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INTERNATIONAL LAW REGIME AGAINST PIRACY

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I. INTRODUCTION

It has been the lot of international law that the question is always asked whether it is really law. While there may not be any one answer to this question, it is commonly accepted that international law is different from municipal positive laws. International law deals with states and municipal law, in most cases, concerns individuals. However, the twentieth century marked a shift from the state-centric outlook of international law towards a more realistic accommodation that individuals might, in certain cases, be subjects of international law. Developments in the areas of humanitarian and international criminal laws best illustrate this shift. Yet, the relevance of international law to the individual, even if recognizable by scholars of international law, might not be easily perceptible to the average citizen of a state. This is one of the reasons the question whether international law is really law persists. This issue is not trivial, as evidenced by the theme of this symposium, "International Law as Law."¹

If law is understood as a system of rules and regulations governing conduct, international law is certainly replete with many such rules and regulations, some of them dating back to antiquity, while some are of

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1. This Article was originally to have been delivered at the 19th Annual Fulbright Symposium, with the theme "International Law as Law", held at Golden Gate University Law School, San Francisco, California, USA, April 3, 2009.

recent origins. For the issue of piracy, these rules and regulations are very old. And here we will confine ourselves to piracy in the nature of waylaying or otherwise interfering with ships, as opposed to the unauthorized use of someone's production or invention, which is the other sense in which piracy is understood.

Customary international law prohibited piracy and treated pirates as enemies of human kind.² Pirates were considered to have waged war not just against any one state but all states.³ As such, pirates were subject to universal jurisdiction by any state.⁴ While the prohibition of piracy could, and was easily stated, the contours of the prohibition, including definition of pirates, were not free from controversy. Besides, pirates were not always universally condemned, but instead were sometimes tolerated and employed by states for their own selfish interests.⁵ A more important point, though, is that like the infamous slave trade, piracy was believed to have largely disappeared in modern times or at least to have fallen to levels that did not demand international attention.⁶ Philip Gosse was quoted in 1964 that "the end of piracy, after centuries, was brought about by public feeling, backed up by the steam engine and telegraph."⁷ In fact, this was the reason initial attempts in the twentieth century to introduce a treaty regime against piracy was unsuccessful. The illusion that piracy was eradicated or, at least, reduced was shattered towards the end of the twentieth and beginning of the twenty-first centuries.⁸ According to the International Maritime Bureau, a total of

2. Douglas R. Burgess, *Hostis Humani Generi, Piracy, Terrorism and A New International Law*, 13 U. Miami Int'l & Comp. L. Rev. 293, 315 (2006) (asserting that: "the central premise of *hostis humani generi* is that a pirate is not an enemy of the state but of humankind itself.").

3. Burgess *supra* note 2 at 307.

4. W. E. HALL, *INTERNATIONAL LAW*, PP. 222-223, (1880) (London, Oxford University Press).

5. Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 Vand. J. Transnat'l L. 1, 12 (2007) (noting that: "During the eighteenth and nineteenth centuries, nations actually used pirates to harass their enemies' merchant shipping").

6. Eugene Kantorovich, *International Legal Response to Piracy of the Coast of Somalia*, ASIL Insights Vol. 13, Issue 2, Feb 6, 2009.

7. Philip Gosse, *Pirates and Piracy*, 17 Encyclopedia Britannica 951, 952 (1964) (cited in Samuel Pyeatt Menefee, *Anti-Piracy Law in the Year of the Ocean: Problems and Opportunity*, 5 ILSA J. Int'l & Comp. L. 309, 318.

8. See Wall Street Journal article by Rivkin and Casey: *Pirates Exploit Confusion in International Law*, <http://online.wsj.com/article> visited 03/19/09 (asserting that: "by the 1970s, as a part of a growing chaos in parts of Africa and Asia, incidents of piracy began to pick up. But it was not until the 21st century that piracy has experienced a meteoric rise, with the number of attacks increasing by double-digit rates per year."); Kantorovich *supra* note 6 (noting that: "the international crime of piracy, like the slave trade, was believed to have largely disappeared in modern times, or at least to have fallen to levels that would not demand international attention. Contrary to that belief, for the past several years, piracy has become endemic off the coast of Somalia, which has not had a government capable of broadly asserting its authority over the country since 1991.")

293 incidents of armed robbery and piracy against ships were reported in 2008 and many incidents are thought to go unreported.⁹ This marked an increase from the 263 incidents reported in 2007 and from the 239 reported in 2006.¹⁰ Today, the international community is bombarded, almost daily, with news reports of piratical incidents, especially in the waters off the coast of Somalia and the Gulf of Aden. It must be noted, however, that owing to the chasm between the definitions of piracy under the prevailing international law regime and as understood by the International Chamber of Commerce's International Maritime Bureau, not every incident recorded by the latter would qualify as piracy under the former. Even making allowance for this disparity, it must be acknowledged that the ancient scourge of piracy is back on the rise and international law is taking notice.

