsir Malick Ndiaye & Rüdiger Wolfrum eds., 2007); see also U.N. Convention on the Law of the Sea, *supra* note 21, at art. 101.

131. See James Kraska, *America's Maritime Challenges and Priorities: The Asian Dimension*, in *MARITIME CHALLENGES & PRIORITIES IN ASIA: IMPLICATIONS FOR REGIONAL SECURITY* 239 (Joshua H. Ho & Sam Bateman eds., 2013); see also SUA Convention, *supra* note 24.

seawaters of Somalia to curb piracy.<sup>132</sup> In this regard, the United Nations has allowed all States to use force against pirates in the territorial waters of Somalia, specifically when in hot pursuit, in order to suppress piracy.<sup>133</sup>

Notably, piracy under the UNCLOS is said to include violence or acts involving detention or any kind of depredation by people with one private (pirate) ship against another (victim) ship in the high seas.<sup>134</sup> Any kind of involvement in the form of facilitation of piracy is also considered an act of piracy.<sup>135</sup> There are in total five requirements within the UNCLOS's definition of piracy: two-ship, private ends, high seas, private ship, and violence rules.<sup>136</sup> These characteristics are discussed in detail above.

Each factor creates some complications and poses an impediment to curbing piracy. The requirement for violence or any kind of depredation or detention makes it impossible to establish piracy when the crewmembers of a ship are accomplices of pirates. Similarly, the two-ship and private ship requirements exclude hijacking from piracy<sup>137</sup> and create a significant loophole that pirates can exploit. Lastly, the high seas requirement excludes all piracy acts in the internal waters<sup>138</sup> providing a legal safe haven for pirates to escape to in the internal waters of Somalia. Critics of this argument have suggested that through UN Resolutions 1816 and 1851, the seizure and arrest of pirates in the territorial waters of Somalia is possible.<sup>139</sup>

Nevertheless, it is pivotal to examine here that such empowerment is only acceptable against sovereign maritime territories of Somalia.<sup>140</sup> Since resolution 1851 does not create new jurisdictional basis in excess of Chapter VII of the U.N charter regarding use of force; therefore it is rudimentarily

132. See GEISS & PETRIG, *supra* note 13, at 41–43.

133. Erickson & Strange, *supra* note 123, at 164; *see also* S.C. Res. 1816, *supra* note 13, ¶¶ 3, 5, 7; *see also* S.C. Res. 1851, *supra* note 60, ¶¶ 2, 3, 6.

134. NEIL BOISTER, *supra* note 47, at 30; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 101.

135. KAMAL-DEEN ALI, *supra* note 47, at 117; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 101.

136. KRASKA, *supra* note 21, at 128–32; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 101.

137. TANAKA, *supra* note 69, at 379–82.

138. GEISS & PETRIG, *supra* note 13, at 63–64; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 101.

139. See TANAKA, *supra* note 69, at 379–82; *see also* S.C. Res. 1816, *supra* note 13, ¶¶ 3, 5, 7; *see also* S.C. Res. 1851, *supra* note 60, ¶¶ 2, 3, 6.

140. DONALD ROTHWELL ET. AL., INTERNATIONAL LAW: CASES & MATERIALS WITH AUSTRALIAN PERSPECTIVES 648 (2014).

unnecessary.<sup>141</sup> States fear that this imbalance in the counter piracy laws injures national interests and sovereignty of states.<sup>142</sup> To avoid allegations of breaching the sovereignty of Somalia, the UNGA 1816—to use force in the internal waters of Somalia—was passed with the consent of Transitional Federal Government of Somalia (“TFG”).<sup>143</sup>

Accordingly, jurisdictional issues regarding using force to seize and arrest pirate ships and pirates, coupled with TFG consent, is explored in Section III, which also address the jurisdictional issues created by enforcement of counter-piracy laws.

### III. JURISDICTIONAL CONCERNS

In addition to definitional impediments to the enforcement of counter-piracy laws, this section will also discuss jurisdictional concerns. It is recognized that the UNCLOS provides universal jurisdiction for the enforcement of its regulations against piracy in the high seas.<sup>144</sup> Similarly, the GCHS also incorporates jurisdictional issues regarding piracy.<sup>145</sup> However, both conventions significantly lack detail on the enforcement of piracy laws.<sup>146</sup> For this reason, this section deals with the jurisdictional and enforcement issues pertaining to piracy. This section is divided into three subsections. Section III.A. addresses legislative issues; Section III.B. covers law enforcement issues with special regard to the specific requirements for valid arrest, TFG consent, and the human rights perspective; and Section III.C. covers adjudicative concerns over the enforcement of counter-piracy laws.

