

Pirates of the Aden: A Tale of Law's Impotence*

Dr. Sandeep Gopalan¹ & Stephanie Switzer²

Piracy is back. A world which had grown used to charming reel images of Johnny Depp in the wildly successful Pirates of the Caribbean series of films has had to readjust its notion of piracy to the very real menace in the Gulf of Aden. Those who thought that it was all happening in a world far, far, away woke up to the reality of the first piracy prosecution in New York in a century.³ Abduwali Abdukhadir Muse, a Somali national, was charged with committing conspiracy to seize a ship by force, conspiracy to commit hostage-taking and two firearm charges in connection with the attack on the *Maersk Alabama*.⁴ This prosecution in New York is not the only recent event of legal significance. The United Nations Security Council has acted with uncharacteristic speed and issued a slew of resolutions.⁵ Crucially, these have been issued pursuant to Chapter VII of the UN charter, which authorises the legal use of force under international law. Similarly, the European Union, another agency not known for the facility of its actions, has passed resolutions against piracy and authorised the use of force.⁶ These actions are a reflection of the fact that the Gulf of Aden is one of the world's busiest shipping routes and that piracy is costly, with different estimates of cost ranging from \$1 billion a year to \$16 billion.⁷ Pirate attacks resulted in tens of millions of dollars being paid in ransom in 2008, and

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¹ B.C.L., D.Phil. (OXON), Reader in Law, University of Reading.

² Lecturer in Law, University of West of Scotland; Doctoral Candidate, University College Dublin

³ Suspect in Ship Hijacking Charged with Piracy' (21 April 2009)

<<http://edition.cnn.com/2009/CRIME/04/21/alleged.pirate.new.york/index.html>> accessed 10 May 2009>

⁴ Ibid.

⁵ UNSC Res. 1816 (2 June 2008) UN Doc. S/RES/1816; UNSC Res. 1383 (7 October 2008) UN Doc.. S/RES/1838; UNSC Res. 1844 (20 November 2008) U.N. Doc. S/RES/1844; UNSC Res. 1846, (2 December 2008) UN Doc. S/RES/1846; UNSC Res. 1851 (16 December 2008) UN Doc. S/RES/1851.

⁶ COUNCIL DECISION 2008/918/CFSP on the launch of a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta), December 8, 2008, OJ L 330, 9.12.2008.

⁷ U.S. House of Representatives Committee on Transportation and Infrastructure 'Hearing' (4 February 2009) <http://www.marad.dot.gov/documents/HOA_Senate%20Sub%20Committee%20Meeting-Feb%204,%202009.pdf> accessed 10 May 2009, 7.

the average ransom paid ranged from \$500,000 to \$2 million.⁸ Insurance premiums have also increased 10-40 times for a single transit through the Gulf of Aden.⁹ The perception that there is easy money to be made has meant that piracy has grown such that forty nine ships were hijacked in 2008, and close to 100 were attacked.¹⁰ The human impact can be seen by the fact that over 889 people were held hostage in 2008 alone, some for several months.¹¹ The most recent major pirate incident was the capture of a Saudi-owned supertanker, the Sirius Star, estimated to be worth over \$100 million and loaded with two million barrels of oil, worth another \$100 million.¹² Reports claim that the tanker was freed after a \$3 million ransom was paid.¹³

Repeated expressions of concern by states and the ready resort to international resolutions are recognition of the fact that the massive area targeted by pirates is impossible for any one state to police.¹⁴ The problem is truly international in every sense – an affected ship might fly the flag of one maritime nation, be chartered by a company in another state, be financed by entities elsewhere, employ crew from countries ranging from India to Ukraine, and might be carrying

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⁸ Ibid; see also J Seper 'Blackwater Joins Fight Against Sea Pirates' *The Washington Post* (Washington, 4 December 2008) <www.washingtonpost.com/news/2008/dec/04/blackwater-joins-fight-against-sea-piracy> accessed 10 May 2009, quoting a Blackwater spokesman and noting that the "dramatic increase of pirate attacks on merchant vessels in the Gulf of Aden had led to parallel cost increases for the shipping industry, resulting in 10-fold insurance increases this year alone. They said that with the added danger pay offered to crews willing to make the journey, pirate ransom demands that reach into the millions, and lengthy negotiations for hijacked ships, if left unaddressed the cost of the piracy boom to the shipping industry -- and consumers buying their goods -- will only increase."

⁹ Ibid

¹⁰ UNSC Res. 1851 (n5) notes "pirate attacks off the coast of Somalia have become more sophisticated and daring and have expanded in their geographic scope," and expressed "concern the findings contained in the 20 November 2008 report of the Monitoring Group on Somalia that escalating ransom payments are fuelling the growth of piracy in waters off the coast of Somalia, and that the lack of enforcement of the arms embargo established by resolution 733 (1992) has permitted ready access to the arms and ammunition used by the pirates and driven in part the phenomenal growth in piracy"

¹¹ (n7)

¹² S Otterman 'Pirates Said to Ask for \$25 Million Ransom, *New York Times*' *New York Times* (New York, 20 November 2008) <<http://www.nytimes.com/2008/11/21/world/africa/21pirates.html>> accessed 27 April 2009.

¹³ M Ibrahim and G Bowley 'Pirates Say They Freed Saudi Tanker for \$3 Million' *New York Times* (New York, 10 January 2009) <<http://www.nytimes.com/2009/01/10/world/africa/10somalia.html>> accessed 27 April 2008. Some news reports indicate that some of the pirates drowned while attempting to flee with their booty. See, 'Somali Pirates Drown with Share of Ransom from Sirius Star Hijack' *The Guardian* (London, 10 January 2009) <http://www.guardian.co.uk/world/2009/jan/10/sirius-star-somalia-pirates-drown> accessed 27 April 2009

¹⁴ U.S. House of Reports Committee on Transportation (n7) 5; pointing out that pirates operate in about 2.5 million square miles of ocean in the Horn of Africa.

goods meant for a different state.¹⁵ Thus, several states might have contacts with just one piratical incident. Notwithstanding this common threat, the incentives and resources of states are not congruent resulting in a range of responses. While there has been concerted action at the UN level in terms of passing resolutions, there have also been a variety of fractured military responses ranging from the United States' creation of Combined Task Force 151,¹⁶ to naval deployments by China¹⁷ and India,¹⁸ to the European Union's EUNAVFOR ATALANTA.¹⁹ There is growing recognition that military actions alone are likely to be unsuccessful and that fixing the ineffective legal response has to be a part of the solution.²⁰ Despite overwhelming acknowledgment that piracy is a crime under international law, states have been generally unwilling to prosecute pirates. The typical response was a policy of catch-and-release, with

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¹⁵ Ibid; See 'Pirates Seized after targeting French Navy Ship' (3 May 2009) <<http://edition.cnn.com/2009/WORLD/africa/05/03/kenya.pirates/index.html>> accessed 10 May 2009

¹⁶ 'New Counter-Piracy Task Force Established' US Navy Press Release <http://www.navy.mil/local/CTF-151/> accessed 11 May 2009

¹⁷ A Barrowclough 'China Sends Navy to Fight Somali Pirates' , *The Times* (London, 26 December 2008) <<http://www.timesonline.co.uk/tol/news/world/africa/article5398856.ece>> accessed 27 April 2009

¹⁸ 'India to step up piracy battle' (21 November 2008) http://news.bbc.co.uk/2/hi/south_asia/7741287.stm accessed 11 May 2009

¹⁹ Council Decision 2008/918/CFSP on the launch of a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta), 8 December , 2008, OJ L 330, 9.12.2008, p. 19 which directs that "[t]he European Union (EU) shall conduct a military operation in support of Resolutions 1814 (2008), 1816 (2008) and 1838 (2008) of the United Nations Security Council (UNSC), in a manner consistent with action permitted with respect to piracy under Article 100 et seq. of the United Nations Convention on the Law of the Sea ... and by means, in particular, of commitments made with third States, hereinafter called 'Atalanta' in order to contribute to the protection of vessels of the WFP delivering food aid to displaced persons in Somalia ... [and] the protection of vulnerable vessels cruising off the Somali coast, and the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, in accordance with the mandate laid down in UNSC Resolution 1816 (2008)..."

