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Blackbeard Meets Blackwater: An Analysis of International Conventions that Address Piracy and the Use of Private Security Companies to Protect the Shipping Industry

Jill Harrelson

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COMMENT

BLACKBEARD MEETS BLACKWATER: AN ANALYSIS OF INTERNATIONAL CONVENTIONS THAT ADDRESS PIRACY AND THE USE OF PRIVATE SECURITY COMPANIES TO PROTECT THE SHIPPING INDUSTRY

JILL HARRELSON*

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INTRODUCTION

On November 17, 2008, Somali pirates captured the *Sirius Star*, a Saudi Arabia-owned oil tanker carrying more than \$100 million of crude oil, off the coast of Kenya.¹ Long considered a historical relic,

1. See Robert F. Worth, *Pirates Seize Saudi Tanker Off Kenya*, N.Y. TIMES, Nov. 18, 2008, at A6 available at <http://www.nytimes.com/2008/11/18/world/africa/18pirates.html?scp=3&sq=piratesandsaudioltanker&st=cse> (stressing that the *Sirius Star* is the largest ship pirates have seized to date); see also *Saudi tanker 'freed off Somalia'*, BBC NEWS, Jan. 9, 2009, <http://news.bbc.co.uk/2/hi/africa/7820311.stm> (last visited Nov. 14, 2009).

pirates regained the world's interest with an increasing number of brazen attacks in the latter half of 2008.² Most notably, the International Maritime Bureau ("IMB") reports an alarming increase in pirate attacks off the coast of Somalia and in the Gulf of Aden.³ Not remotely related to the stereotypical images of eye patches, parrots, and swords, modern-day pirates have evolved into highly organized groups of individuals capable of quickly seizing some of the largest ships available.⁴ Ransom money is the primary motivation for the hijackings, and the pirates claim to have no desire to harm the ship or crew members.⁵

International law, however, has not adapted to address modern-day piracy.⁶ This inadequacy led at least one country to set captured

(reporting that the *Sirius Star* was released in exchange for a \$3 million ransom).

2. See Jeffrey Gettleman, *Somalia Pirates Capture Tanks and Unwanted Global Notice*, N.Y. TIMES, Sept. 27, 2008, at A1 available at <http://www.nytimes.com/2008/09/27/world/africa/27pirates.html?scp=1&sq=somaliapiratescapturetanksandglobalnotice&st=cse> (highlighting that in September 2008 major countries reacted when pirates captured a Ukrainian ship carrying \$30 million in weapons). This ship's capture prompted the United States and Russia to send their Navies in pursuit of the hijacked ship. *Id.*

3. See ICC INT'L MAR. BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS, REPORT FOR THE PERIOD 1 JANUARY – 30 SEPTEMBER 2008, at 32 (2008) [hereinafter IMB REPORT] (establishing the International Maritime Bureau ("IMB") as a division of the International Chamber of Commerce ("ICC") and a non-profit organization designed to be the central point for combating all maritime crime).

4. See Roger Middleton, Briefing Paper, *Piracy in Somalia: Threatening global trade, feeding local wars*, Chatham House Africa Programme Paper 08/02, 2008, at 4-6 (2008) available at http://www.chathamhouse.org.uk/files/12203_1008piracysomalia.pdf (describing how pirates use GPS systems, satellite phones, and "mother ships" to be more effective and expand the range in which they can operate, and how a ship can be captured in only fifteen minutes); see also Gettleman, *supra* note 2 (explaining how Somali pirates have evolved into an organized crime ring, with over one thousand gunmen at their disposal, capable of "grabbing everything from sailing yachts to oil tankers").

5. See generally Robyn Hunter, *How do you pay a pirate's ransom?*, BBC NEWS, Dec. 3, 2008, <http://news.bbc.co.uk/2/hi/africa/7752813.stm> (last visited Nov. 14, 2009) (estimating that the total amount of ransoms paid in 2008 was around \$150 million); *Saudi tanker 'freed off Somalia'*, *supra* note 1 (quoting a pirate named Daybad that the pirates did not intend to hurt the crew aboard the *Sirius Star*).

6. See discussion *infra* Part II.A-B (arguing that current international conventions are ineffective for defining and prosecuting pirates).

pirates free.⁷ The United Nations Convention on the Law of the Sea (“UNCLOS”) provides the universally-accepted definition of piracy under international law.⁸ This definition was drafted for the 1958 Convention on the High Seas, incorporated into the UNCLOS in 1982, and has remained largely unchanged.⁹ Piratical acts also fall under the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (“SUA Convention”), even though the Convention’s main purpose is combating terrorism.¹⁰

The international community has reacted in numerous ways to the increase in piracy.¹¹ However, many of the current actions are not legal solutions to piracy, but rather measures to provide more security to the high-risk areas.¹² In response to the perceived need for increased security, American private security companies have expressed a strong desire to provide a range of security services to the shipping industry.¹³ Controversy surrounds the use of these companies providing armed guards aboard vessels because the legal

7. See Marcus Hand, *Danish Navy Releases 10 Somali Pirates*, LLOYD'S LIST, Sept. 25, 2008, <http://www.lloydslist.com/ll/news/danish-navy-releases-10-somali-pirates/20017574257.htm> (last visited Nov. 14, 2009) (reporting that the Danish navy freed ten suspected Somali pirates because the captured pirates could not be tried in Denmark). Danish authorities were unwilling to turn them over to the transitional government in Somalia. *Id.*

8. See United Nations Convention on the Law of the Sea, art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] (listing acts that count as piracy under international law); see also S.C. Res. 1851, U.N. Doc S/RES/1851 (Dec. 16, 2008) (reaffirming that the UNCLOS is the appropriate legal framework for piracy).

9. See BARRY HART DUBNER, *THE LAW OF INTERNATIONAL SEA PIRACY* 4 (1980) (arguing that the law of the sea is “not a static subject” and questioning the legal view that the piracy articles do not need revision).

10. See Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 222 [hereinafter SUA Convention] (expressing deep concern over the increasing instances of terrorist attacks on the high seas and outlining a number of terrorist actions punishable under the Convention).

11. See discussion *infra* Part I.A (assessing the collaborative efforts of numerous countries).

12. See *id.* (describing actions taken by various organizations like the North Atlantic Treaty Organization (“NATO”) and the U.N. Security Council).

13. See discussion *infra* Part I.D (discussing two American private security companies’ interest in protecting vessels from pirates).

implications are unclear if a private armed guard shoots and kills another person.¹⁴

Part I of this Comment reviews recent actions taken by different countries and international organizations to combat the increase in piracy, explores the legal history of piracy, and provides different international piracy definitions.¹⁵ In addition, Part I examines the increased interest of American private security companies in protecting the shipping industry and the legal implications of their involvement.¹⁶ Part II argues that the UNCLOS and the SUA Convention do not effectively define piracy and are insufficient to prosecute the Somali pirates.¹⁷ Part II also argues that American private security companies can legally provide armed guards aboard ships.¹⁸ Part III proposes methods to ensure that there is an effective international legal regime that properly defines and prosecutes pirates.¹⁹ Finally, Part III recommends that, though legal for American companies, the international community should not allow private security companies to provide armed guards aboard vessels.²⁰

I. BACKGROUND

According to the IMB, the significant increase in reported pirate attacks is directly related to the increased attacks by Somali pirates off the coast of Somalia and in the Gulf of Aden.²¹ Some shipping

14. *See id.* (contrasting the International Maritime Organization's ("IMO") view of armed guards with those of different private security companies).

15. *See* discussion *infra* Part I.A-C (explaining how countries have increased security to the area, how pirates have always been considered "enemies of all mankind," and laying out the international legal framework for piracy).

16. *See* discussion *infra* Part I.D (evaluating proposals by American private security companies).

17. *See* discussion *infra* Part II.A-B (analyzing the problems with the current international legal definitions and jurisdiction restrictions of piracy).

18. *See* discussion *infra* Part II.C (noting that, although their services are lawful, these companies expose themselves to many different jurisdictions when navigating the world's waters).

19. *See* discussion *infra* Part III.A-B (embracing a broader definition of piracy and a new international court with specific jurisdiction over suspected pirates).

20. *See* discussion *infra* Part III.C (suggesting that private security companies not be allowed to provide armed guards on vessels).