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141. Efthymios Papastavridis, *Piracy off Somalia: The ‘Emperors and the Thieves of the Oceans’ in the 21st Century*, in PROTECTING HUMAN SECURITY IN AFRICA 138 (Ademola Abbas ed., 2010); see also S.C. Res. 1816, *supra* note 13, ¶¶ 3, 5, 7; see also S.C. Res. 1851, *supra* note 60, ¶¶ 2, 3, 6.

142. TUERK, *supra* note 120, at 92.

143. Clive Schofield & Robin Warner, *Horn of Troubles: Understanding and Addressing the Somali “Piracy” Phenomenon*, in DEEP CURRENTS AND RISING TIDES: THE INDIAN OCEAN AND INTERNATIONAL SECURITY 58 (John Garofano & Andrea J. Dew eds., 2013).

144. GEISS & PETRIG, *supra* note 13, at 64–65; see also U.N. Convention on the Law of the Sea, *supra* note 21, at art. 105.

145. SINGH, *supra* note 20, at 63–70; see also Geneva Convention on the High Seas, *supra* note 19, at art. 14–21.

146. See generally U.N. Convention on the Law of the Sea, *supra* note 21; Geneva Convention on the High Seas, *supra* note 19. Additionally, see TUERK, *supra* note 120, at 75, 84 and Herbert Miessler, *Customs Frontier*, in 8 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 110 (Rudolf Bernhardt ed., 1985).

### A. Legislative Issues

It is not surprising that the GCHS has not incorporated a legislative requirement for all states to set out national or domestic laws to suppress piracy.<sup>147</sup> But this gap can be explained by the date of the GCHS. The GCHS convened long before piracy became a global issue.<sup>148</sup> However, the UNCLOS and the SUA Convention also do not have a legislative requirement in their legal framework.<sup>149</sup> While the UN was drafting the UNCLOS, certain UN Conventions came into force that detailed transnational crimes,<sup>150</sup> such as the Convention on the Prevention & Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents of 1977.<sup>151</sup> Such instruments obliged Member States to legislatively criminalize offenses listed in the convention, and to penalize offenders heavily with penalties and punishments.<sup>152</sup>

This exclusion from the legislation in the UNCLOS and the SUA Convention reflects the general opinion of the UNCLOS's signatories to enact a reproduction of the GCHS regulations. It is also possible that the drafters did not intend to incorporate a legislative requirement. As the UNCLOS does not oblige States to legislate against piracy, most of the parties to the UNCLOS have not incorporated the legal framework of the UNCLOS into their domestic laws.<sup>153</sup> In turn, the United Nations General Assembly, the SC, and the IMO have been pressing States to incorporate piracy in their respective legislations.<sup>154</sup> Incorporation of the UNCLOS

147. See Miehsler, *supra* note 146, at 11; *see also* Geneva Convention on the High Seas, *supra* note 19.

148. The Geneva Convention on the High Seas was convened in 1958, whereas piracy became a global concern in the 1990s. See Melissa Simpson, *An Islamic Solution to State Failure in Somalia?*, in *TERRORISM IN AFRICA: THE EVOLVING FRONT IN THE WAR ON TERROR* 14 (John Davis ed., 2010).

149. TUERK, *supra* note 120, at 118. *See also* SUA Convention, *supra* note 24; Miehsler, *supra* note 146, at 11. *See generally* U.N. Convention on the Law of the Sea, *supra* note 21.

150. Churchill, *supra* note 126, at 23.

151. MYRA WILLIAMSON, *TERRORISM, WAR & INTERNATIONAL LAW: LEGALITY OF THE USE OF FORCE AGAINST AFGHANISTAN IN 2001* 53 (2016). *See also* The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 1035 U.N.T.S. 167.

152. *See* WILLIAMSON, *supra* note 151, at 53; *see also* The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, *supra* note 151.

153. *See* TUERK, *supra* note 120, at 75, 84.