²⁰ John J. Kruzel 'Navy's Rescue Mission 'Textbook,' But Piracy Still Looms, Gates Says' (13 April 2009) <http://www.navy.mil/search/display.asp?story_id=44297> accessed 10 May 2009, quoting Defense Secretary Robert Gates: "There is no purely military solution to it... [a]nd as long as you've got this incredible number of poor people and the risks are relatively small, there's really no way in my view to control it unless you get something on land that begins to change the equation for these kids."

navies reduced to ferrying captured pirates to the nearest beach.²¹ This has emboldened pirates and contributed to the significant increase in the number and brazenness of incidents.²²

This paper proceeds as follows. Part I analyses the international legal regime applicable to piracy to determine if there are deficiencies. Part II examines some of the concerns of European states in refusing to prosecute captured pirates to show that their concerns may be justified, and that the European Convention on Human Rights might apply in certain situations. Part III argues that given the legal and evidentiary problems associated with bringing captured pirates to Europe or the United States for prosecution, bilateral or multilateral agreements with states like Kenya to prosecute may offer a suitable alternative. Ideally, prosecution ought to be in a specially designated court in that country's judicial system with a guarantee of minimum human rights protections. States entering into such agreements would be wise to employ special agents from Kenya to actually make the arrest to protect against claims that the United Nations Convention on the Law of the Sea does not authorise rendition to third countries. Part IV concludes.

Part I: The Legal Regime

The international legal regime containing the tools to fight piracy is embodied primarily in the 1982 UN Convention on the Law of the Sea (UNCLOS).²³ Article 101 of the treaty defines piracy as “any illegal act[] of violence or detention, or any act of depredation, committed for private

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‘Pirates Seized after threatening French Navy Ship’ (3 May 2009) <<http://edition.cnn.com/2009/WORLD/africa/05/03/kenya.pirates/index.html>> accessed 10 May 2009; detailing how “over the past year, more than 100 suspected pirates have been picked up... Of that total, 27 have been released, and more than 70 taken to jail in France, handed to authorities in Somalia or taken to Kenya under an EU agreement with the government in Nairobi.”

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‘More than \$200M pledged to beat Somali Pirates’ (April 24 2009) <http://edition.cnn.com/2009/WORLD/africa/04/24/pirates.security.meeting.money/index.html> accessed 10 May 2009 detailing how “pirate attacks on ships in the Gulf of Aden and off Somalia's coast accounted for 61 of the 102 attacks during the first quarter. That compares with six incidents for the same period in 2008, said the International Maritime Bureau... A dramatic increase in activity by Somali pirates led to a near-doubling in the number of pirate attacks globally in the first quarter of 2009...”

²³ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force on 16 November 1994) 1833 UNTS 3; for ratification status, see http://www.un.org/Depts/los/reference_files/status2008.pdf

ends by the crew or the passengers of a private ship or a private aircraft." The key provision with regard to actions that may be undertaken by states in combating piracy is contained in Article 105: "[o]n the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board."²⁴ In addition, the article confers jurisdiction upon the courts of the state taking military action: "The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property..."²⁵ A plain reading of this article does not make the jurisdiction of the court of the state capturing pirates exclusive. Thus there would be nothing stopping the rendition of pirates to a third state's court for prosecution as Article 105 uses the word "may" rather than "shall."

Article 105 is unproblematic and covers virtually every reported incident committed for private ends as long as the relevant acts are committed on the High Seas. Some concerns have been raised about the legality of states taking actions against pirates in another state's territorial waters, with the argument being raised that UNCLOS does not confer such power.²⁶ To the extent that there are illegal acts outside this definition, they would be covered by either the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation²⁷ or the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, issued by the International Maritime Organization (IMO), which defines armed robbery as "any unlawful act of violence or any act of depredation, or threat thereof, other than the act of "piracy", directed against a ship or against persons or property on board such ship, within a State's jurisdiction over such offence."²⁸ If the latter Code is read in conjunction with UNCLOS's general duty to cooperate in the repression of piracy, broad powers

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²⁴ Ibid.

²⁵ Ibid.

²⁶ A Umezawa, 'Prevention of Crimes: By Whom and How?', (2003) <http://wwwsoc.nii.ac.jp/jsil/annual_documents/2003/autumn/houkoku-abstr/Panel%20C4%20Umezawa%20paper.pdf> accessed 27 April 2009

²⁷ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force on 1 March 1992) 27 ILM 672

²⁸ Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships (adopted November 2001) IMO resolution A.922(22)

can be implied in situations like Somalia.²⁹ A creative reading of article 25 (1) of UNCLOS to the effect that “[t]he coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent” would offer further support. There is nothing stopping the coastal state from authorising other states to take action against non-innocent passage if it does not possess the resources to do so. If, as is claimed, pirates are taking refuge in Somalia’s territorial waters because of that state’s inability to take coercive action and exercise jurisdiction, it can authorise other states to take appropriate actions in its stead.³⁰ Given the status of Somalia in international law, one can even make an argument that a formal agreement to this effect might be unnecessary. To be sure, consent would be necessary where the pirates are not acting within the territorial waters of a failed state. The regional cooperation agreement in Asia examined later in this paper is such an example.

The deference to sovereignty over territorial waters is also seen in Article 111 of UNCLOS, which covers the right of ‘hot pursuit’. Under Article 111,³¹ the right to hot pursuit must cease upon the ship entering the territorial waters of its own flag state or those of a third party state. This rule applies regardless of the nature of pursuit. Pirates relied upon this loophole to play cat and mouse with pursuing vessels by taking shelter under the shadow of sovereignty of the coastal state, particularly in cases where the coastal state did not have the resources or incentives to apprehend them. The recent UN Security Council resolutions seek to remove this protective barrier; they were passed with Somalia’s consent, granting states the temporary right to “enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law.”³² Art. 107 pertains to the conferment of

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Article 100 (n23) mandates; “All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.”

³⁰ Security Council Authorizes States to Use Land-Based Operations in Somalia, Security Council SC9541, December 16, 2008: “The Minister for Foreign Affairs and International Cooperation of the Transitional Federal Government of Somalia said his country had no capacity to interdict or patrol its long coastline to ensure the security of the sea, but it had cooperated with the international community in that fight and it would continue to do so fully, now and in the future. That was why it supported resolution 1851.”

<http://www.un.org/News/Press/docs/2008/sc9541.doc.htm>

³¹ An almost identical provision is contained in Article 23 Geneva Convention on the High Seas (signed on 29 April 1958, entered into force on 10 September 1962) 450 UNTS 11

³² UNSC Res.1816 (n5)

authority to interdict pirates and expressly limits the authority to states in this regard such that, “[a] seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.” This has salience in connection with reports about private military contractors like Blackwater seeking to enter the market for security against piracy.³³

UNCLOS recognizes the potential for conflict and harassment by states taking unilateral military action and offers some constraint in Article 110: “... a warship which encounters on the high seas a foreign ship . . . is not justified in boarding it unless there is reasonable ground for suspecting that: (a) the ship is engaged in piracy . . . If the suspicions prove to be unfounded, and ... the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage ...”³⁴ There is, however, no guidance on what constitutes reasonable grounds.

