

A PIRATE AND A REFUGEE: RESERVATIONS AND RESPONSES IN THE FIGHT AGAINST PIRACY

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Despite concerted international cooperation and action, including the deployment of various national and international naval forces in the region, piracy, in particular off the coast of Somalia, continues to pose a serious threat to the peace and security of one of the most-traveled waterways in the world, the neighboring states, and to the global economy.

Naval deterrence depends on effective patrolling, which again is closely tied to the concept of jurisdiction and law enforcement. As a point of departure, piracy is considered to be the original universal jurisdiction crime and, as such, states apprehending pirates would be able to base their jurisdiction on that concept. However, in practice, states patrolling the Gulf of Aden have shied away from prosecuting, sometimes even from arresting, suspected pirates due to anticipated legal difficulties of prosecution, high expenses connected with transporting suspects to the national courts of the apprehending forces, and concerns of potential asylum claims being made by pirates.

Some of those claims may be rejected based on the Exclusion Clause in Article 1F of the 1951 Refugee Convention, stipulating that refugee status may be denied to persons who have committed certain serious crimes. The majority of arrests, however, by necessity pertains to unsuccessful pirates and hence involves inchoate acts on the grounds of which a potential asylum claim, nevertheless, may not as readily be denied.

While failure to adequately address the problem of piracy on the high seas may reinforce the threat to security in the region and beyond, insufficiently prepared prosecutions in the various cooperating states'

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national courts may add to the fear of not only harboring a pirate, and lending incentives to future ones, but potentially in this fashion inviting criminal gangs, or sleeper cells, with even more serious agendas into the country. Assessing the legal basis of those fears and evaluating ways to counter the level of threat posed by piracy will be at the core of this article.

I. CONTINUING THREAT

To be sure, although pirate attacks off the coast of Somalia accounted, by far, for the greatest share of all attacks in recent years, piracy is not an unknown phenomenon in the waters off Bangladesh, India, Indonesia, Nigeria, and Tanzania, and thus may be said to constitute a serious global problem with potentially significant geopolitical repercussions. The dubious honor of being recognized as a state belonging to a piracy-infested region adds to the weak state/failed state paradigm, and increases pressure towards falling into the latter category of that continuum. Having a piracy problem in one's backyard exposes the inadequacy of the coastal state's patrolling, policing, and prosecutorial capacity and capability; thus, further undermining the legitimacy of an already weak government and risking pushing it even closer to the failed state label.

The near global attention Somalia has been receiving in recent years has in the main been due to the fact that it fits the failed state label all too well. Hence, in spite of increasing international cooperation and naval-military action, piracy, in particular off the coast of Somalia, continues to threaten the safety, peace, and security of one of the most-frequented waterways in the world, the states in the region, and, by extension, to disrupt the global economy.

According to recent numbers, an estimated 21,000 ships pass through the Gulf of Aden on an annual basis. While the number of acts of piracy and armed robbery against ships¹ reported to the IMO to have occurred in 2009 was 406, against 306 during 2008 and 282 during 2007, the first four months of 2010 alone resulted in 135 reported incidents (and thus on a

1. "Piracy" as defined in Article 101 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) in the main consists of "any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship . . . and directed: (i) on the high seas, against another ship . . ." or "against a ship . . . outside the jurisdiction of any State." United Nations Convention on the Law of the Sea, art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397, 21 I.L.M. 1261 (1982) [hereinafter UNCLOS]. Armed robbery against ships pertains to a similar description of unlawful acts taking place "within a State's jurisdiction over such offences." Cf. Int'l Maritime Org. [IMO], Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships, Res. A 1025(26), annex (Dec. 2, 2009), IMO Doc. A 26/Res 1025 (Jan. 18, 2010).

par with the 2009 peak level)² and a decisive reversal of the trend currently still seems to be quite distant. Taking the extra costs to international shipping due to significantly increased insurance premiums, avoidance (*i.e.*, choosing the alternate route around the Cape of Good Hope, which adds roughly 3,500 miles to the journey), and deterrence (*e.g.*, heightening onboard security, deploying frigates, etc.) into account, estimates of the direct and indirect costs of piracy to the global trade range from \$1 billion to \$16 billion.³ In light of those realities, the IMO pursued a three-pronged approach, aiming at: (1) enhancing individual vessels' security and alert level, (2) increasing regional cooperation, and (3) promoting international military presence in the predominantly affected Gulf of Aden area.