154. Int'l Maritime Organization Res. A.1025(26), *supra* note 115. *See also* Int'l Maritime Organization [IMO], *Piracy and Armed Robbery Against Ships in Waters Off*

regulations into domestic legislation is imperative because States cannot prosecute arrested pirates without national laws in their courts. On the basis of the universal jurisdiction granted by the UNCLOS alone is insufficient.<sup>155</sup>

Some scholars, such as Professor Robin Churchill, argue that the requirement of cooperation under the UNCLOS among Member States also encompasses the requirement to enact laws to suppress piracy within the existing legal framework.<sup>156</sup> Article 100 of the UNCLOS obliges Member States to cooperate with each other to suppress piracy.<sup>157</sup> But, on the other hand, Professor Churchill has also added that such inclusion is merely theoretical and debatable, which a view only expressed by handful of writers.<sup>158</sup>

### B. Law Enforcement Issues

In regard to the jurisdictions of counter-piracy laws, the UNCLOS offers universal jurisdiction to every state.<sup>159</sup> This means that any state can seize a pirate ship or any ship hijacked by pirates on reasonable grounds of suspicion.<sup>160</sup> The UNCLOS adds that States can arrest pirates and seize property from the ship in all seawaters, except territorial ones.<sup>161</sup> The universal jurisdiction to arrest or seize ships for piracy reasons is the only exception to the rule that a flagged ship can only be arrested by its own state.<sup>162</sup> In addition to the powers granted by Article 105, Article 110 of the UNCLOS empowers warships to visit and seize pirate ships, so long as they have reasonable grounds to believe the concerned ship is committing piracy within the scope of Article 101.<sup>163</sup>

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*the Coast of Somalia*, Res. A.1044(27) (Nov. 30, 2011); G.A. Res. 65/37 (Dec. 7, 2010); S.C. Res. 1918 (Apr. 27, 2010); S.C. Res. 2018 (Oct. 31, 2011).

155. Churchill, *supra* note 126, at 24.

156. *Id.*

157. Heinze, *supra* note 42, at 52; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 100.

158. *See* Churchill, *supra* note 126, at 24.

159. GEISS & PETRIG, *supra* note 13, at 64–65; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 105.

160. *See* GEISS & PETRIG, *supra* note 13, at 63; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 105.

161. *See* GEISS & PETRIG, *supra* note 13, at 65; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 105. Article 19 of the Geneva Convention on the High Seas (1958) is identical to Article 105 of the United Nations Convention on the Law of the Sea (1982). Geneva Convention on the High Seas, *supra* note 19, at art. 19; United Nations Convention on the Law of the Sea, *supra* note 21, at art. 105.

162. CRAIG H. ALLEN, MARITIME COUNTERPROLIFERATION OPERATIONS AND THE RULE OF LAW 119 (2007); *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 92.

163. GUILFOYLE, *supra* note 60, at 23–24; United Nations Convention on the Law of the Sea, *supra* note 21, at art. 101, 105, 110; *see also* John A. Wajilda, *An Overview of the Economic Implications of Piracy and Armed Robbery Against Ships in Nigeria*, in PIRACY

*1. Requirements to Make a Valid Arrest*

Three requirements of the UNCLOS must be met to make a lawful arrest within the existing legal framework against piracy—named A, B, and C for the purposes of this article. These requirements are accompanied by international laws. Requirement A makes it mandatory that the arrest be made by a governmental, authorized, flagged warship or any ship of a state.<sup>164</sup> As a reasonable exception to this requirement, Article 19 of the GCHS states that a victim ship can also overpower an offending ship in self-defense and can successfully arrest the pirates and then deliver them to an authorized ship or the relevant forces of any coastal state.<sup>165</sup>

Requirement B obliges the policing ship to make an arrest only after it is satisfied that reasonable grounds exist the other ship is a pirate ship.<sup>166</sup> This requirement is not explicitly mentioned in the UNCLOS or the GCHS, but is implicitly incorporated in the legal framework.<sup>167</sup> Article 106 of the UNCLOS and Article 20 of the GCHS make it clear that the policing state is liable to pay damages if it seizes a ship without adequate grounds.<sup>168</sup> The wording of “without adequate grounds” means that the arrest must only be made after acquiring a reasonable belief that the other ship is a pirate ship.<sup>169</sup> Requirement B is reasonable because empowering every state to arrest or seize any ship without reasonable grounds that the other ship is a pirate ship will over-empower the states, which would only result in chaos. In addition to Article 120 of the UNCLOS, Article 110 also explicitly mentions

AT SEA, 114–115 (Maximo Q. Mejia Jr. et al. eds., 2013); ANNA PETRIG, HUMAN RIGHTS AND LAW ENFORCEMENT AT SEA: ARREST, DETENTION AND TRANSFER OF PIRACY SUSPECTS 223–25 (2014). *See generally* Douglas Guilfoyle, *Jurisdiction at Sea*, in HUMAN RIGHTS AND THE DARK SIDE OF GLOBALISATION 114–15 (Thomas Gammeltoft Hansen & Jens V. Hansen eds., 2016); Hans F.R. Boddens Hosang, *Personal Self-Defence and its Relationship to Rules of Engagement*, in THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 434 (Terry D. Gill & Dieter Fleck eds., 2015).