The actions of the U.N. Security Council are also of legal significance in evaluating the options available to states. The most powerful of the resolutions adopted by the Security Council is Resolution 1851 of December 2008, calling on all countries and regional organizations that can do so to deploy naval ships and military aircraft off the Somali coast.³⁵ The resolution expressed the Security Council’s “grave[] concern[] by the threat that piracy and armed robbery at sea against vessels pose to the prompt, safe and effective delivery of humanitarian aid to Somalia, to international navigation and the safety of commercial maritime routes, and to other vulnerable ships, including fishing activities in conformity with international law.” It reiterated that UNCLOS sets out the legal framework applicable to combating piracy and armed robbery at

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³³ Blackwater announced the launch of MV MacArthur (a 183 ft vessel with helipad) to provide “escort”; it also plans to launch an anti-piracy fleet; see J Seper (n8) who notes “Blackwater spokeswoman Anne Tyrrell said more than 70 companies, including shipping and insurance firms, have contacted the security specialists for information on the McArthur,”

³⁴ This might have salience if unilateral military actions result in mistakes and unintended casualties. For example, the Indian Navy’s claim that it sank a pirate mother ship was refuted by the owner of the ship. See, ‘Indian Navy Sank Thai Trawler Thought to be Pirate Ship’ *The Telegraph* (London, 26 November 2008) <http://www.telegraph.co.uk/news/worldnews/piracy/3522497/Indian-navy-sank-Thai-trawler-thought-to-be-pirate-ship.html> accessed 10 May 2009, noting that “[t]he sunken ship which the Indian navy claimed was a ‘mother ship’ of pirates was not the ‘mother ship’ at all,” quoting Wicharn Sirichaikawat, owner of the Thai fishing trawler *Ekawat Nava 5*.

³⁵ <http://www.un.org/News/Press/docs/2008/sc9541.doc.htm>

sea. The international nature of the problem and the fact that it has grown because of the reluctance of states to take adequate measures was expressly lamented: “concern that the lack of capacity, domestic legislation, and clarity about how to dispose of pirates after their capture, has hindered more robust international action against the pirates off the coast of Somalia and in some cases led to pirates being released without facing justice.” The resolution also emphasises that the reluctance of states to prosecute captured pirates was despite the existence of express legal authority: “the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (“SUA Convention”) provides for parties to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation...” Resolution 1851 relies upon Chapter VII of the Charter as the basis for calling “upon States, regional and international organizations that have the capacity to do so, to take part actively in the fight against piracy and armed robbery at sea off the coast of Somalia ...by deploying naval vessels and military aircraft and through seizure and disposition of boats, vessels, arms and other related equipment.”

Resolution 1851 is interesting in its clear recognition of the different incentives of states. Non-maritime states without affected citizens have no incentives to bear the costs associated with tackling piracy. States benefiting from piracy (because pirates are citizens, ransom money is invested in its territory, pirates share the same ideology or strong ties to the regime in power) might similarly have no incentive to act against pirates. States with the greatest economic incentives are likely to be those directly affected by ransom demands, while those with the strongest humanitarian incentives are likely to be the states which supply the crew on hijacked ships. The potential for some states to free ride in the former category might make other states reluctant to bear the cost of enforcement actions alone. The latter category of states might not possess the resources to act decisively, and even when they do, might externalize their responsibilities to the ship-owners who employ the affected crewmembers. The minimal leverage that crew members have over their home governments means that states supplying the manpower to merchant ships are unlikely to act unilaterally against piracy, except in rare instances. These asymmetric incentives and resources are at the root of Resolution 1851’s plea

for the need for coordination and cooperation, albeit in non-binding language: “Invites all States and regional organizations fighting piracy off the coast of Somalia to conclude special agreements or arrangements with countries willing to take custody of pirates in order to embark law enforcement officials (“shipriders”) from the latter countries, in particular countries in the region, to facilitate the investigation and prosecution of persons detainedfor acts of piracy and armed robbery at sea off the coast of Somalia, provided that the advance consent of the TFG is obtained for the exercise of third state jurisdiction by ship riders in Somali territorial waters...” There is more precatory language: The resolution “[e]ncourages all States and regional organizations fighting piracy ... off the coast of Somalia to establish an international cooperation mechanism to act as a common point of contact between ... states, regional and international organizations.” Further, it “encourages all states and regional organisations ... to consider creating a centre in the region to coordinate information relevant to piracy.” This is a nod to the significant reduction in piracy brought about by cooperation in the Malacca straits.³⁶

The resolution’s real teeth are contained in language authorising states and regional organisations to take “all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy.”³⁷ This authority is limited to twelve months from the adoption of resolution 1846³⁸ and removes substantially any sovereignty obstacles that might theoretically have existed although it is suggested that the resolution’s language merely gives the cover of legality to what would have been possible *de facto*. Given its status as a failed state, Somalia was hardly in a position to advance arguments about violations of its sovereignty if states had entered its territorial waters while taking actions against pirates. Even if it had not been a failed state, it is unlikely that such objections would be received with any sympathy given a state’s obligation to ensure that its territory is not used to commit illegal acts. In any event, resolution 1851 takes that objection off the table. The final parts of 1851 are important indicators of the

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³⁶ ‘Adding Value, Charting Trends – The Piracy and Armed Robbery Situation in Asia’ Presentation delivered at Press Conference on Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia (2008)

<[http://www.recaap.org/news/pdf/press/2nd%20GC%20AD\(R\)%20Presentation%202008%20\(press%20conference\)%20public.pdf](http://www.recaap.org/news/pdf/press/2nd%20GC%20AD(R)%20Presentation%202008%20(press%20conference)%20public.pdf)> accessed 10 May 2009

³⁷ UNSCR Res 1851 (n5) Clause 6

³⁸ UNSC Res 1846 *ibid* was adopted on 2 December 2008

Security Council's excessively cautious approach: it states that the authorisation is only with respect to Somalia and that the "resolution shall not be considered as establishing customary international law." It also emphasizes that the authorisation is owed to the consent of the Transitional Federal Government (TFG) of Somalia.³⁹

Part II: Universal Law, but Reluctant States

1. Universal Jurisdiction

Piracy is traditionally conceptualised as a crime against the 'laws of nations' with individuals engaged in acts of piracy considered as *hostis humani generis*.⁴⁰ As a consequence, the concept of universal jurisdiction over piratical acts is relatively uncontroversial.⁴¹ To this end, states enjoy jurisdictional competence to adjudicate upon individuals accused of piratical acts, regardless of their nationality or where on the High Seas the alleged crimes took place.⁴²

Accordingly, universal jurisdiction over piratical acts has long been a mainstay of legislative and judicial efforts⁴³ to combat piracy. In England, such jurisdiction was placed on a statutory footing in the sixteenth century during the reign of King Henry VIII. This Act of 28 Henry VII, c. 15 provided that individuals accused of piracy and other crimes within the jurisdiction of the English High Court of Admiralty could be tried under a specially constituted King's Commission. The statute authorised pirates to be brought from the High Seas to England and tried here. Proceedings were the same as for trials under the common law and were conducted before a twelve man jury. Perhaps unsurprisingly, the Act proved rather unsuccessful in combating the

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³⁹ This line of thinking is exemplified in the language of the Explanation of the Vote by Indonesia on the S.C. Resolution on Piracy: "Indonesia strongly believes that the principles of respect for sovereignty and territorial integrity as enshrined in the Charter have to be espoused by the Council, at all times. We view that in exercising its mandate in the maintenance of international peace and security, it is possible, and it can certainly be done without having to challenge the integrity of international law. These two objectives are mutually reinforcing, and not exclusive." H. Kleib 'Explanation of the Vote by H.E. Mr. Hasan Kleib, Deputy Permanent Representative of Indonesia on Security Council Resolution on Piracy in waters off the Coast of Somalia' (2 June 2005) <<http://www.indonesiamission-ny.org/NewStatements/ps060208.htm>> accessed 27 April 2009

⁴⁰ *United States v Brig Malek Adhel* 43 US (2 How.) 210, 232 (1844) (Justice Story)

⁴¹ For an early example of the exercise of such jurisdiction see (1696) 13 St. Tr. col. 451

⁴² E. Kontorovich 'Piracy Analogy: Modern Universal Jurisdictions Hollow Foundation' (2004) 45 *Harvard International Law Journal* 183, 190; for an early judicial finding of such jurisdiction see the case of *Dawson's Trial* in which 'undoubted jurisdiction and power' was asserted over the punishment of all piracies and robberies at sea, in the most remote parts of the world', 13 How. St. Tr. At 455 (Sir Charles Hedges)

⁴³ *United States v Smith* 18 U.S. (5 Wheat.) 153 (1820)

problem of piracy, a significant drawback being that it did not allow for the trial of pirates at sea.⁴⁴

The problems associated with transporting pirates back to England to stand trial eventually led to a statute 'for the effectuall Suppression of Piracy' being enacted in 1698 which allowed for the trial of individuals accused of piratical acts to be held at sea⁴⁵ or on any of the 'Islands, Plantations of Colonies belonging to His Majesty and appointed for that purpose.'⁴⁶ The Act directed that 'All Piracies, Felonies and Robberies committed in or upon the sea ... where the Admiralls have Power Authority of Jurisdiction may be examined inquired or tryed heard and determined and adjudged ... in any place at Sea or upon the Land.'