II. HISTORICAL ORIGINS OF PIRACY

Piracy has been a persisting problem for thousands of years, indeed for as long as ships have sailed the oceans and for as long as maritime commerce has existed between states.¹¹ The universal condemnation of piracy in modern times might suggest that it was always viewed with disdain, but this is not so. Initially, piracy was somewhat tolerated and condoned.¹² States actually commissioned pirates to harass and attack the merchant vessels of enemy states.¹³ In that regard, pirates were viewed as a weapon in the arsenal of states. This was particularly pronounced in the 17th century wars between England and France and between England and Spain.¹⁴ One writer compares the piracy acts in those times to the state-sponsored terrorism of today and notes that

9. Shipping companies may not report incidents of piracies for fear that their premium rates may be increased by the insurance companies. See David Shinn, *Saving Somalia Piecing a Country Together*, Harvard International Review.

10. International Maritime Bureau Piracy Report 2008.

11. Douglas R. Burgess, Jr., *Hostis Humani Generi: Piracy, Terrorism and a New International Law*, 13 U. Miami Int'l & Comp. L. Rev. 293, 301 (2006); Erik Barrios, *Casting A Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia*, 28 B.C. Int'l & Comp. L. Rev. 149 (2005).

12. John Peppetti, *Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats*, 55 Naval L. Rev. 73, 87 (2008) (asserting that "during the 1st century BC, piracy was largely condoned throughout the Mediterranean because pirate forces supplied Rome with large numbers of slaves for its luxury markets.").

13. Michael Bahar, *Attaining Optimal Deterrence at Sea: A legal and Strategic Theory for Naval Anti Piracy Operations*, 40 Vand. J. Transnat'l L. 1, 12 (2007) (noting that: "the letter of marque issued to such historical luminaries as Francis Drake and Walter Raleigh was an official commission to engage in piracy.").

14. Burgess, *supra* note 6 at 307 – 308.

piracy was viewed as an ideal way to strike one's enemy and hide the blade.¹⁵ Certain states actually trained pirates.

The proscription of piracy fluctuated from the 16th to even 19th centuries, ranging from states actively encouraging or using pirates to states outlawing piracy. Typically, when there was a war, the state encouraged piracy against the enemy and in times of relative peace, piracy was proscribed. This double standard came back to haunt states. The decommissioned pirates became frustrated and turned their anger to both their former state patrons and others.¹⁶ Thus, they attacked any vessel without discrimination, and perhaps that was how they became enemies of all human kind and indeed enemies of civilization itself. Perhaps, united by the common menace posed by piracy, nearly all the imperial powers signed the Declaration of Paris in 1856 (the "Declaration").¹⁷ The Declaration abolished all forms of piracy, privateering and government sponsorship.¹⁸ The Declaration would seem to be the decisive turning point in the ambivalence of states towards piracy, and to affirm a universal prohibition. It also seemed to lay to rest any previously harbored selfish interest on the part of states to utilize piracy. But, it by no means resolved the other conceptual problems associated with making piracy illegal. Chief among these seemingly unresolved issues is: what is the meaning of piracy?

III. DEFINITION OF PIRACY

The single most controversial aspect of customary international law on piracy is the definition of the term, "piracy." There was no authoritative definition of the term.¹⁹ Therefore, several writers have defined the term in different ways. According to W.E. Hall, pirates are persons who depredate by sea or land without authority from a sovereign.²⁰ Notice Hall's allowance for alternative *loci* for commission of piracy: it could be by sea or land.²¹ Not all writers agreed with this view. Thomas Joseph observes that "another mark of a piratical act is that it must be

15. Burgess, *supra* note 6 at 302 – 303.

16. Burgess, *supra* note 6 at 307 – 308.

17. Bahar, *supra* note 14 at 12.

18. Burgess *supra* note 6 at 314.

19. Havina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 A.J.I.L. 269, 272 (1988).

20. W. E. HALL, *INTERNATIONAL LAW*, 214 -215 (Oxford University Press, 1880)

21. The writer observes: "Usually piracy is spoken of as occurring only upon the high seas. If however a body of pirates land upon an island unappropriated by a civilized power, and rob and murder a trader who may be carrying on commerce there with the savage inhabitants, they are guilty of a crime possessing all the marks of commonplace professional piracy. In so far as any definitions of piracy exclude such acts, and others done by pirates elsewhere than on the ocean but of the kind which would be called piratical if done there, the omission might be assumed to be accidental."