164. GEISS & PETRIG, *supra* note 13, at 92–93; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 107.

165. L.F.E. Goldie, *1937 Geneva Agreement Supplementary to the Nyon Arrangement*, in THE LAW OF NAVAL WARFARE: A COLLECTION OF AGREEMENTS & DOCUMENTS WITH COMMENTARIES 501 (Natalino Ronzitti ed., 1988); *see also* Geneva Convention on the High Seas, *supra* note 19, at art. 19.

166. GEISS & PETRIG, *supra* note 13, at 56.

167. *See id.*

168. Beckman, *supra* note 53, at 26; *see* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 106; *see also* Geneva Convention on the High Seas, *supra* note 19, at art. 20.

169. Churchill, *supra* note 126, at 25.

that a warship requires “reasonable grounds” to arrest or seize pirates and pirate ships.<sup>170</sup>

Finally requirement C requires the arrest be made in the high seas, outside the territorial waters of any state.<sup>171</sup> As discussed above, EEZs are included in the high seas for the purposes of suppressing or fighting piracy.<sup>172</sup>

## 2. TFG Consent

In addition to requirements A, B, and C, TFG consent is another key factor that plays a vital role in determining the legality of making valid arrests, specifically in the territorial waters of Somalia.<sup>173</sup> The notion of TFG consent has been briefly discussed already in this article—the UNSC resolution has made Somali territorial waters an exception to the rule that arrests and seizures can only be made on the high seas.<sup>174</sup> In other words, this means that the territorial waters of Somalia can be used to arrest and seize pirates and pirate ships, since the TFG itself has consented to this proposition to suppress piracy.<sup>175</sup> The TFG explicitly granted consent to use force or enter the territorial waters of Somalia to skirt any allegations of breaching the sovereignty of Somalia.<sup>176</sup> In its own words, the TFG has communicated to the UN General Assembly that vessels may:

Enter the territorial waters of Somalia for the purposes of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery.<sup>177</sup>

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170. Wajilda, *supra* note 163, at 114–15; *see also* GUILFOYLE, *supra* note 163, at 114–15; *see* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 110.

171. Beckman, *supra* note 53, at 26; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 105.

172. GEISS & PETRIG, *supra* note 13, at 64–65; *see also* U.N. Convention on the Law of the Sea *supra* note 21, at art. 58, 101.

173. Treves, *supra* note 15, at 47; *see also* S.C. Res. 1816, *supra* note 13.

174. Beckman, *supra* note 53, at 21; *see also* S.C. Res. 1816, *supra* note 13; *see also* S.C. Res. 1851, *supra* note 60.

175. Erickson & Strange, *supra* note 123, at 164; *see also* S.C. Res. 1816, *supra* note 13.

176. Schofield & Warner, *supra* note 143, at 58.

177. *See* S.C. Res. 1816, *supra* note 13, ¶ 7.

This exception was originally meant to be temporary for a period of six months.<sup>178</sup> However, the timescale has been repeatedly extended.<sup>179</sup> Moreover, the exception comes with various conditions. For example, this resolution is specifically against the territorial waters of Somalia, so it is not customary international law that can be used against piracy against in different states.<sup>180</sup>

Simple SC authorization would have also sufficed to validate the counter-piracy exercises, but the Somali state's consent was acquired to ensure that the sovereignty of Somalia is not breached.<sup>181</sup> This argument is supplemented by the fact that the limits of territorial waters of Somalia are disputed, such that they are claimed far more extensively than the prescribed limits under the UNCLOS.<sup>182</sup> The UNCLOS only allows states to mark a twelve mile-wide limit of territorial waters, which usually corresponds with the natural watermark of a coast,<sup>183</sup> and it allows a 200 mile-wide EEZ limit.<sup>184</sup> Conversely, Somalia has marked 200 mile-wide markings for its territorial waters.<sup>185</sup> It is pertinent that the same region, which is in essence the EEZ of Somalia, has been overwhelmingly exploited by other states, and Somali law enforcement agencies are incapable of defending the country's interests.<sup>186</sup> In practice, other countries routinely use these contested waters for their own interests.<sup>187</sup> Thus, the SC has requested that Somalia demarcate its territorial waters in accordance with the provisions of the UNCLOS.<sup>188</sup>

Professor Achilles Skordas has a unique set of theories in regard to TFG consent.<sup>189</sup> He believes that, the TFG cannot be considered legal authority

178. David Attard & Patricia Mallia, *The High Seas*, in 1 THE IMLI MANUAL ON INTERNATIONAL MARITIME LAW: THE LAW OF THE SEA 271 (Attard et al. eds., 2014) [hereinafter Attard et al.].