21. *See* IMB REPORT, *supra* note 3, at 25 (observing the increase to eighty-three overall pirate attacks in the third quarter of 2008 from fifty-three in the first quarter and sixty-three in the second quarter). Of the numerous attacks during

companies have decided to stop using the Gulf of Aden altogether and instead take a considerably longer route around the African continent.²² Though some Somali pirates attain local hero status in their communities,²³ piracy is still a crime and the international community must address it effectively.²⁴ Both the UNCLOS and the SUA Convention contain articles that cover piratical acts.²⁵ In addition, American private security companies have responded by offering security services to the shipping industry.²⁶

A. COMMON ELEMENTS OF RECENT PIRATE ATTACKS AND CURRENT INTERNATIONAL RESPONSES

The recent pirate attacks occur either within Somalia's territorial seas or when the pirates capture a ship on the high seas and then retreat into Somalia's territorial sea.²⁷ Somalia is a prime location for

2008, sixty-three took place off the coast of Somalia and in the Gulf of Aden. *Id.* These Somali pirates managed to hijack twenty-six vessels, hold 537 crew members hostage, and fire upon an additional twenty-one vessels in the first nine months of 2008. *Id.*

22. See Michael Buchanan, *Pirates Threaten Christmas Shopping*, BBC NEWS, Oct. 23, 2008, <http://news.bbc.co.uk/2/hi/africa/7686466.stm> (last visited Nov. 14, 2009) (indicating that sailing around the Cape of Good Hope can add up to three weeks to a ship's route). According to insurance companies, if ships choose to continue to sail through the waters off the coast of Somalia, then insurance premiums are likely to rise and this cost will likely be passed on to the consumer. *Id.* See also John W. Miller, *Piracy Spurs Threats to Shipping Costs*, WALL ST. J., Nov. 19, 2008, at A12, available at <http://online.wsj.com/article/SB122701864743437147.html> (reporting that companies whose ships opt for the longer but safer route, which costs far more in fuel to complete, are trying to pressure governments along the Gulf of Aden to crack down on piracy or face lost revenues from ships that pass through the area).

23. See *Pirates are Not Swashbucklers: They're Thieves*, NAT'L NEWSPAPER, Nov. 19, 2008, available at <http://www.thenational.ae/article/20081119/OPINION/113627547/1119> (quoting a wedding guest at a pirate's wedding as saying that "[m]arrying a pirate is every Somali girl's dream . . . [because] [h]e has power, money, immunity and the weapons to defend the tribe.").

24. See George D. Gabel, Jr., *Smoother Seas Ahead: The Draft Guidelines as an International Solution to Modern-Day Piracy*, 81 TUL. L. REV. 1433, 1434 (2007) (opining that the romanticization of piracy detracts from the fact that it "has become a real problem").

25. See discussion *infra* Part I.C.1-2 (introducing the relevant articles under the UNCLOS and the SUA Convention).

26. See discussion *infra* Part I.D (detailing recent proposals by American private security companies).

27. See IMB REPORT, *supra* note 3, at 27-30 (summarizing numerous attacks

piracy because it has no functioning government,²⁸ no effective coastal security, and a high poverty rate.²⁹ The lack of coastal security is even more exasperated by the length of the coastline, which is 3025 kilometers.³⁰ Most ship owners succumb to the pirates' demands and pay the ransoms of hijacked ships.³¹ Ship owners believe it is better to pay the ransom than to risk losing crew members and equipment.³²

The international community has made a concerted effort to respond to the pirate attacks.³³ The North Atlantic Treaty Organization ("NATO") launched Operation Allied Provider in order to provide more security to the area.³⁴ The U.N. Security Council passed numerous temporary resolutions.³⁵ The most current

where the pirates sailed the stolen ship back to Somalia's coastal seas, anchored it, and then demanded a ransom to release the ship and its crew members).

28. See Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1, 18 (2007) (noting that Somalia has not had a "functioning government, no real laws, and no enforcement power" since 1991).

29. See S.C. Res. 1851, *supra* note 8 (recognizing that the Transitional Federal Government ("TFG") of Somalia does not have the ability to capture pirates or secure its territorial seas); see also Ethan C. Stiles, Note, *Reforming Current International Law to Combat Modern Sea Piracy*, 27 SUFFOLK TRANSNAT'L L. REV. 299, 301 (2004) (asserting that pirates frequently target locations with ineffective water patrols, prevalent crime, and poor economic conditions). These "hotspots" include the archipelagic states of Southeast Asia and South Africa. *Id.*

30. See CIA World Factbook, Africa: Somalia, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html> (last visited Jan. 22, 2010).

31. See Middleton, *supra* note 4, at 6 (hypothesizing that paying ransoms makes the situation worse but noting the lack of alternatives companies face when outside help is unavailable).

32. *Id.*

33. See S.C. Res. 1846, ¶ 6, U.N. Doc. S/RES/1846 (Dec. 2, 2008) (welcoming initiatives by numerous countries, including the United States, Russia, India, and the United Kingdom, and praising NATO and the European Union for providing naval operations).

34. See News Release, North Atlantic Treaty Organization, *NATO Naval Task Group En Route to Escort Duties off Somali Coast* (Oct. 27, 2008), available at http://www.afsouth.nato.int/JFCN_Operations/allied_provider/news_release/NR_01_08.html (explaining that Operation Allied Provider was primarily created to escort World Food Programme ships taking aid to Somalia but will also be used to create a deterrent presence in the area).

35. See, e.g., S.C. Res. 1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008) (condemning all acts of piracy off the coast of Somalia); S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008) (grappling with maritime security concerns and

resolution extends the authority of cooperating states to enter and capture pirates in areas normally considered Somalia's sovereign territory.³⁶

In addition, the United States has agreed to turn captured pirates over to Kenya for detention and prosecution.³⁷ These types of agreements are currently necessary "because no country, including the U.S., has been willing to hold the [captured] pirates."³⁸ Similar agreements exist between other countries; however, there is no uniformity among the various agreements due to different political climates and practical issues.³⁹ Another international collaboration that coordinates anti-piracy actions is the Contact Group on Piracy off the Coast of Somalia.⁴⁰ The Contact Group's main goal is to "examine practical options for strengthening the ability of countries willing to detain and prosecute suspected pirates."⁴¹

providing suggestions to the international community about how to address piracy off the coast of Somalia and in the Gulf of Aden).

36. See S.C. Res. 1846, *supra* note 33, ¶ 10 (authorizing the states to treat Somalia's territorial seas as high seas for the purpose of combating piracy). This resolution expired on December 2, 2009. *Id.*

37. See Richard Meade, *U.S. to Sign Kenya Deal to Prosecute Somali Pirates*, LLOYD'S LIST, Jan. 16, 2009, <http://www.lloydslist.com/ll/news/viewArticle.htm?articleId=20017609027> (last visited Nov. 14, 2009) (observing that the use of bilateral agreements is becoming increasingly more common between countries that have committed ships to combat piracy in the Gulf of Aden and countries that are willing to accept captured pirates); see also, David Morgan, *U.S. Delivers Seven Somali Pirate Suspects to Kenya*, REUTERS, Mar. 5, 2009, available at <http://www.reuters.com/article/idUSTRE52480N20090305>.

38. Morgan, *supra* note 37. But see *U.S. Navy Arrests Pirate Suspects in Gulf of Aden*, CNN.COM, Feb. 11, 2009, <http://www.cnn.com/2009/WORLD/africa/02/11/piracy.arrests/index.html> (last visited Nov. 14, 2009) (detailing the first pirate arrests made by the U.S.). The pirates will be prosecuted in Kenya. *Id.*

39. See Meade, *supra* note 36 (reporting that pirates caught by the United Kingdom were being prosecuted through the Kenyan legal system and it is understood that pirates caught by Indian forces were handed over to Yemen officials). See also UNCLOS, *supra* note 8, art. 105 (specifying that the courts of the state that seizes pirates outside the jurisdiction of another state may decide what to do with the captured pirates).

40. See David Osler, *Piracy Contact Group Launched*, LLOYD'S LIST, Jan. 15, 2009, <http://www.lloydslist.com/ll/news/viewArticle.htm?articleId=20017608173&src=rss> (last visited Nov. 14, 2009) (stating that this group consists of twenty-four countries, including the United States, and five international organizations).

41. See *id.* (reporting that the Contact Group's first meeting on January 14, 2009, also created separate teams focused on providing support to anti-piracy

B. HISTORY OF THE LAW OF PIRACY

Piracy has existed since antiquity.⁴² Unlike most crimes, piracy conjures up wild fantasies and adventures in the minds of many people, especially those who grew up in Western culture.⁴³ The historically accepted theory in Europe is that pirates are *hostis humani generis*, meaning “enemies of all mankind.”⁴⁴ The U.S. Supreme Court accepted this theory and in 1820 opined that because pirates were *hostis humani generis* they were subject to prosecution by all nations.⁴⁵ A necessary implication of designating pirates as *hostis humani generis* is that they are subject to universal jurisdiction.⁴⁶ Universal jurisdiction means that any state can assert jurisdiction over the defendant even though the act did not occur in that state’s territorial jurisdiction.⁴⁷

C. INTERNATIONAL PIRACY DEFINITIONS

Article 101 of the UNCLOS is the generally-accepted international legal definition of piracy.⁴⁸ However, other conventions and

operations and tracking pirates’ financial resources).