done outside the territorial jurisdiction of any civilized state.”²² And commenting on Hall’s view, Joseph noted that Hall seemed to hold the view that a descent from the sea on to the coast of a state to rob and destroy without any national authorization would be accounted as piratical, but that surely the fact that the crime was committed within the territorial jurisdiction would make the perpetrators amenable to the law of the state and not international law.²³ But a fair measure of agreement would seem to have attended the next important ingredient in the meaning of piracy: piratical acts are done under conditions in which it is impossible or unfair to hold any state responsible for their commission. A pirate either belongs to no state (or organized political society) or, by the nature of his act, has shown an intention or power to reject the authority of that state to which he is properly subject.²⁴ In my view, if one feature should be predominant, or control, in the definition of piracy, it is whether the action of any pirate, or alleged pirate, can legally or fairly be attributable to a state. If so, then it may not really be piracy. This does not mean that such action should be without remedy. The remedy would properly lie in diplomatic redress and other aspects of state responsibility. We shall return to this point in the discussion of the treaty and other modern definitions of piracy.

Other aspects of the controversy surrounding the definition of piracy at customary international law were whether the piratical act must involve robbery. William Blackstone, a respected English legal commentator, viewed piracy as committing acts of robbery and depredation upon the high seas, which, if committed upon land, would have amount to a felony.²⁵ The definition of piracy in customary international law lacks precision.²⁶ In 1932, the Harvard Research Project attempted to codify the customary regime on piracy. On the multiplicity and controversy associated with its definition, the Harvard Draft lamented that:

22. THOMAS JOSEPH, PRINCIPLES OF INTERNATIONAL LAW, 233.

23. JOSEPH *supra* note 23 at 233.

24. HALL *supra* note 21 at P.215.

25. 4 WILLIAM BLACKSTONE, COMMENTARIES, P. 72; See also Ethan C. Stile, *Reforming Current International Law to Combat Modern Sea Piracy*, 27 Suffolk Transnat’l L. Rev. 299, 304 - 305 (2004).

26. For instance, after noting the controversy in the definition of piracy, Lauterpacht stated that: “if a definition is desired which really covers all such acts as are in practice treated as piratical, piracy must be defined as every unauthorized act of violence against persons or goods committed in the open sea by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel.” See I L. OPPENHEIM, INTERNATIONAL LAW, 608-609, cited in Malvina Halberstam, *Terrorism in the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 A.J.I.L.269, 273 (1988).

*“An investigation finds that instead of a single relatively simple problem, there are a series of difficult problems which have occasioned a great diversity of professional opinion. In studying the content of the (definition) article, it is useful to bear in mind the chaos of expert opinion as to what the law of nations includes, or should include, in piracy. There is no authoritative definition. Of the many definitions that have been proposed, most are inaccurate, both as to what they literally include and as to what they omit. Some are impromptu, rough descriptions of a typical piracy.”*²⁷

This is necessarily so, for customary law, by definition, is always evolving, and unlike municipal concepts where judicial decisions and pronouncements happen more often, it usually takes longer for norms of customary international law to crystallize. Yet, the imprecision is not peculiar to customary law. It will later be seen that the requirement of acts of robbery is reflected even in the attempts to codify by treaty the international regime against piracy. The United Nations Convention on the Law of the Seas 1982, which is the prevailing treaty regime on piracy (and contain provisions similar to those of the High Seas Convention 1958) has been assumed to impose the requirement that for an act to be piratical, it has be for private, as opposed to public, end.²⁸

IV. THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEAS

The existing international law on piracy is found in the provisions of the United Nations Convention on the Law of the Seas 1982.²⁹ However, that treaty regime was not the first attempt at making provisions on piracy. As early as 1924, during the era of the League of Nations, an attempt was made to provide an international agreement on the subject. But the effort fizzled out as it was thought that piracy was not an urgent problem then and that it was not likely that an agreement would be reached.³⁰ As a result, the issue was dropped. According to the Polish

27. ALFRED P. RUBIN, *THE LAW OF PIRACY*, 341, 2nd edition, 1999 (Transnational Publishers, Inc., Irvington-on-Hudson, New York) citing Harvard Research 769.

28. Peppetti *supra* note 13 at P.92; Martin Murphy *Piracy and UNCLOS: Does International Laws Help Regional States Combat Piracy?* In PETER LEHR, (ed), *VIOLENCE AT SEA* (Routledge, 2006) at P. 160; Barrios, *supra* note 12 at P. 156; Ethan Stiles, *Reforming Current International Law to Combat Modern Sea Piracy*, 27 *Suffolk Transnat'l L. Rev.* 299, 322-325 (2004).