179. *See id.*

180. Beckman, *Jurisdiction*, *supra* note 53, at 21; *see* S.C. Res. 1816, *supra* note 13.

181. Efthymios Papastavridis, *supra* note 141, at 138.

182. GEISS & PETRIG, *supra* note 13, at 70.

183. FRANCES L. EDWARDS & DANIEL C. GOODRICH, INTRODUCTION TO TRANSPORTATION SECURITY 246 (2013); *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 3.

184. *See* EDWARDS & GOODRICH, *supra* note at 183; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 57.

185. *See* GEISS & PETRIG, *supra* note 13, at 70.

186. Collins, *supra* note 4, at 73.

187. *Id.*

188. Robin Churchill, *The Persisting Problem of Non-compliance with the Law of the Sea Convention: Disorder in the Oceans*, in THE 1982 LAW OF THE SEA CONVENTION AT 30: SUCCESSES, CHALLENGES AND NEW AGENDAS 144 (David Freestone ed., 2012); *see also* S.C. Res. 1976, *supra* note 31.

189. Churchill, *supra* note 126, at 307–08.

that grants consent on behalf of the Somali state, and the TFG can only be considered a legitimate government under the international legal framework because it is the governing body of Somalia.<sup>190</sup> He supports his argument with the accusation of the Monitoring Group of Somalia, the Libyan crisis, and the official Stance of the United States and the United Kingdom.<sup>191</sup> He adds that the use of force in territorial waters with the consent of the TFG and the existence of piracy are two “shaky grounds” that do not “generate legitimacy” to intervene within the sovereign borders of a state.<sup>192</sup>

### 3. Human Rights Perspective

Apart from counter-piracy laws, customary international law obligates policing vessels to try and capture, seize, or arrest pirate ships or their crew, using the minimum level force required to ensure the accomplishment of the intended objective.<sup>193</sup> Furthermore, where the use of force is inevitable, force must not exceed the reasonable, necessary, and proportional limits under customary international law.<sup>194</sup> Policing vessels that intend to make an arrest or seizure of a pirate vessel must respect humanitarian law, such as a person’s rights to liberty and right to be told about the reasons of his or her arrest.<sup>195</sup> In the notable case *Medvedyev v. France* in 2010, the European Court of Human Rights (“ECtHR”) maintained that the human rights enshrined in the European Convention on Human Rights (“ECHR”) in 1950, are applicable in the high seas.<sup>196</sup> The Grand Chamber made direct reference to pirate ships, ruling that ships can be arrested in the seas because the fight against piracy enjoys universal jurisdiction.<sup>197</sup> Similarly, in another case involving Somali pirates known as the *Cygnus* case of 2010, the Rotterdam District Court found that the failure to produce pirates in court within forty days violated Article 5(3) of the ECHR.<sup>198</sup>

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190. *See id.* at 308.

191. *See id.* at 307–08.

192. *See id.* at 308.

193. *See id.* at 26–27.

194. *See id.*

195. PETRIG, *supra* note 31, at 262; for reference to the human rights referred to, *see generally* European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

196. *Medvedyev v. France*, App. No. 3394/03, Eur. Ct. H.R. (2010).

197. *See id.* ¶ 85, at 28.

198. Rb. Rotterdam 17 juni 2010, LJN BM8116, at 6 (Neth.); *see also* ECHR, *supra* note 195, at art. 5.

*C. Adjudicative Issues*

Similar to the universal jurisdiction of arresting and seizing pirates and pirate ships, the adjudicative jurisdiction under conventions is universal,<sup>199</sup> and is implicitly provided in Article 105 of the UNCLOS as follows:

The courts of the state which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.<sup>200</sup>

Article 105 and the empowerment to try pirates has divided scholars into two groups. One group argues that only the state that has arrested the pirates can try the accused pirates; meanwhile, the other believes that while only the arresting state can try the accused pirates, this does not bar them from transferring or extraditing them to other states, as provided for by general customary practice in the international community.<sup>201</sup> Western States have entered into agreements with States such as Kenya, Mauritius, and the Seychelles to transfer and extradite pirates to and for trial in Western courts.<sup>202</sup> In this regard, the UNSC has encouraged states to form agreements to curb adjudicative and jurisdictional issues to fight piracy.<sup>203</sup> Similarly, IMO Resolution 1025 (2010)<sup>204</sup> and UNSC Resolution 1976 (2011)<sup>205</sup> explicitly mention this propositional stance. Furthermore, nearly all States have agreed under the International Covenant on Civil and Political Rights (“ICCPR”) in 1976 and the ECHR in 1950<sup>206</sup> not to transfer or extradite pirates to

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199. GEISS & PETRIG, *supra* note 13, at 64–65; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 105.