42. See Jason Power, Comment, *Maritime Terrorism: A New Challenge for National and International Security*, 10 BARRY L. REV. 111, 112 (2008) (tracing the act of piracy to 1190 B.C.).

43. See STEFAN EKLÖF, PIRATES IN PARADISE: A MODERN HISTORY OF SOUTHEAST ASIA’S MARITIME MARAUDERS 1 (2006) (referring to many books and movies that depict real and fictional pirates as “brave, adventurous, cruel, bloodthirsty and hungry for gold and treasures”).

44. See *id.* at 7-8 (clarifying that while this theory was generally accepted, many European countries used state sanctioned piracy as a war tactic that continued in times of peace).

45. See *United States v. Klintock*, 18 U.S. 144, 152 (1820) (“[Piracy] is punishable in the Courts of the United States . . . [and pirates] are proper objects for the penal code of all nations.”); see also *United States v. The Brig Malek Adhel*, 43 U.S. 210, 232 (1844) (A pirate is deemed, and properly deemed, *hostis humani generis*).

46. See Bahar, *supra* note 28, at 11 (observing that piracy is the oldest offense that falls under universal jurisdiction).

47. See Power, *supra* note 42, at 125–26 (elaborating that once a state exercises universal jurisdiction over a pirate it then uses its own national laws to prosecute the pirate).

48. See S.C. Res. 1846, *supra* note 33 (reaffirming that the UNCLOS is the appropriate legal framework for piracy). See generally DUBNER, *supra* note 9 (providing an overview of the international law applicable to international piracy and proposing some suggestions for combating piracy in the 21st century).

organizations have also attempted to expand the definition of piracy by creating their own definitions.⁴⁹ The SUA Convention does not specifically denominate any offenses as piracy, but it covers piratical acts under a broader class of illegal offenses against ships.⁵⁰ Furthermore, the IMB has created its own definition in order to accurately track the number of pirate attacks that occur each year.⁵¹

1. *The United Nations Convention on the Law of the Sea*

Article 101 states that piracy is an “illegal act of violence or detention” that is “committed for private ends” and is directed against another ship on the “high seas.”⁵² Even though not all countries have ratified the UNCLOS, notably the United States,⁵³ the Article 101 piracy definition is generally accepted as binding customary international law on all nations.⁵⁴ A major component of the UNCLOS definition of piracy is that the act must take place on the high seas.⁵⁵ No state has sovereignty over any part of the high seas, however universal jurisdiction is implicit in the UNCLOS under Article 105.⁵⁶ Thus states will have jurisdiction over pirates if they are captured on the high seas. In contrast, territorial seas are

49. See discussion *infra* Part I.C.2-3 (distinguishing other definitions of piracy from the UNCLOS definition).

50. See SUA Convention, *supra* note 10, art. 3 (making it illegal to take over control of another ship by force, threat, or any form of intimidation).

51. IMB REPORT, *supra* note 3, at 4.

52. UNCLOS, *supra* note 8, art. 101.

53. See MARJORIE ANN BROWNE, CRS REPORT FOR CONGRESS, THE U.N. LAW OF THE SEA CONVENTION AND THE UNITED STATES: DEVELOPMENTS SINCE OCTOBER 2003 2 (Oct. 31, 2007) (explaining that when the UNCLOS was first opened for signature the United States did not agree with the deep seabed provisions concerning “resources beyond national jurisdiction”). Acceptable changes were made, and in October 2007 the Senate Foreign Relations Committee voted to recommend that the Senate ratify the Convention. *Id.* at 1. However, the treaty never came before the full Senate for a vote that session. *Id.* at 2.

54. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) (stating that customary international law results when states act out of a sense of legal obligation to consistently follow a certain practice).

55. See UNCLOS, *supra* note 8, art. 86 (excluding from the definition of piracy acts that take place in the exclusive economic zone (“EEZ”), the territorial seas, a state’s internal waters, or archipelagic waters).

56. See *id.* art. 105 (permitting all states to seize pirates’ ships and arrest the people on board if the ship is in “the high seas” or “outside the jurisdiction of any State”). Article 105 also explicitly states that the state may determine the penalties to be imposed. *Id.*

waters up to twelve nautical miles off the coastal State, and a state has complete sovereignty over its territorial seas.⁵⁷ Ships are subject to the laws of every state through whose territorial seas they travel and to the law of the state whose flag they are flying.⁵⁸

2. *The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*

The SUA Convention also covers piratical acts.⁵⁹ The United States ratified this treaty in 1995, but Somalia is not a party to the SUA Convention.⁶⁰ The SUA Convention was proposed as a result of the politically-motivated hijacking of the *Achille Lauro*, an Italian cruise ship.⁶¹ Article 3 of the SUA Convention prohibits a person from taking a ship by force, harming a person on board a ship, and destroying or damaging ships.⁶²

Unlike the UNCLOS, the SUA Convention does not have a high seas requirement.⁶³ In addition, the SUA Convention does not apply to ships that operate solely in the territorial seas of a coastal state.⁶⁴ The SUA Convention is also distinct from the UNCLOS because it

57. See *id.* art. 2-5 (detailing that the baseline for measuring territorial seas is the “low-water line along the coast as marked on large-scale charts”).

58. See *id.* art. 3 (establishing the coastal state’s jurisdiction over its territorial sea); see also *id.* art. 92 (explaining that ships can only sail under one flag and are subject to the exclusive jurisdiction of that flag state while on the high seas). A ship may not change its flag during a trip, and there are consequences for ships that sail under two or more flags of different states. *Id.*

59. SUA Convention, *supra* note 10, art. 3.

60. See U.S. DEPARTMENT OF STATE, MULTILATERAL TREATIES IN FORCE FOR THE UNITED STATES AS OF JANUARY 1, 2007: MARITIME MATTERS 119-20 (2007), available at <http://www.state.gov/documents/organization/89668.pdf> (listing the 137 countries that are parties to the SUA Convention).

61. See Power, *supra* note 42, at 124 (describing the hijacking in which terrorists demanded that Palestinians held in Israel be released or else they would kill passengers). The terrorists killed one American. *Id.*

62. SUA Convention, *supra* note 10, art. 3.

63. Compare UNCLOS, *supra* note 8, art. 86 (applying the piracy articles only to the high seas), with SUA Convention, *supra* note 10, art. 4 (applying the SUA Convention to all ships that travel “through or from waters beyond the outer limit of the territorial sea”).

64. See Helmut Tuerk, *Combating Terrorism at Sea – The Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 15 U. MIAMI INT’L & COMP. L. REV. 337, 348 (2008) (reasoning that the SUA Convention only applies to ships that leave territorial seas with international travel routes).

focuses on punishing offenders.⁶⁵ Therefore, a significant aspect of the SUA Convention is that it requires a state party to either prosecute or extradite an offender.⁶⁶

Unlike the UNCLOS, the SUA Convention does not embrace the notion of universal jurisdiction. Rather, under the SUA Convention there are three distinct ways a state party can establish jurisdiction over an offender in order to prosecute him or her.⁶⁷ First, a state party can establish jurisdiction if the illegal act takes place in the state party's own territorial seas.⁶⁸ Second, a state party can establish jurisdiction if the attack was against or on board a ship flying the flag of a state party.⁶⁹ Third, a state party can establish jurisdiction if the attack is perpetuated by one of its own nationals.⁷⁰ Similar to the UNCLOS, a party to the SUA Convention does not have jurisdiction to venture into the territorial seas of another nation to capture offenders.⁷¹

3. *International Maritime Bureau*

The IMB uses an alternate definition of piracy.⁷² Essentially, it covers all attempts to take a ship regardless of the location.⁷³ The

65. See Carlo Tiribelli, *Time to Update the 1988 Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 8 OR. REV. INT'L. L. 133, 135 (2006) (concluding that the SUA Convention aimed to provide effective judicial remedies against offenders committing illegal acts against ships); see also Tuerk, *supra* note 64, at 348-49 (pointing out that even though the word "suppression" is in the title of the SUA Convention, there is only one article in the convention that actually addresses the suppression of criminal acts).

66. See SUA Convention, *supra* note 10, art. 10 (requiring a state that captures offenders to "extradite [them]" or send the case "to its competent authorities for the purpose of prosecution").

67. See *id.* art. 6 (limiting the ways a state party can establish jurisdiction over an offense).

68. *Id.* art. 6(1)(b).

69. *Id.* art. 6(1)(a).

70. *Id.* art. 6(1)(c).

71. See Bahar, *supra* note 28, at 25 ("[T]here is no right-of-entry into territorial waters for nations capable of actual suppression.").