29. See Articles 100-107 of UNCLOS

30. The Assembly of the League of Nations formally requested the Council of the League to prepare a provisional list of subjects of international law the regulation of which would seem to be most desirable and realizable. The Committee responsible for drawing up this list included piracy and also included Draft Provision for the Suppression of Piracy, but these were dropped from the

Representative, M. Zaleski, which was approved by the Council of the League of Nations on 13 June 1927:

*“It is perhaps doubtful whether the question of piracy is of sufficient real interest in the present state of the world to justify its inclusion in the programme of the (proposed) conference, if the scope of the conference ought to be cut down. The subject is in any case not one of vital interest for every State, or one the treatment of which can be regarded as in any way urgent, and the replies of certain Governments with regard to it indicate that there are difficulties in the way of concluding a universal agreement.”*³¹

If ever there is any case of changed circumstances, it is in the prevalence of piracy and it doubtful if anyone would today assert that its prevention is not of vital interest for any state or that it is not an urgent matter. Today, piracy is the most frequently occurring international incident.

If the League of Nations was unable to conclude an agreement, the United Nations was more successful with the adoption in 1958 of the Convention on the High Seas, which contained provisions dealing with piracy. When a more holistic law of the seas treaty was negotiated, the provisions of the Convention on the High Seas, as they relate to piracy, were adopted with minor changes.³² That more encompassing regime is the United Nations Convention on the Law of the Sea 1982 (UNCLOS). Although UNCLOS is a treaty and normally should be binding on only State parties thereto, in this case since the Treaty’s provisions are considered a codification of customary international law, the provisions are binding on every State including non parties to the Convention.³³

The approach of UNCLOS is to stratify the waters of the earth into different juridical categories. Broadly, these are territorial waters³⁴, contiguous zone³⁵, exclusive economic zone³⁶ and the high seas³⁷.

conference on the grounds that piracy was no longer a pressing issue to the international community and that the realization of a universal agreement seemed somewhat difficult at that time. See RUBIN *supra* note 28 at PP. 333-334.

31. RUBIN *supra* note 28 at 334.

32. Peppetti *supra* note 13 at 91.

33. Barrios *supra* note 12 at 153; Bahar *supra* note 14 at 10 (noting that: “the United States is not a party to UNCLOS, but it is a party to the 1958 High Seas Convention. Regardless, the definition of piracy contained within both these treaties has become customary international law, binding on all nations, including the United States.”)

34. Articles 2- 32 of UNCLOS.

35. Articles 33 of UNCLOS.

36. Articles 55-75 of UNCLOS.

37. Articles 86-120 of UNCLOS.

Twelve miles into the sea, from the coast line of a littoral state, constitute its territorial waters.³⁸ The littoral state exercises exclusive jurisdiction over its territorial waters, subject to the right of innocent passage vested in the ships or vessels of other states. The contiguous zone is twenty-four miles from the coastline, that is, twelve miles beyond the territorial waters. The coastal state may exercise control necessary to prevent violation of its custom, fiscal, immigration or sanitary laws or regulations within its territory or territorial sea and to punish any such infringement.³⁹ A state can claim up to two hundred miles, from its coastlines, as its exclusive economic zone.⁴⁰ Such claim would entitle the state to the sovereign rights to exclusively exploit the marine resources within that zone.⁴¹ Any other areas are considered the high seas.⁴² Both the contiguous zone and the exclusive economic zone are part of the high seas; however, in these zones, the littoral state enjoys certain limited exclusive rights. Otherwise, in all other respects, they belong to all, and to no one, under the doctrine of the freedom of the high seas.⁴³ For the present purpose, the significance of the classification is that international piracy, to be such, must occur in the high seas. The provisions of UNCLOS dealing with piracy span Articles 100 to 107. These Articles start by enjoining all states to cooperate to the fullest extent possible in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state.⁴⁴ The most important, and by far the most controversial, part is Article 101, which defines piracy. Article 101 states:

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 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;

38. Article 3 of UNCLOS; Sittnick, *State Responsibility and Maritime Terrorism in the Strait of Malacca: Persuading Indonesia and Malaysia to Take Additional Steps to Secure the Strait*, 14 *Pac. Rim L. & Pol'y* 743, 758 (2005).

39. Article 33 of UNCLOS.

40. Article 57 of UNCLOS; Sittnick *supra* note 39 at 758.

41. Tammy M. Sittnick, *supra* note 39 at 758.

42. See Article 86 of UNCLOS stating that "the provisions of this part (High Seas) apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State."

43. See Article 87 of UNCLOS, detailing the rights encapsulated in the doctrine of freedom of the high seas. See also generally on the concept of freedom of the high seas, Natalie Klein, *The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 35 *Denv. J. Int'l L. & Pol'y* 287, 292-295 (2007).

44. Article 100 of UNCLOS.

- (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).

It is generally assumed that the above definition introduced, or retained three requirements for an act to be to qualify as piracy under international law. The first requirement is that the act must occur in the high seas or in “a place outside the jurisdiction of any State.” Although this requirement is heavily criticized, it is suggested that it comports more with international orderliness.