Thus, on September 29, 2009, the IMO's Maritime Safety Committee (MSC) updated and revised its guidance on combating piracy and armed robbery against ships and adopted best management practices to deter and deal with attacks.⁴ The guidelines include, for example, various recommendations with respect to travel routes, manning of engine rooms and lookouts, and more technical advice relating to preferred modes of communication and reporting, evasive maneuvering tactics, and fire pump defensive measures. One of the newest tools in regard to evasion and prevention pertains to a specifically designed electronic sea map, with live updates on suspected pirate vessels, weather reports and other observations plotted in and made available to subscribing ship owners.⁵ As of today, such mapping and reporting is mainly carried out individually, within each shipping company. Despite enhanced on-board security, in light of the still high-level security threat, the by far preferred *modus operandi* to most ship owners would be to avoid the piracy infested shipping lanes off the Somali coast all together and instead employ alternative routes, for example, going around South Africa. But, as most shipping companies individually admit, no one wants to go the extra (sea-) mile alone. Unless the majority of

2. See Maritime Safety Committee [MSC], MSC 87th Sess. (May 12–24, 2010), available at <http://www.imo.org/MediaCentre/MeetingSummaries/MSC/Pages/MSC-87th-Session.aspx> (last visited Feb. 16, 2011); Maritime Safety Committee [MSC], Revised Guidance on Combating Piracy Agreed by IMO Maritime Safety Committee, MSC 86th Sess. (May 27–June 5, 2009), available at http://www.imo.org/newsroom/mainframe.asp?topic_id=1773&doc_id=11478 (last visited Feb. 16, 2011).

3. PETER CHALK, *THE MARITIME DIMENSIONS OF INTERNATIONAL SECURITY: TERRORISM, PIRACY AND CHALLENGES FOR THE UNITED STATES* 16 (RAND Corp., 2008), available at http://www.rand.org/pubs/monographs/2008/RAND_MG697.pdf (last visited Mar. 14, 2011).

4. Int'l Maritime Org. [IMO], Best Management Practices to Deter Piracy in the Gulf of Aden, IMO Doc. MSC, 1/Circ., 1335 (Sept. 29, 2009).

5. See, *e.g.*, *Sjørøverkart som skal hindre angrep [Piracy Map to Avoid Attacks]*, AFTENPOSTEN, Aug. 5, 2010.

companies collectively follow through with such plans, no one wants to carry the extra cost to competitiveness, spending more time and fuel on a substantially longer journey.⁶

As to fostering regional cooperation and coordinating governments' action, the IMO adopted a Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships (Code of Practice),⁷ which, *inter alia*, urges governments to take action, in accordance with the Code, to investigate all acts of piracy and armed robbery against ships occurring in areas or on-board ships under their jurisdiction, and to report to the Organization pertinent information on all investigations and prosecutions concerning such acts. Apart from encouraging states to take necessary national legislative, judicial, and law enforcement action as to be able to receive, prosecute, or extradite any pirates or suspected pirates and armed robbers arrested by warships or military aircraft,⁸ the Code is meant to be a source of best practice and "to provide Member States with an *aide-mémoire* to facilitate the investigation of the crimes of piracy and armed robbery against ships."⁹

Furthermore, in January 2009 the IMO convened a meeting in Djibouti of states in the region, adopting a Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden (the so-called Djibouti Code of Conduct),¹⁰ in which the signatories declared their intention to cooperate to the fullest possible extent, and in a manner consistent with international law, in the repression of such attacks against ships. The state signatories committed themselves towards sharing and reporting relevant information through a system of national focal points and information centers, interdicting ships suspected of engaging in acts of piracy and other attacks against ships, ensuring that persons committing or attempting to commit such prohibited acts are apprehended and prosecuted, and facilitating

6. See, e.g., *Avverget piratangrep mot norsk skip i Adenbukta [Fought off Pirate Attack against Norwegian Vessel in the Gulf of Aden]*, AFTENPOSTEN, Aug. 4, 2010. That point was further underlined by the head of the Norwegian Ship Owner's Association on the occasion of a recent Norwegian Institute of International Affairs conference. See Norwegian Institute of Int'l Affairs [NUPI], *Agenda 2010: Responsibility and Global Governance*, Oslo, Norway (Sept. 16, 2010).

7. Int'l Maritime Org. [IMO], Code of Practices for the Investigation of Crimes of Piracy and Armed Robbery Against Ships, IMO Assembly Res. A 1025(29), Annex (Dec. 2, 2009).

8. *Id.* art. 3.1.

9. *Id.* art. 1.

10. Int'l Maritime Org. [IMO], The Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and Gulf of Aden, IMO 101st Sess. (Jan. 26–29, 2009), available at <http://www.fco.gov.uk/resources/en/pdf/pdf9/piracy-djibouti-meeting> (last visited Feb. 16, 2011) [hereinafter Djibouti Code of Conduct].

proper care, treatment, and repatriation for affected crews and passengers, particular those who have been subjected to violence.