72. See IMB REPORT, *supra* note 3, at 4 (defining piracy as "[a]n act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act").

73. See *id.* (clarifying that the IMB definition applies to ships that are at sea,

IMB uses a broader definition than the UNCLOS because the UNCLOS does not include acts of piracy that take place in a state's territorial seas.⁷⁴ The IMB definition also does not make a distinction between a crime committed for private ends and a crime committed for public ends.⁷⁵ The IMB definition has no legal consequences, but rather deviates from the UNCLOS definition solely "[f]or statistical purposes".⁷⁶

D. PRIVATE SECURITY COMPANIES AND ARMED GUARDS

On October 16, 2008, Blackwater Worldwide⁷⁷ announced its interest in providing security assistance to the shipping industry to help combat piracy.⁷⁸ Blackwater proposed to provide an escort ship to accompany vessels on their routes, rather than having armed guards on the client's ship itself.⁷⁹ Blackwater is no stranger to controversy and has been criticized for some of its questionable

berthed or anchored).

74. See UNCLOS, *supra* note 8, art. 101(a)(i) (limiting the piracy definition to the high seas).

75. Compare *id.* art. 101(a) (narrowing the definition to crimes committed for "private ends"), with IMB REPORT, *supra* note 3, at 4 (referring to acts of piracy without any reference to subjective intent).

76. See IMB REPORT, *supra* note 3, at 4 (explaining that to get accurate statistics the IMB uses an alternative definition because many attacks take place within states' jurisdictions and the UNCLOS definition does not encompass these attacks).

77. See Dana Hedgpeth, *Blackwater Sheds Name, Shifts Focus*, WASH. POST, Feb. 14, 2009, at D1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/13/AR2009021303149.html> (indicating that Blackwater is changing its name to "Xe" (pronounced "zee") because "the idea is to define the company as what it is today and not what it used to be").

78. See Press Release, Blackwater Worldwide, Blackwater Worldwide's Maritime Operations Ready to Assist Shipping Industry (Oct. 16, 2008), available at <http://blackwatermediacenter.com/images/pdf/10-16-08%20Maritime-Release.pdf> (last visited Sept. 9, 2009) (citing costs of piracy to the shipping industry as reasons for additional security). These costs include higher insurance payments, higher crew pay, and higher ransoms. *Id.*

79. See *id.* (describing the 183-foot McArthur ship as a "multi-purpose maritime vessel designed to support military and law enforcement training, peacekeeping, and stability operations worldwide."). But see Sanhita SinhaRoy, *Blackwater to Battle Pirates: The Private Security Firm Eyes a New Market: The High Seas*, IN THESE TIMES, Jan. 26, 2009, available at http://www.inthesetimes.com/article/4173/blackwater_to_battle_pirates/ (reporting that as of January 2009 Blackwater does not have any contracts with the shipping industry and that the McArthur ship is still in the United States).

actions in Iraq.⁸⁰ However, providing support for the shipping industry is inherently different from providing services in Iraq because Blackwater would not be under contract with the U.S. State Department.⁸¹ HollowPoint Protective Services, another American private security company interested in providing security services in the Gulf of Aden, has clearly stated its view that armed guards are the answer.⁸² To bypass the current criticism over the use of private security companies in Iraq, the CEO of HollowPoint distinguished protection of the shipping industry from those services provided by Blackwater in Iraq.⁸³

Private security companies providing services to the shipping industry are not a new phenomenon.⁸⁴ For years, private security

80. See, e.g., Del Quentin Wilber, *Contractors Charged in '07 Iraq Deaths*, WASH. POST, Dec. 9, 2008, at A2, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/12/08/AR2008120800486_pf.html (indicating that Blackwater Worldwide is a North Carolina-based security firm that has contracts to operate in Iraq, and detailing the indictment of six Blackwater security guards who were charged in December 2008 with voluntary manslaughter, attempted manslaughter, and firearm violations in the shooting deaths of at least fourteen Iraqi civilians). But see, Charlie Savage, *Judge Drops Charges From Blackwater Deaths in Iraq*, N.Y. TIMES, Dec. 31, 2009, available at <http://www.nytimes.com/2010/01/01/us/01blackwater.html> (quoting a federal judge's opinion that the "mishandling of the case requires dismissal of the indictment against all the defendants").

81. See Elise Labott, *Official: U.S. Will Not Renew Iraq Contract with Blackwater*, CNN.COM, Jan. 30, 2009, <http://edition.cnn.com/2009/WORLD/meast/01/30/us.blackwater.contract/> (last visited Nov. 15, 2009) (reporting that Blackwater is losing its contract with the State Department because the Iraqi government refused to renew the company's license). Blackwater will continue to have contracts with the State Department for overseas protection of diplomats. *Id.*

82. See Press Release, HollowPoint Protective Services, "Ships Need Armed Guards," Says Security Firm Chief (Oct. 20, 2008) available at <http://hollowpointprotection.com/media/HPPSPiracyPressRelease.pdf> (challenging the "widespread opposition to the practice" and claiming that HollowPoint is currently in negotiations to provide armed protection to shipping companies).

83. See *id.* ("Our purpose is singular in nature. We provide protection for vessels, their crews and cargo. Unlike the situation in Iraq where Blackwater is involved in both peacekeeping and protection activities, we only respond to attacks on the vessels we protect.").

84. See Katharine Houreld, *After Iraq, Security Firms Join Somalia Piracy Fight*, ABC NEWS, Oct. 26, 2008, available at <http://abcnews.go.com/International/wireStory?id=6114582> (asserting that British security companies already have a majority of the market in the Gulf of Aden but that American companies are increasingly interested in providing their own services).

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companies have provided services ranging from consulting on preventative measures to post-attack services.⁸⁵ In addition, insurance companies are now providing discounted rates to ships that hire their own security.⁸⁶ However, the use of armed guards varies from company to company.⁸⁷

The International Maritime Organization (“IMO”) strongly discourages the use of firearms to protect vessels and crews.⁸⁸ The IMO believes that pirates may be more tempted to carry weapons if they believe that ships are armed, thus “escalating an already dangerous situation.”⁸⁹ With or without firearms, private security companies wishing to provide security to the shipping industry are subject to every jurisdiction through which they sail, and the state whose flag they sail under.⁹⁰

85. See Carolin Liss, *Private Security Companies in the Fight Against Piracy in Asia 3* (Asia Research Centre, Working Paper No. 120, 2005) (discussing a range of private security services that include risk assessment, crew training, and recovery of hijacked vessels and crew rescue).

86. See Houreld, *supra* note 84 (announcing that Hart, a British security firm, has entered into an agreement with an insurance company where the insurance company offers discounted rates for ships that use Hart guards). There is no mention of whether these guards will be armed. *Id.*

87. See *id.* (declaring that the British security firm Eos does not arm its employees and that its director believes this restriction attracts customers to the firm).

88. See Int’l Mar. Org. [IMO], *Piracy and Armed Robbery Against Ships: Guidance to Shipowners and Ship Operators, Shipmasters and Crews on Preventing and Suppressing Acts of Piracy and Armed Robbery Against Ships*, ¶¶ 60-61, MSC.1/Circ.1334 (June 23, 2009) [hereinafter *IMO Guidelines*] (reasoning that weapons use requires special training and that accidental killings can potentially have unforeseen consequences, legal and otherwise, even if the person believes it was self-defense); see also EKLÖF, *supra* note 43, at 128 (emphasizing that there are numerous other ways to fight off pirates such as using fire hoses and barbed wire).

89. *IMO Guidelines*, *supra* note 88, at ¶ 60. But see Press Release, HollowPoint Protective Services, *supra* note 82 (alleging that pirates know which ships are likely to have armed guards and they take this into account when targeting ships).

90. See *supra* note 58 and accompanying text (describing state laws ships are subject to under the UNCLOS); see also Liss, *supra* note 85, at 6 (recognizing that abiding by the laws of multiple jurisdictions can be a “difficult and complex task”).

II. ANALYSIS

Under the UNCLOS, some of the Somali pirate attacks are not piracy because they do not occur on the high seas.⁹¹ States can exercise universal jurisdiction over pirates for acts that occur on the high seas only if the pirates are captured on the high seas.⁹² Under the SUA Convention, piracy is illegal, but jurisdiction restrictions make prosecution unlikely.⁹³

A. SOME SOMALI PIRATES FAIL TO MEET ALL THE REQUIREMENTS OF THE UNCLOS PIRACY DEFINITION

An offense is piracy under the UNCLOS if it is committed for private ends, it occurs between two separate ships, and it takes place on the high seas.⁹⁴ Some Somali pirate attacks meet the first two requirements but fail to meet the high seas requirement.⁹⁵ Failure to meet the high seas requirement means the acts are not piracy under international law. Some Somali pirate attacks meet all three requirements, but states cannot exercise universal jurisdiction to prosecute the pirates unless the pirates are seized on the high seas.⁹⁶ Typically, however, the Somali pirates evade capture on high seas by retreating to Somalia's territorial seas.