Trial at sea proved a much more popular way to deal with pirates as it negated the troublesome and expensive requirement of organising their transportation back to England. Thus despite jurisdictional competence to convene such trials, few piracy trials were actually held in England, resulting in something of a scarcity of case law in which 'true' universal jurisdiction was actually exercised to prosecute the crime of piracy.⁴⁷

The lack of such case law is also in part due to the fact that suppression of piratical acts was generally through the self defence of the ship concerned or via political means.⁴⁸ Accordingly, many instances of piracy were dealt with by force⁴⁹ or simply resulted in the capitulation of the crew under attack. There were also incidences of pirates being captured by English crews and subsequently 'returned' to the state of their nationality to be dealt with by the relevant authorities there.⁵⁰ A final possible reason for the paucity of English piracy trials in which 'true' universal jurisdiction was exercised relates to the monetary rewards available for the capture or killing of pirates. Under the Statute of 6 Geo. V, c 49, the sum of £20 was payable for the 'actual

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⁴⁴ 'Codification of International Law: Part V A Collection of Piracy Laws of Various Countries' (1932) 29 *American Journal of International Law* Sup 887, 910

⁴⁵ Competence to hold trials at sea was later removed by the 1806 Act of 46 Geo. III, ch. 54

⁴⁶ 11 and 12 Will III, c. 7, enacted for seven years but application extended by 6 Geo. 1, c. 19 s. 3; of interest is the fact that the infamous trial of Captain William Kidd, rather than being held at sea as permitted under Statute, was held in England pursuant to the earlier Act of 28 Henry VIII.

⁴⁷ A P Rubin *The Law of Piracy* (2ed. Hotei Publishing 1998) 302

⁴⁸ *ibid* 132

⁴⁹ See, for example, *The "Mary"* 166 Eng. Rep. 640 (1752 – 1865)

⁵⁰ *The Magdellan Pirates* 16 Eng. Rep. 47 (1752 – 1865)

taking, sinking, burning, or otherwise destroying of any ship manned by pirates, or persons engaged in piracy ... either taken or secured, or killed during the attack on such a piratical vessel.' Since the monetary reward payable was the same regardless of whether the pirates were captured or killed, it is clear that killing them may have been considered to be the easier option.

Despite the relative lack of piracy prosecutions in England utilising the principle of universal jurisdiction, there was never any doubt among legal commentators and the English judiciary that piracy was a crime against the 'law of nations.'⁵¹ Section 26 of the UK Merchant Shipping and Maritime Security Act 1997 which notes that Articles 101 to 103 of UNCLOS are constitutive of the 'law of nations' embodies this view.⁵² There have, however, been no UK prosecutions for the crime of piracy as constituted by the law of nations since the coming into force of UNCLOS.⁵³ This reluctance to prosecute is not unique to the U.K. - other European states have also been unwilling to prosecute pirates on their soil.⁵⁴ Concerns range from fears about pirates claiming refugee status and other associated human rights protections to insufficient evidence and high cost of prosecution.⁵⁵ In a throwback to old practice,⁵⁶ Britain recently signed an agreement with Kenya to prosecute captured pirates in the latter's courts.⁵⁷

2. Is the Reluctance to Prosecute Justified?

As noted above, much of the reluctance to capture and prosecute individuals accused of piratical acts is attributed to 'human rights' related concerns. In the European context, it is therefore necessary to examine the relevance of the European Convention on Human Rights

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Hence Blackstone, in his Commentaries on the Laws of England, provided a definition of piracy as 'a crime against the law of nations constituting acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to a felony there' 72; see also *Dawson's Trial* (n38)

⁵² Piratical acts in territorial waters are governed by the Aviation and Maritime Security Act 1990

⁵³ c/f *Cameron v HMA* (1971) SLT 333

⁵⁴ See M Woolf 'Pirates Can Claim UK Asylum' Sunday Times (London, 13 April 2008) <<http://www.timesonline.co.uk/tol/news/uk/article3736239.ece>> accessed 27 April 2009

⁵⁵ *ibid*

⁵⁶ *The Magdellan Pirates* (n46)

⁵⁷ B Jopson 'Kenya Signs Deal to Try Pirates' *Financial Times* (London, 12 December 2008) <<http://www.ft.com/cms/s/9b63b8e6-c7c4-11dd-b611-000077b07658.html>> accessed 27 April 2009

before considering the applicability of other international human rights norms to captured pirates.

Article 1 of the European Convention on Human Rights⁵⁸ [hereinafter the Convention] requires that: '[t]he High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention [emphasis added].'⁵⁹ Thus when a contracting state exercises its jurisdiction in terms of article 1, the rights and freedoms set out in the Convention will apply.

The key question is whether individuals engaged in acts of piracy on the High Seas and intercepted by the naval forces of a contracting state are entitled to the protection of the rights set out in the Convention. This turns on whether captured pirates can be said to be under the jurisdiction of a contracting state within the meaning of article 1.

The Grand Chamber has elucidated upon the meaning of 'jurisdiction' within article 1, considering it to reflect the 'ordinary and essentially *territorial* notion of jurisdiction [emphasis added].'⁶⁰ This vein of thinking rests upon the regional nature of the Convention, embodying the goals and concerns of state parties to the Council of Europe.⁶¹ There is much to be said for this view – the Convention and the rights conferred by it are of an exceptional nature and are owed to a historical and cultural process that is tied to territory.

However, while the meaning of jurisdiction is essentially territorial, the acts of states abroad are not invulnerable from Convention control with extraterritorial application of Convention rights possible⁶² in 'exceptional' circumstances.⁶³ As such, the question of 'who', within the meaning of article 1, is to be regarded as coming under the contracting states' jurisdiction such

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Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)

⁵⁹ *ibid*, Article 1

⁶⁰ *Bankovic et al. v Belgium et al.* (2007) 44 EHRR SE5 para [61]

⁶¹ *Ibid*

⁶² DJ Harris, M O'Boyle, C Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995) 642.

⁶³ *Bankovic* (n 56) para [67]

as to enjoy the rights and freedoms set out in the Convention⁶⁴ is thereby not determined *solely* by reference to those residing within the state's territorial boundaries.

The grounds upon which Convention rights may be applied outside of the territorial jurisdiction of the contracting parties can be separated into several rather amorphous categories.⁶⁵ The first relates to situations in which the actions of a state produce a degree of 'effective' control over an area outside of its actual territory.⁶⁶ Such control would typically be exercised either through military occupation⁶⁷ or through the 'consent, invitation or acquiescence of the government of that territory.'⁶⁸ However, in *Bankovic*, the requirement of effective 'authority and control'⁶⁹ over the area concerned was not met in the case of an aerial bombardment. The case concerned an action brought by relatives of individuals killed following a NATO missile attack on the Serbian State radio and television station in Belgrade. The applicants - relatives of five of those killed and one of the individuals injured by the attack- alleged that the NATO powers involved in the bombing had acted in violation of Articles 2, 10 and 13 of the ECHR. Jurisdiction was, however, denied on the grounds that the Convention is a legal instrument operating within the *espace juridique* [legal space]⁷⁰ of contracting states. Accordingly, to extend its application in the manner suggested by the applicants to cover territory not within the 'legal space' of the Convention would be to render void the very purpose of Article 1.⁷¹

However, despite the limitations set out in *Bankovic*, it is clear that states may exercise extraterritorial jurisdiction in respect of the acts of all individuals who operate on its behalf if

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⁶⁴ For a helpful summary of this question, see the dicta of Lord Brown of Eton-Under-Heywood in *R. (on the application of Al-Skeini) v Secretary of State for Defence* (2007) UKHL 26 para [102]