More specifically, according to Article 8 of the Djibouti Code of Conduct, in order to facilitate information sharing and coordination, participating states are requested to use the piracy information exchange centers established in Kenya, Tanzania, and Yemen, respectively. Furthermore, in order to allow for the prosecution, conviction, and punishment of those involved in piracy or armed robbery against ships, and to facilitate extradition, or handing over when prosecution is not possible, each participating state declared its intention “to review its national legislation with a view towards ensuring that there are national laws in place to criminalize piracy and armed robbery . . . and adequate guidelines for the exercise of jurisdiction, conduct of investigations, and prosecutions of alleged offenders.”¹¹

Acknowledging that the current Djibouti Code of Conduct is mainly of declaratory value, Article 13 expresses the participating states’ intention to consult, “within two years of the effective date of this Code of Conduct . . . with the assistance of IMO, with the aim of arriving at a binding agreement.”¹²

Finally, realizing that successful regional cooperation also would depend on international naval assistance, the IMO has been at the forefront of organizations and states to bring the piracy problem to the attention of the UN Security Council,¹³ which, on November 23, 2010, adopted its latest enforcement action resolution concerning the situation in Somalia.¹⁴ Recalling its previous resolutions with regard to Somalia,¹⁵ in UN SC Res. 1950 the Security Council, acting under Chapter VII of the UN Charter, decided to renew for an additional twelve months the authorization granted to Member States in preceding resolutions, pertaining to taking action against pirates in Somali territorial waters (“hot pursuit”¹⁶) and extending

11. *Id.* art. 11.

12. Djibouti Code of Conduct, *supra* note 10, art. 13.

13. Tom Syring, *Recent Developments: UNCHR and IMO Address Plight of Refugees at Sea, New Threats Loom*, INT’L MARITIME ORG. [IMO], available at <http://www.asil.org/rio/imo.html> (last visited Feb. 16, 2011).

14. S.C. Res. 1950, U.N. Doc. S/RES/1950 (Nov. 23, 2010).

15. S.C. Res. 1897, U.N. Doc. S/RES/1897 (Nov. 30, 2009); S.C. Res. 1814, U.N. Doc. S/RES/1814 (May 15, 2008); S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008); S.C. Res. 1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008); S.C. Res. 1844, U.N. Doc. S/RES/1844 (Nov. 20, 2008); S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008); S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008).

16. In other words, allowing pirates to be chased from the high seas into Somali territorial waters, thus preventing pirates’ “hit-and-run” tactics.

the scope of permissible military force even to certain land-based operations in the Somalia mainland.¹⁷ This UN SC Res. 1950 also focused on holding persons suspected of piracy accountable for their acts by calling for increased efforts to prosecute Somali pirates.¹⁸

Based on these resolutions, states have intensified their presence in the Gulf of Aden, with the United States, United Kingdom, French, and Indian navies initially leading the way, now also joined, for example, by a Chinese naval deployment, and the first-ever European Union-led naval force (EUNAVFOR) executing operation “Atalanta.”¹⁹ With presence, however, comes the problem of effective patrolling, which again is closely tied to the concept of jurisdiction and law enforcement. As a point of departure, piracy is considered to be the original universal jurisdiction crime and, as such, states apprehending pirates would be able to base their jurisdiction on that concept.²⁰ However, in practice, states patrolling the Gulf of Aden have shied away from prosecuting, sometimes even from arresting,²¹ suspected pirates due to anticipated legal difficulties and expenses. Yet, without serious and visible efforts at prosecution and punishment, the preventive and deterring effect of increased patrols is at best reduced.

Some of the main concerns of states pertain to the rather small window of opportunity for catching suspected persons “in the act,”²² and the

17. The resolution noted that it was passed with the consent of, and following several requests for international assistance from, the Transitional Federal Government (TFG) of Somalia. See S.C. Res. 1950, U.N. Doc. S/RES/1950 (Nov. 23, 2010). UN SC Res. 1851 had noted in paragraph 6 that “States and regional organizations cooperating in the fight against piracy . . . off the coast of Somalia . . . ‘may undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy. . . .’” S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008).

18. In paragraph 13, the Security Council “[c]alls on all States, including States in the region, to criminalize piracy under their domestic law and favorably consider the prosecution of suspected, and imprisonment of convicted, pirates apprehended off the coast of Somalia, consistent with applicable international human rights law.” S.C. Res. 1950, U.N. Doc. S/RES/1950 (Nov. 23, 2010). See also J. Ashley Roach, *Agora: Piracy Prosecutions—Countering Piracy Off Somalia: International Law and International Institutions*, 104 AM. J. INT’L L. 397, 407 (2010).

19. Established according to EU Council Joint Action 2008/851/CFSP (Nov. 10, 2008) framework, 2008 O.J. (L 301) 8.

20. UNCLOS, *supra* note 1, art. 105 (establishing the right of every State to seize a pirate ship and prosecute acts of piracy).

21. Marie Woolf, *Pirates Can Claim UK Asylum*, SUNDAY TIMES, Apr. 13, 2008, <http://www.timesonline.co.uk/tol/news/uk/article3736239.ece> (last visited Feb. 23, 2011) (noting that in 2008, the British Foreign Office reportedly instructed the Royal Navy not to turn pirates over to Somalia, in fact, not to take them on-board at all, due to concerns they could claim asylum under European human rights laws).