200. *See* GEISS & PETRIG, *supra* note 13, at 65; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 105.

201. *See* Churchill, *supra* note 126, at 28.

202. *See id.* at 28–30.

203. RICHARD WEITZ, WAR & GOVERNANCE: INTERNATIONAL SECURITY IN A CHANGING WORLD ORDER 151 (2011); *see also* S.C. Res. 1851, *supra* note 60; *see also* S.C. Res. 1897, *supra* note 31, ¶ 3.

204. MYRON H. NORDQUIST & NORTON MOORE, THE LAW OF THE SEA CONVENTION: US ACCESSION & GLOBALIZATION, 563 (Myron H. Nordquist et al. eds., 2012); *see also* International Maritime Organization Res. A.1025, *supra* note 115, ¶ 3.

205. PETRIG, *supra* note 31, at 29; *see also* Para 20, S.C. Res. 1976, *supra* note 31, ¶ 20.

206. *See* PETRIG, *supra* note 31, at 260–64; *see also* International Covenant on Civil and Political Rights, Part 3, Article 6, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; *see also* ECHR, *supra* note 195, Article 3 and Protocol No. 6 Article 1, at 6, 38.

States where accused pirates are subject to practices of torture or the death penalty.<sup>207</sup>

Another primary question regarding adjudicative concerns is whether the UNCLOS requires States that have custody of pirates to prosecute them. Article 105 of the UNCLOS uses the word “may,” which suggests that the UNCLOS does not require States to do so.<sup>208</sup> Nevertheless, scholars around the world contend that the duty to suppress piracy under Article 100 includes an obligation to prosecute arrested pirates.<sup>209</sup> On the other hand, it is possible that the interpretation by scholars of Article 100 is beyond the intended or customary scope, because in practice most arrested pirates are released without being brought to trial.<sup>210</sup> Correspondingly, the UNSC has repeatedly lamented the practice of not bringing pirates to justice.<sup>211</sup>

However, this practice is not a result of States with custody of pirates being sympathetic to them. Rather, it is because most of the states that have successfully apprehended pirates do not have appropriate legislation to criminalize piracy.<sup>212</sup> For this reason, the procedure of prosecuting pirates poses a legal obstacle for States, and releasing them without trial is just simpler than confronting piracy and enacting legislation.<sup>213</sup> The proposition that there is no obligation for states to extradite or prosecute pirates under the LOSC is refuted by other treaties, conventions, and agreements among coastal states to suppress piracy—as briefly discussed previously. These regulations of obligation are collectively known as *dedere, aut judicare* and include Article 7 of the Hague Convention, Article 7 of the Montreal Convention, Article 8 of the Hostages Convention, and Article 10 of the SUA Convention.<sup>214</sup> Furthermore, UNSC resolutions such as Resolution

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207. There is no explicit obligation under the International Covenant on Civil and Political Rights to such effect. However general comment number 20 against Article 7 of the International Covenant on Civil and Political Rights provides an implicit relationship. On the other hand, the European Convention on Human Rights provides explicit reference to the aforementioned propositions under Protocols 6 and 13. Moreover, the relationship with pirates’ extradition under ECHR is implicitly maintained.

208. GEISS & PETRIG, *supra* note 13, at 64–65; *see also* U.N. Convention on the Law of the Sea, *supra* note 21, at art. 105.

209. *See* GEISS & PETRIG, *supra* note 13, at 152.

210. PETRIG, *supra* note 31, at 34.

211. WENDY LAVERICK, GLOBAL INJUSTICE & CRIME CONTROL 41, 49, 50 & 54 (2016); *see also* S.C. Res. 2020, at 1, 3 (Nov. 22, 2011); *see also* S.C. Res. 2077, at 1, 3 (Nov. 21, 2012).

212. *See* Beckman, *supra* note 59, at 355.

213. *See id.* at 354–57.