1. Somali Pirates Meet the "Private Ends" Requirement and the "Two-Ship" Requirement

Article 101(a) states that "private ends" must motivate the illegal act and a person on a private ship must commit the act.⁹⁷ A major

91. See UNCLOS, *supra* note 8, art. 101 (limiting the definition of piracy to the high seas); see also Bahar, *supra* note 28, at 17 (concluding that harmed states must utilize other mechanisms if the act takes place in territorial seas).

92. See *supra* note 57 and accompanying text.

93. See SUA Convention, *supra* note 10, art. 10 (dictating what a signatory state should do if it apprehends an offender); see also Tiribelli, *supra* note 65, at 149 (arguing that a "fundamental defect" of the SUA Convention is that it does not actually have a "strict obligation to extradite").

94. UNCLOS, *supra* note 8, art. 101(a).

95. See IMB REPORT, *supra* note 3, at 25 (reporting twelve attacks in Somalia's territorial seas).

96. See UNCLOS, *supra* note 8, art. 105 (limiting the seizure of ships to the high seas); see also IMB REPORT, *supra* note 3, at 27-30 (observing that the Somali pirates are anchoring the stolen ships in Somalia's territorial seas).

97. UNCLOS, *supra* note 8, art. 101(a).

exception to the UNCLOS definition of piracy is that politically motivated acts do not meet the “private ends” requirement and are therefore not piracy.⁹⁸ For example, the hijacking of the *Achille Lauro* was not piracy because it was politically motivated.⁹⁹ In contrast, the Somali pirates operate for large amounts of ransom money and not for any political reason.¹⁰⁰ Ransoms are paid in cash and the Somali pirates take this cash for their personal gain.¹⁰¹

In addition to the “private ends” requirement, the act must involve two ships to qualify as piracy.¹⁰² Article 101 of the UNCLOS specifically states that the acts must be “against another ship or aircraft.”¹⁰³ The Somali pirates meet this requirement because they are approaching the targeted ships in separate ships.¹⁰⁴ The “two-ship” requirement is always going to be met unless the Somali pirates start acting as stowaways or pose as crew members.¹⁰⁵ It is highly unlikely that Somali pirates will change their current strategy because they have already created an effective system where they use

98. See JACK A. GOTTSCHALK & BRIAN P. FLANAGAN, JOLLY ROGER WITH AN UZI: THE RISE AND THREAT OF MODERN PIRACY 35 (2000) (concluding that the act does not have to be “sanctioned by a recognized government” to be considered political).

99. See *id.* at 36-37 (using the politically-motivated *Achille Lauro* incident as an example to illustrate the problems with defining piracy as an act of private motivation under the UNCLOS). Both a federal judge and the President of the United States cited that incident as piracy even though technically it was not legally correct. *Id.* at 37.

100. See IMB REPORT, *supra* note 3, at 51-65 (narrating the details of each reported pirate attack and concluding that the trend appears to be that pirates are operating purely for ransom money).

101. See Posting of Jeffrey Gettleman to The Ledge, The New York Times News Blog, <http://theledge.blogs.nytimes.com/2008/09/30/q-a-with-a-pirate-we-just-want-the-money/?ref=africa> (Sept. 30, 2008, 09:10 EST) (quoting the spokesperson for the Somali pirates holding a Ukrainian ship hostage at the time of the interview as saying the ransom money is used to “protect ourselves from hunger”).

102. See GOTTSCHALK & FLANAGAN, *supra* note 98, at 35 (describing the hijacking of the *Santa Maria*, a Portuguese cruise ship, as not piracy because no second vessel had been used to board the ship).

103. UNCLOS, *supra* note 8, art. 101(a)(i).

104. See Middleton, *supra* note 4, at 4 (explaining how the Somali pirates use small skiffs to attack larger ships).

105. See Power, *supra* note 42, at 119 (hypothesizing that the only way to attack a vessel in international waters is to use another vessel).

quicker, smaller, and easily maneuverable ships to attack.¹⁰⁶ Therefore, the Somali pirates fulfill the “private ends” and the “two-ship” requirement.¹⁰⁷

2. When Somali Pirates Fail to Meet the High Seas Requirement the Acts Are not Piracy

The final requirement under the UNCLOS for an act to qualify as piracy is that pirates must commit the act on the high seas or outside the jurisdiction of any state.¹⁰⁸ The Somali pirates do not meet this requirement when the attacks occur in the territorial seas of Somalia.¹⁰⁹ When attacks take place in Somalia’s territorial seas, the acts fail to meet the high seas requirement based purely on geography.¹¹⁰ However, when the Somali pirates attack ships in the Gulf of Aden farther than twelve nautical miles off the coast, the act is piracy under the UNCLOS.¹¹¹ Thus, twelve miles is the determinative distance for classifying an attack as piracy.

3. The Inability of States to Capture Pirates on the High Seas Means States Cannot Exercise Universal Jurisdiction over Them

States only have the authority to seize the pirates on the high seas.¹¹² When the Somali pirates retreat to Somalia’s territorial seas they are no longer on the high seas and only Somalia has jurisdiction over them.¹¹³ It is estimated that the time between sighting a pirate, and

106. See Middleton, *supra* note 4, at 4 (explaining that the pirates also use “mother ships” to increase their range, and so many times there are at least three ships directly or indirectly involved in every attack).

107. UNCLOS, *supra* note 8, art. 101(a).

108. See *id.*

109. See *id.* art. 101; see also IMB REPORT, *supra* note 3, at 25 (acknowledging at least twelve attacks took place off the coast of Somalia).

110. See UNCLOS, *supra* note 8, art. 86 (affirming that territorial seas are not considered part of the high seas).

111. See *id.* art. 3; see also Encyclopedia Britannica, Gulf of Aden, available at <http://www.britannica.com/EBchecked/topic/5650/Gulf-of-Aden> (describing the total width of the Gulf of Aden as 300 miles).

112. UNCLOS, *supra* note 8, art. 105.

113. See *id.* art. 2 (declaring that the coastal state has sovereignty over its territorial seas); see also IMB REPORT, *supra* note 3, at 27-30 (indicating that in all instances where pirates hijacked a ship in the Gulf of Aden, the pirates then took the ship and crew and anchored off the coast of Somalia).

the pirate boarding a target ship is fifteen minutes.¹¹⁴ This short time span makes it extremely difficult for a state to capture pirates on the high seas before they retreat into Somalia's territorial seas.¹¹⁵ Since a naval ship cannot seize the Somali pirates once they retreat into Somalia's territorial seas, it is difficult for foreign states to capture pirates and establish jurisdiction over them.¹¹⁶

One counterargument to the inability to establish jurisdiction over pirates is that under the UNCLOS framework countries are legally entitled to enter the territorial seas of Somalia because Somalia does not actually have any territorial seas.¹¹⁷ The UNCLOS is a treaty among states and only states can have territorial seas.¹¹⁸ Since Somalia is a failed state, it is unable to legally claim a territorial sea.¹¹⁹ Therefore, the argument goes, the waters off the coast of Somalia are "outside the jurisdiction of any State."¹²⁰

On July 24, 1989, the then-current Somalia government ratified the UNCLOS,¹²¹ and affirmatively claimed an extreme

114. See Middleton, *supra* note 4, at 4 (maintaining that the short amount of time it takes to seize a ship explains why waters with security patrols are still ineffective at deterring attacks). It is hypothesized that to actually prevent an attack a naval vessel would have to be incredibly close to the ship under attack and helicopters would have to be instantaneously ready to assist. *Id.*

115. *But see id.* at 4 (recognizing that a U.S. naval ship was able to prevent a pirate attack on August 8, 2008, but also acknowledging that the naval ship was only ten miles away and able to launch helicopters).

116. See UNCLOS, *supra* note 8, art. 111(3) (prohibiting a state from letting its ship pursue a second ship into the second ship's state territorial waters or another state's territorial seas).

117. See Bahar, *supra* note 28, at 67 (arguing that the United States could enter within twelve nautical miles of Somalia's coast without legal consequences).

118. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §201 (1987) ("[A] state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.").

119. See Bahar, *supra* note 28, at 67 (citing reasons why Somalia is not a state, including that Somalia does not have a functioning government, that it has continuously been in a state of civil war, and that in January 2007 it declared a state of emergency).