22. Often, there are no more than fifteen minutes between a pirate attack being launched and the action being concluded.

problematic status of pirates. Prior to the launch, a pirate vessel may merely appear as a fishing boat and by quickly disposing of weapons by throwing them overboard, any evidence to the contrary soon rests safely on the seabed. On the other hand, under international law pirates are considered to be non-combatants,²³ which put, for example, further constraints on navies' "rules of engagement." Furthermore, the modalities of apprehension may impose additional difficulties on any ensuing prosecutions; as many pirates are detained under circumstances that resemble the battlefield conditions criticized in regard to the apprehension of many Guantánamo Bay detainees, "where evidence was not collected or preserved as required for prosecution."²⁴

Realizing the shortcomings and limitations of increased naval presence in the face of the 2009 attacks on the U.S. vessels *Maersk Alabama* and *Liberty Sun*, a new legal initiative in the United States, building upon the IMO's guidelines with respect to enhancing vessels' security level, intends to allow other mariners to defend their vessels and be protected by law when doing so. The U.S. Mariner and Vessel Protection Act of 2009,²⁵ if passed, would provide U.S. Mariners with immunity in U.S. Courts if they wound or kill pirates whilst responding to a pirate attack. The Act, proposed by Rep. Frank LoBiondo, charges the U.S. Coast Guard with certifying firearms training for merchant vessels and provides for any trained mariner using force plus owner, operator, or master of the respective vessels to be exempted from liability in U.S. Courts as a result of such use of force. Furthermore, the Act directs the United States to negotiate international agreements through the IMO to provide similar exemptions from liability in other countries for the use of force by mariners and vessel owners, operators, or masters, as well as to ensure that armed U.S. crews can enter foreign ports. It also contains plans to authorize deployment of Coast Guard Maritime Safety and Security Teams (MSST) to ride aboard and defend U.S. flagged vessels transiting piracy prone waters. The initiative is carried in an amendment to the National Defense Authorization Act.

23. See, e.g., Eugene Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, 13 AM. SOC. INT'L L. 2 (2009).

24. John R. Crook, *Contemporary Practice of the United States Relating to International Law: Closing Guantánamo Proves Difficult—Khadr's Military Commission Trial Set for August*, 104 AM. J. INT'L L. 506-07 (2010). Cf. Charlie Savage, *No Terror Evidence Against Some Detainees*, N.Y. TIMES, May 29, 2010, at A12.

25. United States Mariner and Vessel Protection Act of 2009, H.R. 2984, 111th Cong. (2009) (introduced on June 19, 2009, referred to the Subcommittee on Border, Maritime, and Global Counterterrorism on July 7, 2009).

II. BLURRY LINES TO LACONIA

While all attempts at containing the threats posed by piracy, in general, are laudable endeavors, the various initiatives and measures, initiated or adopted by the IMO and other national and international actors, display shortcomings to varying degrees. The Code of Practice represents little more than a handbook for investigating piracy crimes, stating best practices, but containing few commitments on the part of participating states. Likewise, the Djibouti Code of Conduct enlists important coordination and cooperation obligations, but a legally binding agreement is not to be expected until 2011. The MSC guidelines, on the other hand, include various immediately practical recommendations in regard to combating piracy and armed robbery; although, the success of those measures also depends, to a certain extent, on the participation and coordination of international naval forces. Finally, considering dependence on (foreign) military cooperation, measures such as those stipulated in the U.S. Mariner and Vessel Protection Act of 2009 may be understandable. However, manning civilian vessels with armed seafarers (and encouraging the use of force to fight off presumed pirates with pledges of liability exemptions), may lead, once again, to a dangerously blurry line between civilians and combatants, while concomitantly contributing to an escalation of violence on the high seas. What had once been realized as a lethal dilemma of international law, culminating in the *Laconia* affair during World War II,²⁶ might still be a non-commendable idea in the present circumstances.

In any case, ultimately, as also UN SC Res. 1897 acknowledges, a solution to piracy off the coast of Somalia lies ashore. That, however, would require intense institution or even state building efforts which, in the foreseeable future, does not seem feasible. In fact, despite years of internationally supported capacity-building efforts, the weak so-called Transitional Federal Government (TFG) in Somalia has yet to manage to agree upon the text of a badly needed new constitution;²⁷ accommodating the various competing clans, and barely controlling more than a fraction of the capital Mogadishu, not to mention of the entire country—and even that rather tiny bit of control is based on foreign support. Thus, as of now, international patrolling, deterrence by apprehending and prosecuting, and

26. Pertaining, roughly speaking, to the question of whether a submarine encountering an (armed) merchant ship may treat that ship as a military vessel and its crew as combatants.