⁶⁵ These categories are based upon those enumerated by J Mantouvalou 'Extending Judicial Control: International Human Rights Treaties and Extraterritoriality' (2005) 9 (2) *International Journal of Human Rights* 147 and P Arnell 'Human Rights Abroad' (2007) 16 *Nottingham Law Journal* 1, 6; see also *Loizidou v. Turkey* (1997) 23 EHRR 513 para [62]

⁶⁶ Arnell *ibid* 6; see for example *Llascu & Others v Russia and Moldova* (2004) 40 EHRR 46

⁶⁷ *Loizidou v. Turkey* (1997) 23 EHRR 513 para [62] - [63]

⁶⁸ *Bankovic* (n56) para 71; see also *Issa v Turkey* (2005) 41 EHRR 27

⁶⁹ See also *Öcalan v Turkey* (2005) 41 EHRR 985

⁷⁰ European Convention (n54) Article 56 (1)

⁷¹ Paragraph 80; see however *Markovic and Others v Italy* (application no. 1398/03)

such acts produce effects outside of the state or are performed outside state territory.⁷² Such 'personal jurisdiction'⁷³ on behalf of the state may be exercised in circumstances in which state agents acting abroad effect a degree of personal control over an *individual*. Thus in *Cyprus v Turkey*, the European Commission expressly noted that state agents may 'bring any other persons or property within the jurisdiction of that State, to the extent that they exercise authority over such persons or property.'⁷⁴ Similarly, in the case of *Öcalan v Turkey*⁷⁵ the applicant had been arrested by members of the Turkish security forces in Nairobi Airport, and subsequently returned to Turkey. The question was whether the applicant's initial seizure in Nairobi meant that Turkey could be said to have exercised jurisdiction over the applicant. In response, the Grand Chamber noted;

"It is common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was under effective Turkish authority and therefore within the 'jurisdiction' of that state for the purposes of article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory."⁷⁶

Personal jurisdiction thus focuses upon the link and degree of control between the state and the individual concerned.⁷⁷ This compares with the former scenario in which the focus of analysis is upon the effectiveness of state control in a *geographical area* outside of their territorial jurisdiction.⁷⁸ While these groups may seem to be mutually exclusive, there will be factual scenarios in which both categories will be applicable.⁷⁹ In addition, in the case of *Bankovic*, it was noted by the Grand Chamber that "cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state"⁸⁰ may attract the extraterritorial application of the Convention. Whether this

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This summary is developed from that provided by J Williams 'Al Skeini: A Flawed Interpretation of Bankovich' (2005) 23 *Wisconsin International Law Journal* 687, 697

⁷³ Ibid

⁷⁴ (1975) 2 DR 126 para [8]

⁷⁵ (2005) 41 EHRR 985

⁷⁶ Ibid para [91]

⁷⁷ Arnell (n61) 6 and Williams (n68) 697

⁷⁸ See generally *Llascu & Others v Russia and Moldova* (2004) 40 EHRR 46

⁷⁹ Arnell (n61) 6 in reference to *Issa v Turkey* (2005) 41 EHRR 27.

⁸⁰ Para [73]

represents a separate category⁸¹ for extraterritorial jurisdiction or whether this can be subsumed as a component of the 'personal jurisdiction' test, the jurisprudence of the European Court of Human Rights supports the view that the activities of state agents on board 'vessels' belonging to a state *may* come within the jurisdiction of that state for the purposes of article 1 of the Convention.

States may therefore be concerned that the delineated exceptions to the territorial application of Convention rights are potentially applicable to pirates detained on a warship belonging to a contracting state. While there remains a paucity of cases concerning the application of fundamental rights to the high seas,⁸² the recent case of *Medvedyev*⁸³ confirms that individuals detained by the navy of a contracting state and subsequently towed to the territory of that state may come within the jurisdiction of the state for the purposes of the ECHR.⁸⁴ While the judgment of the European Court in this regard is currently being reviewed by its Grand Chamber,⁸⁵ other case law is, however indicative of the fact that individuals detained by the navies of contracting states to the ECHR may come within the scope of its protection. A recent House of Lords judgment in the case of *Al Skeini*⁸⁶ provides a useful starting point for this analysis. The case concerned the death of an Iraqi civilian in a British detention facility in Iraq following mistreatment at the hands of members of the British armed forces. The deceased was found to fall within the 'jurisdiction' of the United Kingdom under Article 1 of the Convention. While there was some disagreement among their Lordships as to the reasons for such jurisdiction⁸⁷, the majority found it to be based upon the effective control of the British army over the detention facility. However, the court refused to find that the Convention applied in relation to five other Iraqi civilians killed while members of the British army were on patrol in

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⁸¹ See generally Williams (n68)

⁸² J Bomhoff 'The Transdisciplinary Conflict of Laws, The Foreign and the Private in Conflict-of-Laws, State-Action, and Fundamental Rights Cases with Foreign Elements' (2008) 71 *Law and Contemporary Problems* 39, 65, ff 150.

⁸³ *Medvedyev and Others v France* (application no. 3394/03); see also *Rigopoulos v. Spain*. (application no. 40177/98)

⁸⁴ As cited in R Middleton 'Pirates and how to deal with them' Chatham House Briefing Note (22 April 2009) <http://www.chathamhouse.org.uk/files/13845_220409pirates_law.pdf> accessed 10 May 2009, 4

⁸⁵ For further details see Press Release by Registrar of the European Court of Human Rights <<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=849834&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>> accessed 10 May 2009

⁸⁶ *R. (on the application of Al-Skeini) v Secretary of State for Defence* (2007) UKHL 26

⁸⁷ *ibid*; see in particular the dicta of Lord Brown

Basra. The rationale was that the volatile situation in Iraq at the time of patrolling by the army militated against a finding that they were exerting 'effective' control over the area concerned. While this reasoning has been criticised,^[2] its application to pirates on the High Seas might have interesting consequences. Pirates who are detained, for example, by the British navy are likely to be considered within the 'effective control' of Britain and so within the scope of protection afforded by the Convention. There is, after all, little discernable difference between detention on a warship and detention in a military prison.^[2] As such, pirates so detained are likely to come within the jurisdiction of the state for the purposes of Article 1 of the Convention.^[2] However, pirates who are merely in the vicinity of an aerial bombardment by the British Royal Air Force are less likely to attract the protection of the Convention.^[2] This is because a state would be less likely to be able to exert 'effective control' over the area concerned.^[2] The essence of *Al Skeini* and subsequent case law is that British military personnel may at times be bound by the applicable provisions of the European Convention of Human Rights^[2], when they are engaged in activity outside of the UK^[2] but such applicability will very much turn on the facts of each case.

An additional exception to the traditional territorial conception of jurisdiction relates to the responsibility of a contracting state to the Convention in circumstances in which an individual's removal to another country would potentially result in a violation of their rights under the Convention.^[2] Such a situation would arise when an individual faces extradition or expulsion to a country in which there is a 'real risk' of being subjected by the receiving state to torture or other forms of inhuman or degrading treatment.^[2] This is because article 3 of the Convention

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^[2] See for example Williams (n68) and M Milanovic "From compromise to principle: clarifying the concept of state jurisdiction in human rights treaties" (2008) 8 (3) *Human Rights Law Review* 411

^[2] See also case of *Hess v United Kingdom* (1975) 2 DR 72

^[2] *R (B and Others) v Secretary of State for Foreign and Commonwealth Affairs* [2004] EWCA Civ 1344 [2005] QB 643 for consideration of the application of jurisdiction in relation to an embassy

^[2] Although the provisions of Article 110 UNCLOS will be relevant

^[2] *Bankovic* (n56)

^[2] S. 6 (1) Human Rights Act 1998 instructs public authorities not to act in a manner which is incompatible with Convention rights.