214. *See* Hague Convention for the Suppression of Unlawful Seizure of Aircraft art. 7, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; *see also* Montreal Convention (formerly Convention for The Unification of Certain Rules For International Carriage By Air) art. 7, May 9, 1999, 2242 U.N.T.S. 309; *see also* International Convention Against the Taking

1976 of 2011 and 1897 of 2009 have respectively urged states to bring their domestic laws into conformity with the UNCLOS to suppress piracy and to prosecute pirates to enforce counter-piracy laws effectively.<sup>215</sup>

The number of prosecutions and convictions of pirates is very low compared to the number of incidents of piracy reported and to the numbers of pirates apprehended.<sup>216</sup> A research study found that in a time span of eleven years, from 1998 to 2009, a total of 1,158 incidents of piracy were reported, but only seventeen were prosecuted.<sup>217</sup> These statistics were based on the universal jurisdiction of piracy, since the policing states lacked domestic laws to prosecute pirates.<sup>218</sup> Similarly, a report of the SC found that in a time span of five years, from 2006 to 2011, out of 1,063 prosecution cases, only 612 pirates were successfully convicted.<sup>219</sup>

Professor Robin Churchill identified the reasons for this dramatic variability in the numbers of instances in prosecutions versus apprehensions and persecution versus convictions.<sup>220</sup> He writes that the low numbers of apprehensions are related to the cost of locating and apprehending pirates in the high seas; this cost is further increased with the additional costs of prosecuting and imprisoning pirates.<sup>221</sup> So, without significant personal interest, that is, when the stakes are concerned with personal equity, policing states are not interested in incurring the costs related to the suppression of piracy.<sup>222</sup>

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of Hostages art. 8, Dec. 17, 1979, 1316 U.N.T.S. 205; *see also* SUA Convention, *supra* note 24.

215. ANNA PETRIG, HUMAN RIGHTS AND LAW ENFORCEMENT AT SEA: ARREST, DETENTION AND TRANSFER OF PIRACY SUSPECTS 25 (Gudmundur Alfredson, ed., 2014); *see also* S.C. Res. 1976 *supra* note 31, ¶ 13; *see also* S.C. Res. 1897 ¶ 6 (Nov. 30, 2009).

216. Eugene Kontorovich & Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy*, 104(3) AM. J. INT'L L. 436, 449–50 (2010).

217. Churchill, *supra* note 126, at 30.

218. *See* Kontorovich & Art, *supra* note 216, at 244; *see also* Churchill, *supra* note 126, at 30.

219. Melanie O'Brein, *Where Security Meets Justice: Prosecuting Maritime Piracy in the International Criminal Court*, 4 ASIAN J. INT'L L. 81, 85 (2014).

220. *See* Churchill, *supra* note 126, at 30.

221. *See id.*

222. *See* Kontorovich & Art, *supra* note 216; *see also* Churchill, *supra* note 126, at 29–32.

#### IV. CONCLUSION

The primary question that this article asked is whether the existing legal framework to suppress and fight piracy is sufficient. Upon thorough examination of the international laws to suppress piracy, it may be concluded that the current framework is ineffective. The strict definitional requirements under the legal framework of the UNCLOS fail to ensure the enforcement of counter-piracy laws.<sup>223</sup> For example, the two-ship requirement, the exclusion of politically motivated or terrorist activities from piracy, the exclusion of territorial waters, the private ship requirement, and the violence requirement all place hindrances to the practical execution of counter-piracy laws.<sup>224</sup> Nevertheless, these limitations are not the only restraints against execution of anti-piracy laws. For instance, most piracy offenses include violence and involve two ships,<sup>225</sup> and where only one ship is involved and passengers of ship hijack the ship, piracy falls within the scope of the SUA Convention.<sup>226</sup> But the SUA Convention, unlike the UNCLOS, does not offer universal jurisdiction to every state in regard to enforcing counter-piracy laws.<sup>227</sup> Therefore, there is a need to expand the definition of piracy under the UNCLOS to include offenses of piracy involving only one ship.<sup>228</sup> Similarly, the private ends requirement excludes politically motivated or terrorist activities from the definition of piracy.<sup>229</sup> The scope of the UNCLOS's piracy definition must also be extended to amend the loophole within the legal framework, which allows the exploitation of laws by pirates, since the intentions of offenders are subjective in the determination of whether the event is occasioned for private ends.<sup>230</sup> The territorial requirement on the other hand must not be increased to include the territorial waters of coastal states, since the SUA Convention covers nearly all offenses of violence within territorial waters, such as armed robberies and other offenses enlisted

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223. PAUL TODD, *MARITIME FRAUD & PIRACY* 6 (2013).

224. Kristen Boon, *Commentary to 125 TERRORISM: COMMENTARY ON SECURITY DOCUMENTS: PIRACY & INTERNATIONAL MARITIME SECURITY—DEVELOPMENTS THROUGH 2011* 5–6 (Kristin E. Boon, Aziz Huq & Douglas C. Lovelace, Jr. eds., 2012).