27. *The Project*, MAX PLANCK INST. FOR COMP. PUB. L. & INT'L L., Mar. 16, 2011, http://www.mpil.de/ww/en/pub/research/details/know_transfer/somalia/the_projects.cfm (last visited Mar. 28, 2011) (establishing that ongoing procrastination and lack of progress has led the Max Planck Institute, one of the legal capacity building partners, to characterize the constitution-drafting process as “decelerating”).

capacity building in the (surrounding) region, seems the closest one may get to enhancing the Somali state as such, hoping that regional spill-over effects will eventually ensue and also positively affect Somalia.

III. PIRACY AND INTERNATIONAL LAW

Any efforts at combating piracy are additionally complicated by the fact that even where pirates have been apprehended and apparently sufficient evidence has been collected, most of the countries comprising the international naval forces show little interest in actually prosecuting the attackers, for fear of high expenses connected with transporting suspects to the national courts of the apprehending forces, and concerns of potential asylum claims being made by pirates. Instead, and in lack of an international court alternative, transfer to a third country has been favored as a compromise and, as of now, Somalia's neighbor Kenya has emerged as the leading national location for piracy trials. Thus, in spite of the fact that Article 105 of the United Nations Convention on the Law of the Sea (UNCLOS)²⁸ not only provides that "every State may seize a pirate ship" on the high seas,²⁹ but also stipulates that prosecution of the apprehended suspects should be by "[t]he courts of the state which carried out the seizure,"³⁰ there suspected pirates have increasingly been transferred to Kenyan authorities. As part of the European Union-led operation "Atalanta," in 2009 the EU, for example, concluded an agreement with the government of Kenya for the transfer and trial of persons suspected of having committed acts of piracy.³¹

A. Prosecuting Piracy under International Law

But what exactly is the legal basis for piracy prosecutions, and is there a duty to prosecute that pertains to all, or to certain states? As pointed out above, the UNCLOS, in particular Article 105, may be employed to

28. UNCLOS, *supra* note 1, art. 105.

29. The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 222, 27 I.L.M. 672 (1988) (*entered into force* Mar. 1, 1992) (demonstrating the basis of jurisdiction where pirates are not apprehended on the high seas, but for example, following a "hot pursuit," have been seized in Somali territorial waters) [hereinafter SUA Convention].

30. UNCLOS, *supra* note 1, art. 105 (emphasis added).

31. See Exchange of Letters 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 for Their Treatment After Such Transfer, EU-Kenya, Mar. 6, 2009, 2009 O.J. (L 79) 49, *reprinted in* 48 I.L.M. 751 (2009).

establish a right of every state to seize a suspected pirate ship, apprehend, and try suspected persons. That Convention, along with international customary law both preceding and exceeding the ensuing codification of some of the international norms governing maritime law, established universal jurisdiction over acts of piracy.

On 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. The courts of the State which carried out the seizure *may* decide upon the penalties to be imposed. . . .³²

Nothing in the UNCLOS, however, imposes a duty on State Parties to prosecute, or, for that matter, any other legal obligations, save one: Article 100 of the UNCLOS, which underlines that “[a]ll States *shall* cooperate 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.”³³ While everything else appears voluntary, merely authorizing states to act, Article 100 may be read as a specific obligation to act to repress piracy, although no particular guidance is offered in the treaty text as to the nature of the required cooperation. To be sure, when discussing earlier drafts of the UNCLOS predecessor, the International Law Commission “had sought to put some teeth”³⁴ into the relevant article pertaining to the duty to cooperate in its commentary on draft Article 38, stipulating that “[a]ny State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law.”³⁵ However, the draft article adds that “[o]bviously, the State must be allowed a certain latitude as to the measures it should take to this end in any individual case.”³⁶ Read against that backdrop, the latitude bestowed on states in cooperating “to the fullest possible extent” in Article 100 of the UNCLOS seems to be substantial and hence, even that obligation appears to be rather vague. In sum, the legal basis for piracy prosecutions may be found in customary international law and its codification in UNCLOS, Articles 105 and 100. However, neither customary international law, treaty law such as

32. UNCLOS, *supra* note 1, art. 105 (emphasis added).

33. UNCLOS, *supra* note 1, art. 100 (emphasis added).

34. Roach, *supra* note 18, at 405.

35. Report of the International Law Commission on the Work of Its Eighth Session, [1956] 2 Y.B. INT’L L. COMM’N 253, at 282, U.N. GAOR, 11th Sess., Supp. No. 9, U.N. Doc. A/3159 (1956) (commenting on the draft of Article 38) [hereinafter ILC Report].

36. *Id.*

UNCLOS, nor the *travaux préparatoires* seem to impose a clear duty on states to prosecute piracy.

Furthermore, prosecutions for certain piratical acts may also be based on various, widely ratified international criminal law treaties, such as the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention),³⁷ the International Convention Against the Taking of Hostages of 1979 (Hostages Convention),³⁸ the International Convention for the Suppression of the Financing of Terrorism of 1999 (Terrorism Financing Convention),³⁹ and the United Nations Convention Against Transnational Organized Crime of 2000 (TOC Convention).⁴⁰ While none of these treaties address the boarding of suspected pirate vessels, and as such maintain the traditional rule of exclusivity of flag state jurisdiction, they potentially cover a broad range of piracy support activities. Those include hostage taking of crews, acting as an organized criminal group across borders, and, not least, the provision of supplying equipment and funds to the entire criminal enterprise, without which most pirate endeavors never would have seen the light of day, considering the substantial investments necessary to acquire, for example, rocket-propelled grenades and other sophisticated assault hardware.