^[2] F de Londras 'International Decision: Saadi v Italy' (2008) 102 *American Journal of International Law* 616, 622

^[2] *Soering v United Kingdom* (1989) 11 EHRR 439

^[2] Although the obligation is wider than this; see *Regina (Ullah) v Special Adjudicator* (2004) UKHL 26 in which it was held that Articles 2, 4, 5, 6 and 8 of the Convention apply in relation to extradition and expulsion cases.

sets out an absolute prohibition on torture and inhuman or degrading treatment.⁹² In the case of *Saadi v Italy*,⁹³ the Grand Chamber of the European Court of Human Rights underlined that, even in cases involving suspects accused of terrorist acts, the right enshrined in article 3 is absolute.⁹⁴ As such, where there was a 'real risk' that the suspect, if deported, would face torture or inhuman or degrading treatment, the right under article 3 would override any concerns regarding public policy or national security.⁹⁵ Such jurisdiction would arise despite the fact that the torture would occur in another territory. This might be problematic in connection with the depositing of pirates in Kenya or other territories such as the Somali region of Puntland if legitimate concerns about human rights being violated exist. In addition to the Convention, the United Nations Convention against Torture would raise similar concerns.¹⁰¹

There is some inkling in EU documents that such concerns are real. For example, article 12(2) of the EC's Joint Action decision of November 2008 states: "No persons referred to in paragraphs 1 and 2 may be transferred to a third State unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law on human rights, in order to guarantee in particular that no one shall be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment."¹⁰²

It is to be noted, however, that such provisions do not provide an all encompassing 'get out'

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⁹³ See for example *Ireland v United Kingdom* (1980) 2 EHRR 25

⁹⁴ *Saadi v Italy* (2008) 24 BHRC 123

⁹⁵ Compare the absolute nature of Article 3 of the Convention with the principle of *non-refoulement* under Article 33 (2) of the 1951 Refugee Convention. This provides that the benefit of the *non-refoulement* principle may not be claimed by a refugee 'whom there are reasonable grounds for regarding as a danger to the security of the country ... or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country'.

⁹⁶ F de Londras '*Saadi v Italy: European Court of Human Rights Reasserts the Absolute Prohibition on Refoulement in Terrorism Extradition Cases*' (2008) 12 (9) *ASIL Insights* <<http://www.asil.org/insights080513.cfm>> accessed 27 April 2009

¹⁰¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984) 1465 UNTS 85, Art. 3(1) ("No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.")

¹⁰² COUNCIL JOINT ACTION 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, O.J. L301 10.11.2008, p.33. Article 12(1) confers broad powers with regard to the handling of captured pirates providing that they may be handed over "to the competent authorities of the flag Member State or of the third State participating in the operation, of the vessel which took them captive, or — if this State cannot, or does not wish to, exercise its jurisdiction, to a Member States or any third State which wishes to exercise its jurisdiction over the aforementioned persons and property."

clause excluding the application of the Convention. Even in the face of diplomatic assurances, the European Court of Human Rights in general reserves the right to review whether, on the evidence available, the applicant will be exposed to a real risk of a violation of their Convention rights in the event of deportation.¹⁰³ In a forerunner of things to come, there are reports that one of the pirates deposited in Kenya by German marines operating as part of the EU mission against piracy is suing the German government for €10,000 for inhumane treatment in jail following rendition to Kenya.¹⁰⁴

There are hence strong grounds to believe that pirates detained by state parties to the European Convention may be able to assert claims under some of its provisions.¹⁰⁵ Such protections are further bolstered by UNSCR 1851 which, as delineated above, sanctions the use of force against individuals accused of piratical acts. It is notable that while the use of ‘all necessary means’ is permitted in the fight against piracy; such force is mandated to be consistent with applicable human rights law.¹⁰⁶ Indeed, on a more general level, action taken pursuant to a Chapter VII Security Council mandate authorising ‘all necessary means’ is required to be in accordance with the “well established principles of international law” and in line with the protections accorded there under.¹⁰⁷ A central component of such protections is the ‘right to life’, a right which, if not yet *jus cogens*, is certainly intrinsic to most international and regional human rights treaties.¹⁰⁸ While this does not automatically render unlawful all killings

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¹⁰³ *Chahal v United Kingdom* (1996) 23 EHRR 413

¹⁰⁴ D Fong ‘Politics influences the jurisdiction for Somali pirate trials’ (DW-WORLD.DE 2009) <<http://www.dw-world.de/dw/article/0,,4198300,00.html>> accessed 27 April 2009

¹⁰⁵ The most relevant claims are likely to arise in relation to Article 2 [the right to life], Article 3 [prohibition on torture and other forms of inhuman and degrading treatment], Article 5 [relating to detention] and Article 6 [right to a fair trial]

¹⁰⁶ (n5) Clause 6

¹⁰⁷ *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident in Lockerbie (Request for the Indication of Provisional Matters)*, ICJ Reports 1992, 3, 56, cited in R McLaughlin ‘The Legal Regime Applicable to the Use of Force when Operating under a United Nations Security Council Chapter VII Mandate Authorising ‘All Necessary Means’’ (2008) *Journal of Conflict and Security Law* 1, 5; Note decision of the Grand Chamber in *Behrami and Behrami v France, Saramati v France, Germany and Norway* (Application nos. 71412/01 and 78166/01) 2 May 2007 in which the acts of military forces of several contracting states to the ECHR acting pursuant to Chapter VIII powers of the UN security Council were held to be attributable to the UN and not the states themselves. This judgment can however be distinguished on the grounds that the right to seize, detain and try pirates is a product of international law and not merely a reflection of powers delegated by the UN Security Council under Chapter VII.

¹⁰⁸ McLaughlin *ibid* at 7

of individuals accused of piratical acts, any such deprivation of life must adhere to recognised exceptions to the right to life such as self defence.¹⁰⁹ Unsurprisingly, states engaged in the fight against piracy have been keen to excuse such killings as acts of self defence. For example, the Indian Navy sank a pirate vessel allegedly killing fourteen pirates in November 2008.¹¹⁰ The Indian Navy's statement following the attack sought to characterize the action as an exercise of its right to self defence: "On repeated calls, the vessel's threatening response was that she would blow up the naval warship... INS Tabar retaliated in self defence and opened fire on the mother vessel."¹¹¹ This is not an isolated instance – the Royal Navy killed two Somali pirates in November 2008.¹¹² One can only speculate about the likelihood of success of lawsuits brought by relatives of those killed in these incidents.

UNSCR 1851 also requires that action taken pursuant to its authority is in line with applicable international humanitarian law.¹¹³ The most relevant provision in this regard is that of Common Article 3 of the Geneva Conventions. This applies a 'minimum yardstick' applicable to all armed conflict, whether international or non-international in nature.[Ⓜ] Common Article 3 sets out a list of basic rights to which individuals are entitled in situations of conflict including the right to a fair trial and freedom from torture. Underlying the rights protected by Common Article 3 is the right to be treated 'humanely' in all circumstances. All major states have ratified the four

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¹⁰⁹ Ibid; for further commentary on the use of force at sea, see R Middleton (n81) 2

¹¹⁰ R Blakely 'Indian Navy sinks pirate mothership during bold stand-off in Gulf of Aden' *The Times* (London, 19 November 2008) <<http://www.timesonline.co.uk/tol/news/world/africa/article5186821.ece>> accessed 27 April 2009

¹¹¹ Ibid

¹¹² R Norton-Taylor and T Parfitt 'British Commandos Kill Somali Pirates in Showdown at Sea' *The Guardian* (London, 12 November 2008) <<http://www.guardian.co.uk/world/2008/nov/12/somalia-russia1>> accessed 27 April 2009 The report also contains language resonant of a claim of self defence: "Various non-forcible methods had been used in an attempt to stop the dhow but they were unsuccessful," the MoD said, adding that the inflatables circled the dhow in an attempt to stop it. People on the dhow fired at the British commandos who returned fire in self-defence, the MoD said. Two of the dhow crew were killed.

¹¹³ (n5) Clause 6

Ⓜ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* Merits [1986] ICJ Rep 14

Geneva Conventions and so the minimum protections afforded therein are required to be granted to individuals accused of piratical acts.⁸

3. A tale of two prosecutions

Western states do have a history of prosecuting and punishing pirates under domestic law. One of the more famous instances is the prosecution in Britain of the pirate William Kidd.¹¹⁶ He was tried under a 1536 Statute enacted during the reign of Henry VII.¹¹⁷ The Statute was entitled "An Act for the punishment of pirates and robbers of the sea" and provided that "all treasons, felonies, robberies, murders and confederacies" committed upon the seas could be tried in accordance with the common law by a specially appointed King's Commission. After a short trial, Kidd was found guilty and sentenced to be hanged.