120. See UNCLOS, *supra* note 8, art. 101(a) (limiting the area where piracy acts can occur).

121. LAW OF THE SEA, BULLETIN NO. 37, at 2 (1998) available at http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletinE37.pdf.

territorial sea of two hundred nautical miles.¹²² However, that legal entity has ceased to exist. Since 1991 none of the transitional governments in Somalia have formally declared a territorial sea.¹²³ Under the UNCLOS a state has to affirmatively declare its territorial sea.¹²⁴ The UNCLOS does not automatically create a territorial sea for every coastal State, but rather only authorizes a state to legally claim a territorial sea up to twelve nautical miles from its coast.¹²⁵ Regardless of the fact that no Somalia transitional government has laid claim to a territorial sea, the world recognizes Somalia as a sovereign entity with jurisdiction over its territorial seas.¹²⁶ However, following the framework of UNCLOS, Somalia's territorial sea is recognized as twelve nautical miles, not two hundred.¹²⁷ Thus, for purposes of combating piracy Somalia does have a territorial sea and the UNCLOS does not reach the Somali pirates because they are either operating in, or retreating to, Somalia territorial seas.¹²⁸

B. SOMALI PIRATES ENGAGE IN ILLEGAL ACTS UNDER THE SUA CONVENTION, BUT EXTRADITION TO SOMALIA IS IMPOSSIBLE AND JURISDICTION RESTRICTIONS MAKE PROSECUTION UNLIKELY

Under the SUA Convention, the first determination is whether the pirates' actions are an illegal offense.¹²⁹ If the actions are illegal, the capturing country either has to prosecute or extradite the suspected

122. Table of Claims to Maritime Jurisdiction, *available at* http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf.

123. *See* Bahar, *supra* note 28, at 68 (concluding that it is strictly a "plain language" argument to say that Somalia has no right to declare a territorial sea).

124. *See* UNCLOS, *supra* note 8, art. 3 (affirming the right of every coastal state to claim a territorial sea).

125. *Id.*

126. *See* S.C. Res. 1846, *supra* note 33 ("Reaffirming its respect for the sovereignty, territorial integrity, political independence and the unity of Somalia.").

127. *See* Bahar, *supra* note 28, at 69 (noting that Kenya rejected a motion arguing lack of jurisdiction based on Somalia's claim to a two hundred mile territorial sea).

128. *See* IMB REPORT, *supra* note 3, at 17-20 (detailing how the Somali pirates either operate in Somalia territorial seas or take captured ships back to them).

129. *See* SUA Convention, *supra* note 10, art. 3 (listing illegal offenses under the convention).

pirate.¹³⁰ However, there is no “strict obligation to extradite” the offender.¹³¹ If there is no extradition agreement between the two countries wishing to extradite a pirate, then the capturing country “may, at its option,” use the SUA Convention as a basis for extradition.¹³²

1. Somali Pirates Engage in Illegal Acts Under the SUA Convention

Article 3(1)(a) of the SUA Convention makes it a crime for any person to use force to seize or take control of a ship.¹³³ The Somali pirates’ acts fit this definition because they are using force to seize ships.¹³⁴ A pirate necessarily has to use force to seize a ship; no legitimate ship owner is going to willfully turn his or her ship over to a gang of pirates.¹³⁵ Furthermore, if pirates believed that force was not necessary to capture ships they would not arm themselves with a small arsenal of weapons.¹³⁶

130. *See id.* art. 10(1) (commanding the state either to initiate proceedings against the accused or extradite him or her to a country that will prosecute the unlawful offense).

131. *See* Tiribelli, *supra* note 65, at 149 (arguing that this is a “fundamental defect” with the agreement).

132. *See* SUA Convention, *supra* note 10, art. 11(2) (allowing states that make “extradition conditional on the existence of a treaty” to use discretion in deciding whether to extradite under the convention); *see also* Power, *supra* note 42, at 127-28 (raising the issue that many countries that pirates target do not have extradition agreements with other countries).

133. *See* SUA Convention, *supra* note 10, art. 3 (outlining other illegal offenses under the convention, such as destroying a ship, harming or killing a crew member, and endangering the safe navigation of a ship).

134. *See* IMB REPORT, *supra* note 3, at 51-53 (providing detailed reports of pirates using force in attacks off Somalia); *see also id.* at 14 (recording that the majority of attacks in the Gulf of Aden and Somalia involved pirates armed with guns). One narrative states, “[p]irates armed with guns and grenade launchers attacked the fishing vessel and hijacked it to an unknown location. Twenty-six crew members were taken hostage and a ransom demanded for their safe release. On 25 April 2008 the crew and vessel were released by the pirates. It appears the owners paid a ransom” *Id.* at 51-52.

135. *See, e.g.,* Middleton, *supra* note 4, at 4 (providing an example of how one boat went into a high-speed spin until the attackers gave up and contending that captains take whatever evasive actions they can to prevent pirates from boarding their ships).

136. *See id.* (asserting that pirates use automatic weapons and rocket launchers to assault ships).

Some Somali pirates might also commit crimes delineated under Article 3(1)(b) or 3(1)(c) of the SUA Convention.¹³⁷ Article 3(1)(b) pertains to individuals who harm a person onboard a ship, and Article 3(1)(c) covers individuals who destroy or damage ships.¹³⁸ However, the Somali pirates' sole motivation is ransom money and they rarely harm crew members or destroy or damage ships.¹³⁹ Thus, Article (3)(1)(a) applies to all Somali pirates, and in some remote cases other provisions may also apply.¹⁴⁰

2. *Extradition to Somalia is Impossible and Jurisdiction Restrictions Make Prosecution by a Capturing State Unlikely*

Under the SUA Convention, a capturing country must prosecute or extradite a person engaging in an illegal act.¹⁴¹ A capturing country cannot extradite Somali pirates to Somalia unless it has an extradition agreement with Somalia.¹⁴² A capturing country does not have the option to use the SUA Convention in lieu of an extradition agreement because Somalia is not a party to the SUA Convention.¹⁴³

137. See SUA Convention, *supra* note 10, art. 3 (delineating illegal acts of force often committed by pirates when seizing or attempting to seize a ship).

138. *Id.*; see also IMB REPORT, *supra* note 3, at 29 (detailing how armed pirates fired at ships in order to hijack them). In addition, one ship Master had a heart attack and died onboard after pirates successfully hijacked his ship. *Id.* at 30.

139. See Middleton, *supra* note 4, at 6 (stating that for the most part crews are treated well but that there have also been reports of crews being beaten, or not being given adequate food and water); see also David Osler, *Yardimci Mulls Armed Guards for Ships Transiting Gulf of Aden*, LLOYD'S LIST, Jan. 13, 2009, <http://www.lloydslist.com/ll/news/viewArticle.htm?articleId=20017607278> (last visited Nov. 14, 2009) (reporting that the crew of a hijacked ship was safe and in good health after being held hostage for over two months).

140. See SUA Convention, *supra* note 10, art. 3 (establishing that an individual can be prosecuted for seizing a ship, without making injury to passengers a necessary element of the offense).

141. See *id.* art. 10 (providing that when a state does not extradite an alleged offender, it must prosecute him or her "without delay"); see also Power, *supra* note 42, at 127 (asserting that if the state cannot exercise proper jurisdiction over the individual engaged in the illegal activity the state must then extradite the individual to an authority that has proper jurisdiction).

142. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 25 (Oxford University Press, 2007) (establishing that most states believe the duty to extradite arises from treaties or national legislation).

143. See Int'l. Mar. Org., http://www.imo.org/home.asp?topic_id=910 (follow "Status of Conventions by country" hyperlink) (last visited Nov. 14, 2009).

Furthermore, even if extradition were possible, Somalia lacks a functioning government capable of prosecuting the pirates.¹⁴⁴

A capturing state has three options under the SUA Convention to establish jurisdiction over pirates.¹⁴⁵ Still, capturing states will have difficulty establishing jurisdiction over the Somali pirates, thus making prosecution unlikely.¹⁴⁶ The first jurisdiction option does not apply because the pirates are not operating in the territorial seas of any state party; the pirates are operating in Somalia's territorial seas or the Gulf of Aden.¹⁴⁷ Second, it is unlikely that a state party can establish jurisdiction over the Somali pirates because the pirates hijacked a ship sailing under its flag. A majority of the hijacked ships fly under the flags of Antigua Barbuda, Cyprus, Liberia, the Marshall Islands, Panama, and Singapore.¹⁴⁸ Many of the naval ships in the area are from the United States, the European Union, Denmark, Russia, India, and Canada.¹⁴⁹ Therefore, a U.S. ship could capture pirates attacking a Liberian ship, but the United States has no jurisdiction to prosecute them under the SUA Convention because the pirates did not attack a U.S. ship. Finally, the third jurisdiction option does not apply because the pirates are from Somalia; they are not nationals from any state party.¹⁵⁰ Therefore, it is unlikely that a capturing state could establish jurisdiction to prosecute the pirates under the SUA Convention.¹⁵¹

144. See S.C. Res. 1846, *supra* note 33, at 1 (recognizing Somalia's inability to effectively combat piracy).

145. See discussion *supra* Part I.C.2 (discussing the ways a nation can establish jurisdiction under the SUA Convention).