Certain acts which would otherwise have been treated as piracy under international law, would not be treated as so under Article 101; however, it does not necessarily mean that those acts should go unpunished or without redress. For instance, if a foreign ship is attacked in the territorial waters of a State, the State, whose flag the ship is flying, is entitled, under international law, to demand that the other State, in whose territorial waters the act occurred, punish the perpetrators or otherwise redress the act. If the latter State does not redress the ship’s act, the State is in breach of its international obligation and a victim State would have the normal remedies available for such international delict.⁴⁵ Depending on the extent or frequency with which such acts occur in the territorial waters, victim States could actually attribute the “piracy” acts to the State in whose territorial waters they have been occurring. An analogy can be made to the United States’ invasion of Afghanistan. The U.S. was justified in attacking Afghanistan because Afghanistan, under Taliban rule, refused to surrender those who planned the attack on the World Trade Center and the Pentagon in the U.S. in 2001. The U.S. invasion was generally regarded as not being illegal.⁴⁶ Admittedly, there are countries that are either unwilling or unable to properly police and maintain the security of their territorial waters. It is suggested that international law, which is still essentially state-centric, cannot be

45. See Sittnick *supra* note 39 at 762 (asserting that: “Under principles of state responsibility, a state bears responsibility for its conduct that breaches its international obligations.”).

46. Following the 9/11 attacks, the UN Security Council passed resolution recognizing “the inherent right of individual and collective self-defence in accordance with the Charter.”; See generally Lawrence Azubuike, *Status of Taliban and Al Qaeda Soldiers: Another Viewpoint*, 19 Conn. J. Int’l L. 127, 140-141(2003). (noting that: “it is indubitable that the preponderance of international opinion weighed heavily in favor of the U.S. use of force, not only against Al Qaeda, but also against the Taliban.”)

distorted simply as a result of the aberration of failed States. Rather, the focus should be to address the concept of failed States and to try as much as possible to prevent the deterioration of States into lawlessness. Similarly, where a State has demonstrably failed, the international community, through the United Nations Security Council, should be bold to declare it as such with the result that the normal attributes of a State may temporarily be denied it. Every right carries with it a concomitant duty. If a State is not able to perform its duty to the international community, its statehood should legitimately be called into question. The result of this analysis, with respect to the law of piracy, is that where a State has failed, it really cannot assert its right to the inviolability of its territorial waters. And as such, without doing damage to the broader principle and respect for the sovereignty of States, the peculiar instance where a State is unwilling or unable to prevent "piracy" in its territorial waters can be dealt with. For example the principle of hot pursuit could extend to the territorial waters of that failed State.

The second, and equally controversial, requirement is that the act of piracy must be committed for private ends.⁴⁷ This requirement has historical roots. As noted above, pirates were not always frowned upon. As noted above, States once employed pirates and used them against enemy States. Similarly, it is also anchored in the very nature of piracy, which is that pirates must not be acting for any recognized State.⁴⁸ UNCLOS does not define "for private ends" nor did the 1958 High Seas Convention. However, it is a commonly held view that acts of violence committed on religious or ethnic grounds or for political reasons cannot be treated as piracy.⁴⁹ It has been suggested that the phrase, "for private ends" "must be understood to distinguish between State-sponsored piracy or privateering which could be redressed under the laws of war and piracy which could not. Again, essential to piracy's definition is not the actor's intent, but whether any State can be held liable for the actor's actions."⁵⁰ Thus, a war ship, as a general rule, cannot be a pirate ship unless its crew has mutinied and taken control of the ship.⁵¹ In that situation, the acts of piracy committed by the ship would be assimilated to acts committed by a private ship or aircraft. This is the purport of Article 101 of UNCLOS. The rationale for the "for private ends" requirements is that it reflects the underlying concern about interfering with commercial shipping and transportation and the reluctance of other

47. See the English case of *Republic of Bolivia v Indemnity Mutual Marine Assurance Co., Ltd* (1909) 1 K.B. 785 (Eng C.A.).

48. JOSEPH *supra* note 23 at 234.

49. Peppetti *supra* note 13 at 92.

50. Bahar *supra* note 14 at 30.

51. Article 102 of UNCLOS; Bahar *supra* note 14 at P. 39.

States to assert jurisdiction over politically motivated acts that do not have a commercial aspect.⁵²

The third requirement is the so-called two-ship requirement. Under Article 101, the illegal act must be directed against another ship or aircraft or against persons or property on board such ship or aircraft. It is thought that this requirement emanates from the notion that a ship is always under the jurisdiction of the flag State⁵³. In fact, a ship is considered the floating island of the flag State. The consequence is that any act or offense committed on board a ship is subject to the domestic laws of the flag State. The primary concern of international law therefore, especially in the “no man’s land” of high seas, is to protect outsiders and not necessarily the passengers of a given ship.