225. GUILFOYLE, *supra* note 60, at 125.

226. SUK KYOON KIM, *MARITIME DISPUTES IN NORTHEAST ASIA: REGIONAL CHALLENGES AND COOPERATION* 154 (2017).

227. Sandra L. Hodgkinson, *The Governing International Law on Maritime Piracy*, in *PROSECUTING MARITIME PIRACY: DOMESTIC SOLUTIONS TO INTERNATIONAL CRIMES* 26 (Michael P. Scharf, Michael A. Newton, & Milena Sterio eds., 2015).

228. *See* Hodgkinson, *supra* note 227, at 22–26, to understand reasons of including hijacking under the UNCLOS definition.

229. SEDAT LACINER & IHSAN BAL, *USAK YEARBOOK OF INTERNATIONAL POLITICS & LAW* 234 (2011).

230. *See id.* (The author argues that the UNCLOS definition and its requirement of private ends must be expanded to include politically motivated or terrorist activities.).

under it.<sup>231</sup> Rather, this requirement should be constricted to exclude the sovereign territories of Somalia, since it is highly contestable whether the TFG regime in Somalia can authorize the use of force inside the sovereign territorial waters of Somalia. Similarly, TFG consent cannot possibly permit unlimited enforcement of counter-piracy intervention in the territorial waters of Somalia.<sup>232</sup>

Therefore, the definitional requirements of piracy under the LOSC do not present a considerable set of restraints to the enforcement of counter-piracy laws,<sup>233</sup> but rather, greater impediments against suppression of piracy are fashioned by the jurisdictional concerns that are contingent on with the existing legal framework.<sup>234</sup> Of all the limitations, the feature that poses the greatest threat to law enforcement is the fact that the UNCLOS does not require Member States to legislate against piracy as an offense in accordance with the UNCLOS under their domestic/national laws.<sup>235</sup> Similarly, the UNCLOS does not oblige Member States to prosecute or extradite the pirates apprehended.<sup>236</sup> Because of this gap in the counter-piracy legal framework, states routinely release pirates without prosecution to avoid bearing the costs of the suppression of piracy.<sup>237</sup> Ninety percent of all pirates arrested are released without being prosecuted.<sup>238</sup> To counter this practice, UNSC resolutions such as 1976 of 2011 and 1897 of 2009 have respectively urged states to bring their domestic laws into conformity with the UNCLOS to suppress piracy and to prosecute pirates in an effort to enforce counter-piracy laws effectively.<sup>239</sup> This insistence should be accompanied

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231. See Hodgkinson, *supra* note 227, at 66.

232. Justin M. Ndichu, “*Plugging a Leak*”: *A Preliminary Step in Establishing a Nuanced Approach to Govern Intervention in the New Age*, 49 CORNELL INT’L L.J. 201, 217, 219–20 (2016).

233. See Hodgkinson, *supra* note 227, at 22–30.

234. Churchill, *supra* note 126, at 29–32.

235. Eric A. Heinze, A “*Global War on Piracy?*” *International Law and the Use of Force against Sea Pirates*, in *MARITIME PIRACY & THE CONSTRUCTION OF GLOBAL GOVERNANCE* 52 (Michael J. Struett, Jon D. Carlson, & Mark T. Nance eds., 2013).

236. See *id.*

237. Wajilda, *supra* note 163, at 114–15.

238. Elisa Morgera & Kati Kulovesi, *The Role of the EU in Promoting International Standards in the Area of Climate Change*, in 8 *EU MANAGEMENT OF GLOBAL EMERGENCIES: LEGAL FRAMEWORK FOR COMBATING THREATS & CRISES* 341 (Ingre Govaere & Sara Poli eds., 2014).

239. *Id.* at 342; see also S.C. Res. 1976, *supra* note 31, ¶ 13; see also S.C. Res. 1897, *supra* note 31, ¶ 6.

by the inclusion of these requirements under the UNCLOS to make law enforcement more effective.

Furthermore, regardless of the supposition that counter-piracy laws restrict law enforcement itself, owing to the prevailing loopholes described in this Article, it cannot be contended that these are the only factors in the global community's failure to effectively exterminate piracy. There are obviously other factors that contribute to the failure in the fight against piracy. For instance, the cost of locating, apprehending, and prosecuting pirates is said to be a central feature that prevents states, which are not directly involved, to fight or suppress piracy.<sup>240</sup>

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240. DAVID A. SADOFF, BRINGING INTERNATIONAL FUGITIVE TO JUSTICE: EXTRADITION & ITS ALTERNATIVES 227 (2016).