146. See SUA Convention, *supra* note 10, art. 6(4) (mandating that a capturing country take the necessary measures to establish jurisdiction over applicable offenses).

147. See IMB REPORT, *supra* note 3, at 21 (stating that there were twelve attacks off Somalia and fifty-one in the Gulf of Aden during the first three quarters of 2008).

148. See *id.* at 17-18 (detailing that out of forty-three countries whose ships were attacked in 2008, ships flying under the flags of these six countries accounted for almost fifty percent of attacked ships).

149. See S.C. Res. 1846, *supra* note 33, at ¶ 6 (recognizing the efforts of these countries to provide security to the coast of Somalia).

150. See IMB REPORT, *supra* note 3, at 21 (noting that Somali pirates are responsible for the increased attacks in the Gulf of Aden).

151. See discussion *supra* Part I.C.2 (discussing the ways a nation can establish jurisdiction under the SUA Convention).

C. AMERICAN PRIVATE SECURITY COMPANIES CAN LEGALLY PROVIDE ARMED GUARDS TO THE SHIPPING INDUSTRY

Private security companies must abide by the laws of all territorial seas through which they travel.¹⁵² In addition, these companies must always comply with the laws of the vessel's flag state.¹⁵³ Therefore, even if a ship's flag state allows for armed guards, vessels will encounter problems when navigating through numerous territorial seas.¹⁵⁴ For example, problems will potentially arise when a ship travels through territorial seas that do not allow armed guards or which have stringent gun control laws. Ships are not capable of easily removing prohibited weapons when travelling by sea.

American private security companies sailing under the American flag are allowed to have armed guards aboard vessels.¹⁵⁵ In addition, these companies will not run into legal problems in Somalia's territorial seas because there is no functioning government in Somalia.¹⁵⁶ As long as the companies are in compliance with the laws of every other territorial sea through which they travel to reach the Gulf of Aden, it is legal for private security companies to provide armed guards.¹⁵⁷

152. See UNCLOS, *supra* note 8, art. 2 (establishing the coastal state's jurisdiction over its territorial seas); see also Liss, *supra* note 85, at 6 (recognizing that "reputable" companies always have to abide by the laws of the countries they are operating in).

153. See UNCLOS, *supra* note 8, art. 92 (determining that ships shall sail under only one state flag and that this state retains exclusive jurisdiction over the ship when it is on the high seas).

154. See Liss, *supra* note 85, at 7 (citing that employees of Background Asia, a private security company, are required to "disassemble their weapons and lock the ammunition magazines and firing pins in separate locations" when traveling through Singapore waters). The author also reports that Malaysia and Indonesia do not allow armed escorts, and that Malaysian authorities have warned that any armed escorts found in Malaysian waters would be detained, and the crew arrested. *Id.*

155. See U.S. CONST. amend. II (affirming an individual's right to bear arms).

156. See *supra* note 28; see also Houreld, *supra* note 84, at 1 (reporting that Somali government officials also approve of the use of private companies).

157. See Press Release, HollowPoint Protection Services, *supra* note 82, at 1 (quoting the CEO as saying, "[y]es, we have established which countries allow private armed agents on their vessels").

III. RECOMMENDATIONS

To address the surge in piracy off the coast of Somalia and in the Gulf of Aden, the United Nations (“U.N.”) should update the UNCLOS piracy definition and create a new international court with exclusive jurisdiction to only prosecute pirates. Somali pirates are rarely captured and they have no fear of prosecution.¹⁵⁸ Current worldwide cooperation to provide increased security to the area is necessary, but the area is too large for the naval ships to prevent all attacks.¹⁵⁹ Private security companies can provide a useful role in filling in gaps to protect ships, but the international community should not allow these companies to provide armed guards aboard vessels.¹⁶⁰

A. THE U.N. SHOULD REMOVE THE HIGH SEAS REQUIREMENT UNDER THE UNCLOS DEFINITION OF PIRACY AND REMOVE THE JURISDICTION RESTRICTION THAT COUNTRIES SEIZE PIRATES ON THE HIGH SEAS FOR FAILED STATES

States like Somalia, without a functioning government, can become breeding zones for piracy.¹⁶¹ Yet, international law under the UNCLOS does not cover the piratical acts off these coastal states because of the requirement that the act take place on the high seas.¹⁶² As a solution, the U.N. should amend the UNCLOS piracy definition

158. See Katharine Houreld & Mike Corder, *Few Nations Willing to Prosecute Pirates*, DENVER POST, Apr. 18, 2009, available at http://www.denverpost.com/nationworld/ci_12169011 (concluding that many pirates are set free because of the “many pitfalls along the path to prosecution”). *But see* Devlin Barrett, *Source: Captured Somali Pirate to Face Trial in NY*, BREITBART, Apr. 16, 2009, available at http://www.breitbart.com/article.php?id=D97J_S0T01&show_article=1 (reporting that a Somali pirate who held a U.S. captain hostage will be sent to New York for prosecution).

159. See Anita Powell, *Ships Have Few Options Against Somali Pirates*, ABC NEWS, Apr. 10, 2009, available at <http://abcnews.go.com/International/WireStory?id=7304362&page=1> (recognizing that it would take sixty-one ships to control even a fraction of where pirates have operated).

160. See Liss, *supra* note 85, at 3 (listing services offered by security companies, such as risk assessment and crew member training).

161. See Stiles, *supra* note 29, at 301 (acknowledging the difficulty in controlling the coast of Somalia because of anarchy and corruption).

162. See UNCLOS, *supra* note 8, art. 101(a)(i) (limiting the definition of piracy to acts committed on the high seas).

to include areas other than the high seas.¹⁶³ Historically, the high seas were perhaps one of the riskiest places for piracy, but modern day pirates now operate much more often in territorial seas of non-functioning states.¹⁶⁴ Some Somali pirates do not fall under the UNCLOS because they do not operate in the high seas.¹⁶⁵ Somalia has no government capable of capturing and prosecuting pirates under Somali law; therefore international law should be expanded to address this shortfall.¹⁶⁶ Since the UNCLOS is generally-accepted customary international law, and the Somali pirates meet the other UNCLOS requirements, removing the high seas requirement places the pirates squarely within the UNCLOS and provides a modern piracy definition for the international community.¹⁶⁷

For failed states, the U.N. should also remove the requirement that countries seize pirates on the high seas.¹⁶⁸ There is no official definition of a failed state, but most definitions include the inability of the government to control the territory, lack of stability for the citizens, no economic growth, and much violence.¹⁶⁹ Countries should be able to pursue and capture pirates within these failed states' territorial seas. The U.N. Security Council essentially waived

163. See discussion *supra* Part II.A (analyzing the drawbacks of the high seas restriction).

164. See DUBNER, *supra* note 9, at 160 (arguing that territorial seas are targeted by pirates in coastal states where the pirates know there is no adequate security or law enforcement); see also IMB REPORT, *supra* note 3, at 4 (adopting a different definition of piracy because the UNCLOS does not address pirate attacks that take place in states' sovereign territories).

165. See discussion *supra* Part II.A.2 (analyzing the drawbacks of the high seas restriction).

166. See S.C. Res. 1846, *supra* note 33, at 1 (noting Somalia's inability to handle the increase in piracy).

167. See discussion *supra* Part II.A. (arguing that the high seas requirement forbids the Somali pirates' attacks from being piracy under the UNCLOS).

168. See UNCLOS, *supra* note 8, art. 105 (allowing states to only capture pirates on the high seas, outside the territorial seas of any other state).

169. Rosa Ehrenrich Brooks, *Failed States, or the State as Failure?*, 72 U. CHI. L. REV. 1159, 1160 (2005); see also Foreign Policy, Failed States Index 2009 available at http://www.foreignpolicy.com/articles/2009/06/22/2009_failed_states_index_faq_methodology (listing the following factors used to determine a failed state: "Demographic Pressures, Refugees/IDPs, Group Grievance, Human Flight, Uneven Development, Economic Decline, Delegitimization of the State, Public Services, Human Rights, Security Apparatus, Factionalized Elites, and External Intervention").

the high seas jurisdiction restriction when it passed Resolution 1846.¹⁷⁰ This Resolution was a good first step in recognizing how pirates take advantage of failed states by operating in, or retreating to these states' territorial seas.¹⁷¹ However, the resolution was only temporary.¹⁷² Thus, for failed states, the U.N. should permanently remove from the UNCLOS the jurisdiction restriction that countries capture pirates on the high seas.¹⁷³

B. THE U.N. SHOULD CREATE A NEW INTERNATIONAL COURT WITH EXCLUSIVE JURISDICTION TO ONLY PROSECUTE PIRATES

To date, most countries have been unwilling to prosecute pirates.¹⁷⁴ The use of bilateral agreements between certain countries will not encompass all captured pirates, only those pirates captured by countries who have entered into such agreements.¹⁷⁵ Bilateral agreements between two countries are not an ideal way to deal with piracy because piracy affects the entire international community, not just ship owners, crew members, and governments of the ships attacked.¹⁷⁶ Therefore, the U.N. should create a new international

170. See S.C. Res. 1846, *supra* note 33, at ¶ 10 (authorizing states to enter Somalia's territorial seas and use all necessary means to repress piracy).