According to Article 105, every State may seize the pirate ship or aircraft, or a ship or aircraft taken by pirates and under the control of pirates and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide on the penalties to be imposed and may also determine the action to be taken with regard to the ship, aircraft or property subject to the rights of third parties acting in good faith. Such a seizure can only be done by warships or military aircrafts or other ships or aircrafts clearly marked and identifiable as being on government service and authorized to that effect.⁵⁴ This is a salutary provision even though some see it as yet another limitation in UNCLOS. The interdiction of pirates and the fight against piracy essentially has to be a governmental function. Private ships or vessels cannot usurp governmental functions simply because they are in the high seas. Of course, this requirement does not detract from the inherent right of any private ship to defend itself against pirates nor does it prevent them from cooperating with government in the interdiction and apprehension of pirates. Thus, private ships or vessels can always report or give information to government with a view to apprehending terrorists. Historically, there is the right of hot pursuit, which allowed the State to pursue pirates from its territorial waters into the high seas. Under UNCLOS, pirates could be pursued from the high seas, but the right of hot pursuit ended once they entered the territorial waters of any State. Again, critics charge that this limitation militates against the efficacy of the international regime against piracy especially in a situation where the coastal State is unable or unwilling to do anything about piracy. As discussed above, the better solution will be to address

52. Barrios *supra* note 12 at 153.

53. Martin Murphy *supra* note 29.

54. Article 107.

the fundamental or underlying cause for a State's inability or unwillingness to punish pirates emanating from or taking refuge in its territory. If it is a clear case of unwillingness, on the part of the State, then its State responsibility is implicated but, if it is a question of inability, then it forfeits its UNCLOS rights since it is otherwise, unable to discharge its international responsibility.

V. RECENT PIRACY INCIDENTS AND UNCLOS

One of the fairly undisputed aspects of the international law on piracy is that it is subject to universal jurisdiction.⁵⁵ Any State may properly try a pirate even though such State might not have any nexus with the actions of the pirate. After all they are enemies of all humankind. Indeed, for all the prohibition against piracy, international law does not provide for the substantive offense. Instead, it only offers a basis for States to assume the jurisdiction to deal with piracy as defined by international law. The State would still look to its internal law to determine the punishment to be meted out to pirates.⁵⁶ This makes the situation a little tricky. A State can regard an act as piracy that international law would not. That criminalization will of course be valid and enforceable within that State. Nevertheless, even if other States have similar provisions, such coincidence in their laws would not translate the act into piracy at international law. Absent a special agreement among States, none of them are bound to arrest or punish the subjects of the others for such acts committed outside its own jurisdiction; even though they are regarded as offenses by the law of the State to which the offender belongs.⁵⁷

The universal jurisdiction is retained by Article 105 of UNCLOS, under which every State may seize a pirate ship or aircraft. However, the Article provides that the courts of the State that carried out the seizure may decide upon the penalties to be imposed. It has been suggested that this is a limitation on the universal jurisdiction and that it restricts the trial of pirates only to the courts of the States making the arrest.⁵⁸ Although such a reading of the Article is plausible it is by no means

55. Most writers allude to this point.

56. See LESTER B. ORFIELD AND EDWARD D. RE, *CASES AND MATERIALS ON INTERNATIONAL LAW*, 1965, (The Bobbs-Merrill Company, Inc., Indianapolis) (citing Judge J.B. Moore in the *Lotus* case, PCIJ ser. A, No. 10, P. 71 (1927) to the effect that "though states may provide for its punishment, it is an offense against the law of nations" but noting the comment of J.W. Bingham, as reporter, in the *Harvard Research in International Law*, titled "Piracy," 26 *Am. J. Int'l L. Supp.* 739, 759-60 (1932): "Properly speaking, then, piracy is not a legal crime or offense under the law of nations....International Law Piracy is only a special ground of state jurisdiction – of jurisdiction in every state."

57. JOSEPH *supra* note 23 at 237; See also Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 *Tex. L. Rev.* 785, 795-796 (1988)

58. Kantorovich *supra* note 6.

compelling. Nothing on the face of the Article makes the jurisdiction exclusive to the arresting State. Instead, it is permissive. Besides, it is commonly agreed that UNCLOS codified the customary law on the subject of piracy.⁵⁹ If UNCLOS intended to depart, in any material respects, from the universal jurisdiction, which had been the hallmark of international law on piracy, a clearer provision would have been used.