If properly implemented under domestic law, these treaties may be useful tools in the suppression of pirate activities. Yet, as of now they have been virtually absent in any attempts at addressing piracy off the coast of Somalia, or for that matter, elsewhere, and point to the challenges any domestic prosecution faces, besides willingness on the part of states: implementation of international treaties and adoption of modern national laws governing the prosecution of piracy.

B. Domestic Proceedings

To date, there is no international court or other international institution in existence which would have jurisdiction over the crime of piracy and hence, domestic proceedings are the only feasible alternative. To be sure, in theory the Rome Statute of the International Criminal Court (ICC) could

37. SUA Convention, *supra* note 29.

38. International Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205, 18 I.L.M. 1456 (1979).

39. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, G.A. Res. 54/109, 39 I.L.M. 270 (2000).

40. United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, S. Treaty Doc. No. 108-16 (2004), 2225 U.N.T.S. 209. As of June 2010, the SUA Convention had 165 State Parties, the Hostage Convention had 167 parties, the Terrorism Financing Convention had 173 parties, and the TOC Convention had 155 parties.

be amended such as to cover the crime of piracy. The mere thought of such a proposal, however, met with significant opposition prior to the 2010 Review Conference of the ICC, and thus, was never really an option. Apart from financial and organizational concerns, the gist of the argument against inclusion of piracy and other treaty-based crimes, under the auspices of the ICC, was a concern that it would overwhelm and trivialize the Court. Considering that the ICC had been established to deal, according to its Preamble, with the “most serious crimes of concern to the international community,”⁴¹ the broadly conveyed sense was that, for all its potential graveness, piracy per se did not, in general, rise to such a level of seriousness from an international point of view. After all, for example, UN SC Res. 1816 and 1838, adopted under Chapter VII of the UN Charter and constituting enforcement action that presupposes a threat to peace and security, did not actually regard piracy per se as constituting such a threat. In fact, those resolutions more generally indicated “that the incidents of piracy and armed robbery against vessels in the territorial waters of Somalia and the high seas off the coast of Somalia *exacerbate* the situation in Somalia which continues to constitute a threat against international peace and security in the region.”⁴²

Piracy by itself was not deemed to represent a sufficiently serious threat such as to endanger international peace and security and hence, as of now, domestic prosecutions remain the sole venue for trying suspected pirates.

Following UN SC Res. 1851 of December 16, 2008, where the Security Council had urged states willing to prosecute piracy to enter into agreements with states and organizations mainly involved in patrolling the coast and physically involved in fighting piracy, Kenya concluded agreements with, *inter alia*, the United Kingdom, the United States, and the European Union; and emerged as the hub of piracy prosecutions. In the wake of those agreements, at least ten cases involving seventy-six suspected pirates had been brought in the Mombasa courts as of August 31, 2009. Kenya’s willingness appears to be in stark contrast to the rather reluctant practice in that regard on the side of the states actively involved in patrolling waters off the coast of Somalia.⁴³ The emerging picture thus far

41. Rome Statute of the International Criminal Court, pmbi., July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 999 (1998).

42. S.C. Res. 1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008) (emphasis added); S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008) (emphasis added).

43. See generally *United States v. Musé*, No. 9-CR-512 (S.D.N.Y. filed May 19, 2009) (charging the defendant, *inter alia*, with piracy against the U.S.-flagged M/V *Maersk Alabama* on the high seas and, armed with a firearm, hijacking it by force and detaining its captain in a lifeboat on or

is that states taking part in the international naval presence in the Gulf of Aden may, if at all,⁴⁴ try suspected pirates who attack ships of those states' nationality, or with nationals of those states being affected, for example, as crew members. Where no such nexus may be established, avoidance of active prosecution seems to be the general trend,⁴⁵ sometimes to the detriment of the apprehended persons. For example, in May 2010 the Russian navy captured, and a few days later released, suspected pirates, instead of bringing them in with a view to initiating proceedings. Rather, the Somali men reportedly were released far at sea in a small rubber boat, rendering their chances of survival uncertain.⁴⁶ Overall, piracy prosecutions in countries other than Kenya have thus far been almost absent. However, recent refusal on the part of Kenya to continue accepting pirates for trial, formally blamed on not having received the assistance in bearing the burden of prosecution promised by its partners in the bilateral agreements, may alter that trend. In fact, that refusal has already resulted in a couple of recent indictments in, for example, both the United States⁴⁷ and Germany,⁴⁸ cases that otherwise would have been transferred to Kenya.