The charging of Abduwali Muse in New York is the first such case in a century in the United States. The prosecution relates to the hijacking of the ship Maersk Alabama owned by Maersk Line, Limited, a company based in Norfolk, Virginia. The Maersk Alabama is registered in the United States, flies its flag, and crewed by U.S. citizens. Muse had boarded the ship, fired his

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⁸ For an overview of the applicability of Common Article 3 to the situation of piracy on the High Seas, see E Kontorovich 'International Legal Responses to Piracy off the Coast of Somalia' (2009) 13 (2) *ASIL Insights* <<http://www.asil.org/insights090206.cfm>>⁸<http://www.asil.org/insights090206.cfm>> accessed 27 April 2009

¹¹⁶ Kidd's trial took place at the Old Bailey in May 1701. Kidd was tried for a number of crimes; the murder of a Mr William Moore and piracy relating to the boarding and taking away of the ship, the *Quedagh Merchant*. The first charge to be presented to him was that of murder and Kidd spent much of the earlier part of the hearing asking for more time to put together his defence, having been afforded only two weeks to prepare and belatedly informed of the nature of the charges on the day of his trial. Such requests were given short shrift by the Admiralty representative, a Dr George Oxenden. Various witnesses were produced for the prosecution although Kidd was afforded no opportunity at this point to adduce evidence of his good character. The jury was subsequently dismissed to consider the charge of murder against Kidd and while these discussions were taking place, a new jury was sworn in to hear the charge of piracy. During the second hearing, the previous jury finished its deliberations and it was announced to the Court that Kidd had been found guilty of the crime of murder. Kidd's request for an opportunity to put forward a defence to the crime of piracy based upon the existence of French passes which he alleged granted him permission to seize the ship in question were denied. A number of witnesses were called to give evidence against Kidd before the second jury was sent away to consider its verdict. After only half an hour of discussion, they found him guilty of the charge of piracy. He was subsequently sentenced to be hanged by the neck until dead.

¹¹⁷ 28 Henry VII, c. 15

gun at the captain, and took about \$30,000 in cash from the ship. After a series of events, Muse apparently surrendered to the USS Bainbridge.¹¹⁸ The first count of the complaint charges Muse under section 1651 of Title 18, which recognises the crime of “piracy under law of nations”: “Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”¹¹⁹

Count two pertains to section 2280 of Title 18: “A person who unlawfully and intentionally - (A) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; (B) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship...”¹²⁰ The section provides for imprisonment of not more than 20 years, or fine, or both. If the offence involves the death of any person, the offender shall be “punished by death or imprisoned for any term of years or for life.”¹²¹ Count four was section 1203 – hostage taking.¹²² There are early signs that the trial is turning out to be a circus and it is unlikely that such an experiment will be repeated.

The contrasting tales of Kidd and Muse illustrate the perils of bringing pirates to trial in distant jurisdictions in the face of strong procedural protections afforded to the accused. When considered alongside other attempts at prosecuting pirates under universal jurisdiction, it illustrates the folly of uncoordinated ad hoc actions. Universal jurisdiction offers no exogenous reason to prosecute - the decision to incur the expenses of prosecution and imprisonment must ultimately rest upon a determination of costs and benefits. To the extent that national interests are affected, the question that the prosecuting state has to ask is whether bringing the pirates to trial in its jurisdiction represents the optimal use of its resources to achieve its objectives. If

¹¹⁸ *United States v. Muse*, Complaint, available at http://graphics8.nytimes.com/packages/pdf/nyregion/22pirate_Complaint.pdf.

¹¹⁹ U.S. Code.

¹²⁰ United States Code.

¹²¹ *Ibid*

¹²² “...whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts or conspires to do so, shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.”

there are other lower cost alternatives available, these are preferable notwithstanding universal jurisdiction. Thus universal jurisdiction ought to be employed instrumentally in the fight against piracy.

PART III: The Way Forward

Repelling piracy is not impossible; there is valuable precedent in the immediate past that can be employed usefully. The Straits of Malacca were in the throes of a piracy menace just a decade ago – a significant portion of the 469 pirate attacks recorded in 2000 was in that region. A regional cooperation agreement was hammered out under the aegis of ASEAN with Japan playing a leading role in the negotiating process.¹²³ There has been a marked decline in incidents of piracy in that region following the implementation of the agreement.¹²⁴ From 2003 to 2008, pirate attacks declined from a total of 239 to 70 in South-East Asia.¹²⁵ In contrast, attacks rose from a total of 63 to 158 in Africa during the same time frame.¹²⁶ The lesson is clear – cooperation and coordination are essential if anti-piracy efforts are to be successful. The Official Communiqué of the International Conference on Piracy around Somalia convened by the United Nations Political Office for Somalia “[s]tressed the importance of enhancing coordination and cooperation in the fight against piracy, and welcomed the recent efforts of States and organisations to establish means for that cooperation... [and] urged the provision of necessary technical support to enhance maritime and legal capacity building of all regional countries most directly affected by piracy.”¹²⁷ The recent United States National Security Council document *Countering Piracy off the Horn of Africa: Partnership and Action Plan* also recognises the need for more cooperation.¹²⁸ It provides for a combined patrolling force, and the creation of a “contact group” of countries willing to take coordinated action.¹²⁹ Similarly,

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Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, available at (n32)

¹²⁵ U.S. House of Representatives Committee on Transportation and Infrastructure (n7)

¹²⁶ Ibid

¹²⁷ The Communiqué was issued on 11 December 2008 and is available at www.UN-Somalia.org.

¹²⁸ http://www.marad.dot.gov/documents/Countering_Piracy_Off_The_Horn_of_Africa_-_Partnership__Action_Plan.pdf

¹²⁹ Ibid.

the formation of the Contact Group following the passage of resolution 1851 is an encouraging development.¹³⁰

On 6 May 2009, the European Union concluded an Exchange of Letters with Kenya pertaining to the modalities of transfer and prosecution of pirates captured by NAVFOR ATALANTA.¹³¹ The agreement contains several detailed provisions with high levels of precision, delegation, and obligation. It could be said to be an example of moderate to hard legalisation.¹³² As per the agreement, EUNAVFOR will transfer captured pirates only to competent Kenyan authorities, and Kenya will accept for investigation and prosecution such pirates.¹³³ The signatories pledge to “treat persons transferred ...both prior to and following transfer, humanely and in accordance with international human rights obligations, including the prohibition against torture and cruel, inhumane and degrading treatment or punishment, the prohibition of arbitrary detention and in accordance with the requirement to have a fair trial.”¹³⁴ Further, captured pirates “will receive adequate accommodation and nourishment, access to medical treatment and will be able to carry out religious observance.”¹³⁵ The agreement spells out the need for detainees to be “brought promptly before a judge or other officer authorised by law to exercise judicial power, who will decide without delay on the lawfulness of his detention and will order his release if the detention is not lawful.”¹³⁶ Detainees are “entitled” to trial within a “reasonable time” or to release.¹³⁷ They also have an entitlement to fair and public trial, and to



¹³⁰ The Contact Group includes Australia, China, Denmark, Djibouti, Egypt, France, Germany, Greece, India, Italy, Japan, Kenya, South Korea, The Netherlands, Oman, Russia, Saudi Arabia, Somalia TFG [Transitional Federal Government], Spain, Turkey, United Arab Emirates, United Kingdom, United States, Yemen, the African Union, European Union, NATO, the U.N. Secretariat, and the International Maritime Organization.