The tenor of Article 105 assumes more prominence in the light of recent occurrences and the actions of certain States that have apprehended pirates. A classic illustration of the universality principle in relation to piracy is offered by the *Alondra Rainbow* incident and prosecutions.⁶⁰ The *Alondra Rainbow* was a Japanese owned tanker with a Filipino crew under the command of two Japanese officers. The tanker was sailing from Indonesia to Japan when pirates hijacked the ship. The Indian Navy later captured the pirates and towed the vessel to India. The pirates were tried and convicted by an Indian court.⁶¹ Similarly, the United States and the United Kingdom have established the practice of transferring pirates, captured in the Gulf of Aden, to Kenya for trial even though Kenya in most cases have nothing to do with the incidents.⁶² Kenya as a party to UNCLOS asserts its universal jurisdiction.⁶³

If there is any gap in the international regime, it is not in maintaining the universal jurisdiction usually associated with piracy, but in not providing its own mechanism for trial and punishment of pirates. It is a gaping omission that the Statute of the International Criminal Court did not deal with piracy. This is especially poignant when it is realized that not every State has the facilities for such trials and those which do may not be willing to go through the trouble.⁶⁴ That is the reason the United States and the United Kingdom developed the practice of transferring the pirates captured by them to third parties. Although the United States is not a party to the Statute of the ICC, it is not inconceivable that it would

59. Bahar *supra* note 14 at P. 10.

60. Peppetti *supra* note 13 at 108 – 110.

61. See generally, on the case, Peppetti *supra* note 13 at 108-109.

62. Kantorovich *supra* note 6.

63. Kantorovich *supra* note 6; Peppetti *supra* note 13 at 109 (citing the *Safina Al Bisaarat* incident).

64. For instance, it was reported that the British Foreign Office warned the Royal Navy not to detain pirates since that might violate their human rights and could even lead to claims of asylum in Britain. See Wall Street Journal article by Rivkin and Casey: *Pirates Exploit Confusion in International Law*, <http://online.wsj.com/article> visited 03/19/09; See also BARRY H. DUBNER, *THE LAW OF INTERNATIONAL SEA PIRACY*, 161, (1980) (Martinus Nijhoff Publishers), The Hague/Boston/London) (noting that under conventional law acts of piracy though defined by international law are punished by municipal law, and noting the possibility that a state might be unable or unwilling to punish and thus called for an international mechanism for punishment).

cooperate with the court in dealing with the menace of pirates, had the Statute dealt with the matter.

The 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention")

After the UNCLOS, it did not take long for the perceived gaps or lacunae to be exposed or for the provisions of UNCLOS to be tested. In 1985, the *Achille Lauro*⁶⁵, an Italian flag cruise ship, which was sailing from Alexandria to Port Said, was seized by some members of the Palestine Liberation Front (PLF), a faction of the Palestine Liberation Organization (PLO). The hijackers killed one passenger. Some characterized the hijacking as piracy while others did not see it as such because of the perceived political motives of the hijackers and the fact that a second ship or vessel was not involved.⁶⁶ The supposed gaps coupled with the stark reality of the *Achille Lauro* incident gave the impetus for Italy, supported by Austria and Egypt, to propose a convention to address maritime terrorism.⁶⁷ Essentially, the resulting Convention, the SUA Convention, eliminates the three restrictions discussed above in relation to UNCLOS.⁶⁸ It is pertinent to note, however, that unlike UNCLOS, which is considered as reflective of customary international law, the SUA Convention is only binding on State parties to the Convention. Thus, it is still of limited application and, for those persuaded that the strictures contained in UNCLOS are unsavory, SUA does not offer much relief.

VI. THE ESCALATION OF PIRACY IN THE GULF OF ADEN AND IN THE STRAIT OF MALACCA

Recently, the international community has been inundated, almost daily, with reports of piracy. While this rise is spread across the globe, two parts of the world have received the most focus: (1) the Gulf of Aden, off the coast of Somalia, and (2) the Strait of Malacca which is located within the territorial waters of the coastal States of Indonesia, Malaysia and Singapore.⁶⁹

The United Nations Security Council has had to become aware of the menace of piracy in the Gulf of Aden off the coast of Somalia. The

65. See generally Dean C. Alexander, *International Transportation Law: Maritime Terrorism and Legal Responses*, 19 Temp. L.J. 453, 464 (1991); Bahar *supra* note 14 at 27 – 28.