In April 2010, the U.S. Attorney's Office for the Eastern District of Virginia announced the indictment of eleven men from Somalia on charges that included piracy. Five were charged in connection with a failed nighttime assault on March 31, 2010 on the USS *Nicholas*, a U.S. Navy frigate that the attackers apparently mistakenly thought was an unarmed merchant ship. The other six men were charged in connection with an unsuccessful early morning attack on or about April 10, 2010 on the USS

about Apr. 8–12, 2009), Superseding Indictment (S.D.N.Y. filed Jan. 12, 2010) (adding a charge of hijacking two non-U.S.-flagged ships before the *Maersk Alabama*).

44. As an example to the contrary, i.e., despite the existence of such a nexus, in May 2010, for example, the Russian navy released a group of Somali pirates captured a couple of days earlier in an operation to recover a seized Russian tanker, apparently due to lack of a clear legal basis for prosecuting them. See Ellen Barry, *Russia Frees Somali Pirates It Had Seized in Shootout*, N.Y. TIMES, May 8, 2010, at A4.

45. Cf. The chief prosecutor in Hamburg, Germany, where pirates caught by that country most likely would be tried, who has been quoted as stating: "[T]he German judicial system cannot, and should not, act as World Police. Active prosecution measures will only be initiated if the German State has a particular, well-defined interest. . . ." Ewald Brandt, *Prosecution of Acts of Piracy off Somalia by German Prosecution Authorities*, Presentation at the International Foundation for Law of the Sea Conference, Piracy—Scourge of Humanity (Apr. 24, 2009).

46. Anne Appelbaum, *The Rule of Law Walks the Plank*, WASH. POST, May 18, 2010, at A19.

47. See, e.g., *United States v. Hasan*, No. 10-CR-56, 2010 WL 4281892 (E.D. Va. Oct. 29, 2010); *United States v. Said*, No. 10-CR-57, 2010 WL 3893761 (E.D. Va. Aug. 17, 2010).

48. See generally Matthias Gebauer, Horand Knaup & Marcel Rosenbach, *First Trial of Somali Pirates Poses Headache for Germany*, DER SPIEGEL ONLINE, Apr. 20, 2010, <http://www.spiegel.de/international/world/0,1518,689745,00.html> (last visited Mar. 22, 2011).

Ashland, an amphibious assault ship. Both vessels were homeported in Virginia, in Norfolk and Little Creek respectively; hence, the locus of the indictment. All eleven men were charged with piracy, which, according to 18 U.S.C. § 1651, carries a mandatory penalty of life in prison.⁴⁹ In addition, the indictment also charged them with:

Attack to plunder a vessel, which carries a maximum of 10 years in prison; [a]ssault with a dangerous weapon in the special maritime jurisdiction, which carries a maximum of 10 years in prison; [c]onspiracy to use firearms during a crime of violence, which carries a maximum of 20 years in prison; [u]se of a firearm during a crime of violence, which carry a mandatory minimum of 10 years in prison and a maximum of life in prison if convicted of one count. The five men charged in the indictment involving the U.S.S. Nicholas face two firearm counts, which would carry an additional minimum of 25 years—to equal 35 years—in prison if convicted of both counts.⁵⁰

After pleading guilty on August 6, 2010 to attacking so to plunder a vessel, engaging in an act of violence against persons on a vessel, and using a firearm during a crime of violence, Jama Idle Ibrahim, one of the six men involved in the attack on the USS *Ashland*, was sentenced to thirty years in prison on November 29, 2010.⁵¹ The piracy charges against the six men, however, had initially been dismissed by the federal district judge on August 17, 2010 on the grounds that firing a weapon at a ship to force it to stop and be boarded did not amount to an act of piracy. In analyzing the piracy statute, 18 U.S.C. § 1651, the district court followed the defendants' lawyers in applying the Supreme Court's definition of piracy as "robbery at sea" from the 1820 case of *United States v. Smith*.⁵² As there was no robbery alleged in the USS *Ashland* case, the court rejected charges of

49. "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." 18 U.S.C. § 1651 (1945).

50. See Press Release, United States Attorney's Office, Eastern District of Virginia, Alleged Somali Pirates Indicted for Attacks on Navy Ships (Apr. 23, 2010), available at <http://www.justice.gov/usao/vae/Pressreleases/04-AprilPDFArchive/10/20100423piratenr.html> (last visited Mar. 14, 2011).

51. Press Release, United States Attorney's Office, Eastern District of Virginia, Somali Sentenced for Acts of Piracy Against the USS *Ashland* (Nov. 29, 2010), available at <http://www.justice.gov/usao/vae/Pressrelease/11NovemberPDFArchive/10/20101129ibrahimnr.html> (last visited Mar. 14, 2011).