¹³¹ ‘Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer’ OJ L79/49 25.3.2009 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:079:0049:0059:EN:PDF>>

¹³² For an analysis of legalized agreements, see, Sandeep Gopalan, ‘From Darfur to Sinai to Kashmir: Legalization and Ethno-Religious Conflicts’ (2007) 55 *Buffalo L. Rev.* 1

¹³³ *Ibid.* article 2

¹³⁴ *Ibid.*

¹³⁵ *Ibid.* article 3

¹³⁶ *Ibid.* article 3(b)

¹³⁷ *Ibid.* article 3(c)

the presumption of innocence.¹³⁸ The agreement also offers significant procedural safeguards to captured pirates, chief amongst them the right to counsel of the accused's choice. If the accused does not have counsel, the court can appoint one for him if the "interest of justice so requires." The right to be tried without "undue delay" is reiterated.¹³⁹ The accused has the right to examine witnesses, right to an interpreter, and the right against self incrimination.¹⁴⁰ Upon conviction, the accused has the right to appeal under applicable Kenyan law.¹⁴¹ The death penalty cannot be imposed on transferred pirates.¹⁴² The agreement prohibits Kenya from transferring any transferred person to another state without the prior written consent of EUNAVFOR.

Article 5 of the agreement is an example of hard legalisation. It contains very precise obligations in terms of record keeping for both sides. EUNAVFOR is required to keep records "of the physical condition of the transferred person while in detention, the time of transfer to Kenyan authorities, the reason for his detention, the time and place of the commencement of his detention, and any decisions taken with regard to his detention."¹⁴³ Correspondingly, Kenya has to keep records of "any seized property, the person's physical condition, the location of their places of detention, any charges against him and any significant decisions taken in the course of his prosecution and trial."¹⁴⁴ The article contains some element of delegation – the records will be available to EU and EUNAVFOR representatives upon request to the Kenyan Ministry of Foreign Affairs.¹⁴⁵ It is surprising that the records are not available to other interested persons like the lawyers of the accused. It is also unclear as to what the consequences of improper record-keeping might be for the prosecution.

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¹³⁸ Ibid.

¹³⁹ Ibid article 3(f)

¹⁴⁰ Ibid.

¹⁴¹ Ibid. article 3(g)

¹⁴² Ibid. article 4. The language is interesting: "No transferred person will be liable to suffer the death sentence. Kenya will, in accordance with the applicable laws, take steps to ensure that any death sentence is commuted to a sentence of imprisonment."

¹⁴³ Ibid article 5(b)

¹⁴⁴ Ibid. article 5(c)

¹⁴⁵ Ibi, article 5(d)

The monitoring function is also performed by articles 5(e) and (f): Kenya is required to notify EUNAVFOR of the location of pirates detained following transfer. In addition, it is also required to notify EUNAVFOR if there is any deterioration in the physical condition of the transferee and if there are any allegations of improper treatment. It is hard to see how this can be realized in practice because of the obvious conflict of interest. The potential for embarrassment and harsh media attention is unlikely to yield incriminating information. A check against this is the provision of access to EU and EUNAVFOR representatives to transferees in Kenyan custody and an entitlement to question them. Further, the agreement delegates some of the monitoring function by allowing access to national and international humanitarian agencies to visit transferred pirates. Disputes between Kenya and the EU in interpreting the agreement are to be resolved by diplomatic means.

The Exchange of Letters has had teething problems if recent reports are to be believed. Spain recently captured seven Somali pirates and wanted to bring them to Madrid for prosecution.¹⁴⁶ The news report states “Judge Fernando Andreu of the National Court begrudgingly ordered them freed but refused to surrender them to Kenya as suggested by a prosecutor... Andreu refused to order the suspects surrendered to Kenya, saying it bypassed all Spanish laws on extradition and arguing that the EU accord cannot be applied to people with legal proceedings pending in Spain.”¹⁴⁷ If anything, this illustrates the problem with universal jurisdiction and stresses the need for exclusive jurisdiction in Kenya for states covered by the Exchange of Letters. If states can pick and choose when they have to transfer captured pirates to Kenya, much of the legal certainty that the agreement sets out to achieve will be frustrated.

However, simply dumping pirates in Kenya and relying on that country’s justice system to deal with them effectively is foolish. If reports are to be believed, Kenya’s courts face a backlog of 800,000 cases and suspects languish in jail for over a year before they are heard by a judge.¹⁴⁸ Creating the infrastructure and building capacity have to be part of the international response to piracy. This is not news - the Danish representative in response to adoption of UNSC

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¹⁴⁶ Spain: about face on piracy suspects, May 8, 2009, < <http://www.chicagodefender.com/article-4353-spain-about-face-on-piracy-suspects.html>>

¹⁴⁷ Ibid.

¹⁴⁸ Nations Consider Prosecution of Pirates, North County Times, April 17, 2008, available at <http://www.nctimes.com/articles/2009/04/17/news/nation/za487f063636c8c228825759b0076c8a5.txt>.

Resolution 1851, emphasized this very point, '[t]he question of judicial infrastructure should be a major focus of the international community's attention, Danish naval forces had recently detained a number of suspected pirates in international waters, but, because it was impossible to prosecute the suspects in Denmark or any other State, the detainees had eventually been released.'¹⁴⁹ Despite this concern, the EU's Exchange of Letters does not explicitly address the problem of capacity. It restricts itself to stating that the implementing arrangements to the agreement might make 'provision of technical support, expertise, training and other assistance upon request of Kenya in order to achieve the objectives of this Exchange of Letters.' Thus, creating judicial and prosecutorial capacity is not a *sine qua non* to transfer and is dependent on Kenya specifically requesting such help.

That judicial capacity building has to be a significant part of the toolbox is not new – there was a proposal put forward by Malta in 1971, that in relation to pirate ships seized outside 'national ocean space', the 'International Maritime Court shall decide upon the penalties to be imposed and shall determine the actions to be taken ... subject to the rights of third parties acting in good faith.'¹⁵⁰ This was proposed as a possible amendment to Article 19 of the 1958 Geneva Convention on the High Seas, but was not adopted. Given the general lack of appetite amongst states for international tribunals, creating a special international court is a bridge too far. A realistic, and more modest, option would be set up a designated court in Kenya with contributions from states desiring to prosecute pirates there. After all, Kenya has no intrinsic interest in prosecuting Somali pirates and cannot be expected to bear the costs of prosecution and imprisonment alone. As part of this bargain, a legalized agreement with obligations to observe minimal human rights protections for captured pirates must be hammered out for the solution to be protected against attack on human rights grounds. The EU's Exchange of Letters offered an excellent opportunity to set up a designated court in Kenya with the capacity to effectively prosecute and convict pirates. Despite the agreement being silent in this regard, the provision for entering into implementation arrangements might offer hope for such an idea to fructify in the future.

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¹⁴⁹ <<http://www.un.org/News/Press/docs/2008/sc9541.doc.htm>> ☐

¹⁵⁰ A/AC.138/53 Article 22; as cited in M H Nordquist *United Nations Convention on the Law of the sea, 1982* (Martinus Nijhoff 1985)

Part IV: Conclusions

Maritime piracy entails significant economic and humanitarian costs and poses a truly international problem. The vastness of the area affected and the incongruence of interests means that unilateral state action is unlikely to be successful. Differences in capacities and incentives at the state level make cooperation and coordination beneficial. International law offers a focal point for such cooperation and coordination. If, as is argued in this paper, UNCLOS and other international legal instruments offer a sufficiently clear legal regime for the prosecution of pirates, the only problem that remains is the reluctance of states to exercise prosecutorial jurisdiction. Simply reiterating that states have universal jurisdiction to prosecute pirates and lamenting their unwillingness to do so is useless. States have no exogenous reasons to prosecute pirates, and their unwillingness to exercise universal jurisdiction might be for good reasons - political compulsions, concern about free-riding, fear about pirates taking advantage of procedural loopholes, evidentiary difficulties, backlogs in domestic courts, and resource constraints. Regardless of the merits of these reasons, this paper argues that it is unnecessary to resolve them. Bilateral and multilateral agreements with states proximate to the piratical incidents offer a more efficient alternative. The bilateral agreements between Kenya and the U.S., U.K., and the E.U. are strong evidence of this reality. If the agreements guarantee minimum human rights protections, contain verification and monitoring mechanisms, and build capacity, they would put the pirates out of business.