66. Halberstam *supra* note 20 at 271 (especially footnote 8).

67. Sittnick *supra* note 39 at 759.

68. Sittnick *supra* note 39 at 760.

69. Sittnick *supra* note 39 at 745.

pirates operate with impunity as Somalia is clearly unable to do anything about it. The Security Council Resolutions encourage states to cooperate with the Transitional Federal Government of Somalia (TFG) to repress piracy, and, for that purpose, after notifying the Secretary General of the United Nations, may enter the territorial waters of Somalia to exercise any rights in order to repress piracy.⁷⁰ While the UN Security Council Resolutions were proper, it seems that they did not sufficiently address the problem. They couched, in the usual diplomatic language, and seemed exhortatory.⁷¹ It was stressed that the resolutions applied solely to the situation in Somalia and did not establish any precedent of customary international law.⁷² The fact of the matter is that a situation where ships are being daily waylaid on the seas demanded a fairly robust and decisive action. It implicated international peace and security, and appeals to cooperate with the government of Somalia, which seemed not really in charge of anything, were not the best response. The deployment of an international force was called for, with a mechanism for trial and punishment of pirates. Although there is a coalition of navies led by the US, which has been patrolling the Gulf of Aden, the focus of the patrols has been to ward off the pirates rather than to pursue and apprehend them.⁷³ This method has proved insufficient. The pirates were undeterred and even attempted to hijack a US ship. In April 2009, pirates tried to hijack a US ship, the *Maersk Alabama*, but the Captain and his crew thwarted their efforts because the Captain surrendered himself to the pirates in order to safeguard his crew. The pirates fled with the Captain to an enclosed lifeboat. However US Navy Seals were able to rescue the captain and killed three of the four pirates in the process.⁷⁴ The fourth pirate was arrested and brought to the US for trial.⁷⁵ Even though the US

70. See for example UNSC Resolution 1816 (2008); UNSC Resolution 1846 (2008).

71. For instance UNSC Resolution 1816 (2008) urges states to be vigilant to acts of piracy and armed robbery and encourages them to increase and coordinate their efforts to deter piracy. Even though States are permitted to enter Somali territorial waters to repress piracy, they have to do so in cooperation with the Somali Transitional Federal Government. Besides, the Resolution made it a point to note that the authorization applied only to the Somali situation and did not affect the rights and responsibilities of states under international law.

72. Kantorovich *supra* note 6; It is surprising why such a caveat was thought necessary. If a situation similar to the Somali problem were to arise again, there should be no hesitation on the part of the international community to act. Indeed the measures contained in the resolutions do no violence to the sovereignty of Somalia, since they were requested by the so called government of that country and were to be implemented with their consent.

73. Kantorovich, *supra* note 6

74. See Reuters article titled: *US Navy Rescues Captain, Kills Pirates*, <http://www.reuters.com/article/topNews/idUSTRE53A1LP20090412?pageNumber=2&virtualBrandChannel=0> (visited May 20, 2009)

75. See article titled, *Piracy charge with mandatory life sentence looms*, http://news.yahoo.com/s/ap/us_piracy_suspect_court (visited May 20, 2009)

action has not stopped the pirates,⁷⁶ such decisive actions would drastically reduce the occurrence of piracies. No matter that the pirates are armed with sophisticated weapons, the single most important factor encouraging them has been that they had been operating unchallenged for a long time. If they have to fight or defend against a national or international force every time they undertake their nefarious activity, their cost-benefit analysis would be different.

For the Strait of Malacca, the coastal states of Indonesia and Malaysia have resisted the involvement of foreign or outside forces on the basis of respect for their sovereignty. (Singapore is amenable to such step.)⁷⁷ Instead, they have embarked on coordinated patrols in which the maritime security forces from the three states patrol within their own territorial waters.⁷⁸ It is all well and good for Indonesia and Malaysia to assert and protect their sovereignty. That is their prerogative. However, they must realize that they also have responsibility. If they continue to fail to repress piracy, they implicate their international responsibility.⁷⁹ Those states whose nationals and or ships fall victim to the pirates in the Strait of Malacca should be able to make and maintain claims against the two states for failing in their duty to repress and prevent piracy in their territorial waters.

VII. CONCLUSION

Piracy is no longer a matter of antiquity or of historical interest, as modern piracy has assumed an alarmingly dangerous amount of currency. Current international regime on the subject is not wholly unsatisfactory. However, there are two major suggestions advocated. First, a more robust approach by the UN Security Council will deal with the immediacy of the problem and at least arrest the situation by deterring pirates. Second, a longer and more enduring solution will be to couple the international definition and prohibition against piracy with a meaningful judicial process, preferably within the structures of the international criminal court. By streamlining the judicial process, states would have an adequate alternative forum if they are unable or unwilling to prosecute pirates in their home countries. Therefore, by providing an

76. It reported a few days ago that they actually attempted to hijack a ship, which unbeknownst to them was a French naval vessel. Of course they were apprehended.

77. Sittnick *supra* note 39 at 755.

78. Sittnick, *supra* note 39 at 753.

79. See generally Sittnick *supra* note 39 (arguing that relying on the Corfu Channel Case and similar cases in that line and on UN Security Council Resolution 1373 of 2001 requiring states to take "the necessary steps" to prevent terrorism, Malaysia and Indonesia's refusal to take available steps to reduce the threat of piracy in the strait of Malacca would amount to a violation of their international obligations).

international definition and ensuring an adequate forum, the international community would recognize that piracy is a criminal offense that is and this will subsequently ensure that piracy is treated as an international criminal offense which it is, and create the awareness of the opprobrium and condemnation with which mankind views piracy.