171. See IMB REPORT, *supra* note 3, at 27-30 (detailing how the Somali pirates anchor hijacked ships in Somalia's territorial seas).

172. See S.C. Res. 1846, *supra* note 33, at ¶ 10 (declaring that the resolution will expire in December 2009).

173. See *id.* at 1 (recalling all previous U.N. Security Resolutions passed that relate to piracy off the coast of Somalia and noting that S.C. Res. 1846 went into force on the day S.C. Res. 1816 expired). Security Council Resolution 1816 was the precursor to Resolution 1846, declaring that states can enter Somalia's territorial waters to stop piracy. See S.C. Res. 1816, ¶ 7, U.N. Doc. S/RES/1816 (June 2, 2008).

174. See Meade, *supra* note 37 (hypothesizing that a deal between the United States and Kenya is a significant move towards creating a process to prosecute pirates). *But see* Alasdair Sandford, *Somali Pirates Face Prosecution in France*, Apr. 16, 2008, BBC NEWS, available at http://www.bbc.co.uk/worldservice/learningenglish/newsenglish/witn/2008/04/080416_somali_pirates.shtml (reporting that the French were going to prosecute Somali pirates who held a French yacht hostage "in what would be the first trial of its kind").

175. See Meade, *supra* note 37 (outlining a proposed deal where Kenya will only prosecute pirates caught by the United States).

176. See Middleton, *supra* note 4, at 1 (hypothesizing that the costs of piracy increase the cost of manufactured goods and oil and that piracy has the potential to cause a major environmental disaster).

court specifically designed to prosecute captured pirates.¹⁷⁷ The UNCLOS defines piracy, but it relies on states and their national laws to actually prosecute pirates.¹⁷⁸ A new international court with exclusive jurisdiction over pirates would take this pressure off national governments.¹⁷⁹

In addition, this court could evaluate issues such as whether piracy did occur and the appropriate penalties to be imposed.¹⁸⁰ Once the UNCLOS definition of piracy is updated, the new court will then have a modern standard to apply to the pirates' acts.¹⁸¹ Furthermore, this international court could also determine its own penalties for the punishment of pirates, thus providing one standard for the entire international community.¹⁸² Currently, different countries have a wide range of penalties for pirates, and it is inequitable for pirates to receive a harsher or more lenient sentence just because a certain country captures them.¹⁸³

Inherent in this recommendation is the idea that states will have to voluntarily submit to jurisdiction by another body.¹⁸⁴ In order to get as many countries as possible to submit to the jurisdiction of the new

177. See Joshua Michael Goodwin, Note, *Universal Jurisdiction and the Pirate: Time for an Old Couple to Part*, 39 VAND. J. TRANSNAT'L L. 973, 1008-09 (2006) (insisting that the creation of the International Criminal Court ("ICC") demonstrates that states are willing to work together to combat international crime); see also DUBNER, *supra* note 9, at 161 (proposing asserting jurisdiction over pirates in a specific "dispute settlement mechanism").

178. See Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 TUL. MAR. L.J. 1, 10 (2008) (explaining that pirates are unique because they are not tried in an international court under international law when they are caught outside the jurisdiction of any state).

179. See UNCLOS, *supra* note 8, art. 105 (allowing for the courts of the state that seized the pirates to decide on the proper penalties).

180. See DUBNER, *supra* note 9, at 162 (purporting that having an international tribunal to specifically deal with pirates might also lead to more prosecutions because some states might currently be reluctant to punish pirates for fear of retaliation by terrorist groups).

181. See discussion *supra* Part III.A (arguing for a change in the current definition of piracy under the UNCLOS).

182. See Goodwin, *supra* note 174, at 1008 (pointing out that because all nations have different laws, pirates can receive a sentence of anywhere from three years to life in prison depending on which country is prosecuting them).

183. *Id.*

184. See DUBNER, *supra* note 9, at 161-62 (proposing that the jurisdiction of the international court should include the ability to impose penalties and grant political asylum).

international court, this court should only have the power to prosecute crimes relating to piracy.¹⁸⁵ It is more likely that states will submit to the jurisdiction of a court that deals with one specifically-defined crime.¹⁸⁶

C. THE INTERNATIONAL COMMUNITY SHOULD NOT ALLOW
PRIVATE SECURITY COMPANIES TO PUT ARMED GUARDS ON
VESSELS

Arming vessels creates a potential situation of escalated costs and violence.¹⁸⁷ Innocent crew members are more likely to suffer the negative consequences of having armed guards on vessels. The pirates claim to have no desire to hurt the crew members but they do fire assault rifles “indiscriminately” during attacks.¹⁸⁸ Violence could quickly escalate and produce deadly consequences if an armed guard began firing back.¹⁸⁹ The crew members are currently safer being taken hostage rather than being caught in the middle of a gun battle.¹⁹⁰ Some argue that the uncertainty of not knowing whether a vessel is armed creates a beneficial deterrent effect.¹⁹¹ However, ships can utilize plenty of other defense mechanisms to deter pirates that do not threaten the lives of the crew members.¹⁹²

185. *Cf.* Goodwin, *supra* note 174, at 1008–09 (disagreeing with the creation of a new tribunal).

186. *Cf. id.* (pointing out that not all countries have submitted to jurisdiction of the ICC).

187. *See* EKLÖF, *supra* note 43, at 129 (concluding that many times the costs to the ship owner of hiring a private security company are high compared to the cost and risk of piracy); *see also* IMO Guidelines, *supra* note 88, at ¶ 60 (arguing that having firearms on board would just encourage pirates to carry firearms).

188. *See* Houreld, *supra* note 84, at 2 (explaining the manager of IMB’s understanding of how pirates operate).

189. *See* GOTTSCHALK & FLANAGAN, *supra* note 98, at 135 (noting the incremental nature of piracy-related violence).

190. *See supra* Introduction (noting that pirates are operating for ransom money and in general do not want to hurt the crew); *see also* IMB REPORT, *supra* note 3, at 27–30 (providing numerous examples of crew members being returned after a ransom was paid).

191. *See* GOTTSCHALK & FLANAGAN, *supra* note 98, at 135 (quoting Capt. Philip Cheek as saying, “suspicion alone, that a vessel is carrying among her crew, half a dozen trained killers would have a snowball effect”). “It would probably only need one surprise shoot-out, . . . killing every boarder, to send out the right message.” *Id.*

192. *See* Houreld, *supra* note 84, at 3 (listing a range of “[h]igh-tech but non-

It has been suggested that the U.N. could facilitate putting professionally-trained armed guards aboard ships.¹⁹³ Yet, it is highly unlikely that all countries could reach an agreement because not every country directly benefits from maritime commerce.¹⁹⁴ Ultimately, the dangers to the crew members outweigh the potential deterrent effect of putting armed guards on vessels and companies like Blackwater Worldwide and HollowPoint Services should not provide armed guards to the shipping industry. Furthermore, private security companies do nothing to help address the underlying problems of piracy or aid in the effective prosecution of pirates.¹⁹⁵

CONCLUSION

Current international conventions do not provide a proper legal regime to adequately define and prosecute Somali pirates. In order to effectively address the increase in pirate attacks, the U.N. should remove the high seas requirement from the UNCLOS piracy definition, and the jurisdiction restrictions for failed states. In addition, the U.N. should create a new international court that has exclusive jurisdiction to only prosecute pirates. American private security companies can legally put armed guards aboard American ships, but they must abide by the laws of every territorial sea through which they travel. However, armed guards unnecessarily increase the risks to crew members and the international community should not allow them on vessels as a solution to the increase in piracy attacks.

lethal weapons” including dazzle guns and microwave guns).

193. See GOTTSCHALK & FLANAGAN, *supra* note 98, at 137 (commending the idea if it could actually be accomplished).

194. See *id.* (hypothesizing that the states that do not directly benefit from maritime commerce would not agree to pay for or provide support for arming vessels).

195. See Liss, *supra* note 85, at 12 (acknowledging that private security companies may have some benefits to preventing individual attacks, but that they do nothing to “address the underlying root causes of modern day piracy itself.”).