52. *United States v. Smith*, 18 U.S. 153 (1820).

piracy.⁵³ The district court apparently did not take account of the fact that Article 15(3) of the 1958 Geneva Convention on the High Seas,⁵⁴ to which the United States is a party and which therefore, according to Article VI § 2 of the U.S. Constitution, forms part of the “supreme law of the land,” defines piracy as including “any act of inciting or of intentionally facilitating an act described” as piracy in the two preceding paragraphs.⁵⁵ Two months later, a different judge in the same district court reached the opposite conclusion, upholding charges of piracy.⁵⁶

In the only other pending U.S. prosecution involving Somali pirates, Abduwali Abdukhadir Musé, charged, *inter alia*, in connection with the April 2009 attack on the *Maersk Alabama*, on May 18, 2010 pleaded guilty in a Manhattan federal court to two felony counts of hijacking maritime vessels, two felony counts of kidnapping, and two felony counts of hostage-taking. Musé’s guilty plea pertained foremost to his participation in the April 8, 2009 hijacking of the *Maersk Alabama* container ship in the Indian Ocean, and the subsequent taking of the captain of the ship as a hostage, in addition to his participation in the hijacking of two other vessels in late March and early April of 2009 and related hostage-taking. Prosecutors reportedly will seek a sentence between twenty-seven and thirty-three years imprisonment.⁵⁷ Commenting on the case, Preet Bharara, the U.S. Attorney for the Southern District of New York, underlined that the *Maersk Alabama* hijacking and the events leading up to it “make clear that modern-day piracy is a crime against the international community and a form of terrorism on the high seas.”⁵⁸ On February 16, 2011, Musé was sentenced

53. See generally John Schwartz, *Somalis No Longer Face Federal Piracy Charges*, N.Y. TIMES, Aug. 18, 2010, at A16.

54. United Nations Convention on the High Seas, art. 15(3), Sept. 30, 1962, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

55. U.S. CONST. art. VI, § 2. The United States appealed this decision to the U.S. Fourth Circuit Court of Appeals: *United States v. Said*, No. 09-7168, 2010 WL 331416, at *1 (4th Cir. Jan. 26, 2010).

56. See Opinion and Order, *United States v. Hasan*, No. 10-CR-56, 2010 WL 4281892 (E.D. Va. Oct. 29, 2010).

57. See Ray Rivera, *Somali Man Pleads Guilty in 2009 Hijacking of Ship*, N.Y. TIMES, May 19, 2010, at A21; Cheryl Robinson, *Somali Pirate Pleads Guilty in Maersk Alabama Hijacking*, CNN.COM, May 18, 2010, http://articles.cnn.com/2010-05-18/justice/new.york.pirate.plea_1_maersk-alabama-hijacking-somali?_s=PM:CRIME (last visited Mar. 22, 2011).

58. Press Release, Department of Justice, Federal Bureau of Investigations, *Somali Pirate Pleads Guilty in Manhattan Federal Court to Maritime Hijackings, Kidnappings, and Hostage Takings* (May 18, 2010), available at <http://newyork.fbi.gov/dojpressrel/pressrel10/nyfo051810c.htm> (last visited Mar. 14, 2011).

to thirty-three years and nine months in prison, the maximum penalty under the stipulated sentencing-guideline range.⁵⁹

In the first piracy related case before German courts in about 400 years, the indictment charges the ten suspects with the joint criminal enterprise of disrupting maritime traffic along with hostage-taking and extortion, punishable according to sections 316c and 239a of the German Criminal Code. The Somali men are accused of attacking the MS *Taipan* some 530 nautical miles east of the Horn of Africa. The crew evaded capture by hiding in a so-called “panic room.” Dutch naval forces, as part of the EUNAVFOR operation “Atalanta,” eventually boarded the ship, apprehended the pirates, and handed them over to Germany. According to the District Attorney’s Office, in case of conviction the pirates face a maximum sentence of fifteen years of imprisonment. Among preliminary objections raised by the defense team at the beginning of the trial were questions as to the legality of the capture by Dutch naval forces and subsequent extradition to Germany. The trial is taking place in the district court of Hamburg, the home port of the MS *Taipan*.⁶⁰

What is worth noting is that while the piracy related cases before U.S. courts were mainly based on a specific piracy provision in the U.S. penal code (18 U.S.C. § 1651), referring to the “crime of piracy as defined by the law of nations,” whereas the German case, in lack of such an explicit legal provision, is based on provisions of the penal code that may, for the most part, be applied to a broad range of criminal activities not at all depending on a nexus with piracy, and lacking a reference to piracy as defined in international law. Furthermore, though perhaps not surprisingly, comparing the applicable sentences (even if taking into account the distinguishableness of the various cases), there is a significant difference between the two countries in regard to the maximum sentence likely to be handed down if the suspected pirates are to be convicted, ranging from up to fifteen years of imprisonment in the German case, and up to thirty-five years (and a minimum of twenty-five years) of imprisonment in the cited U.S. cases.

The still reigning confusion, however, even within the same domestic jurisdiction, and sometimes within the very same district court, may be

59. Chad Bray, *Somali Man Sentenced to More Than 33 Years in Hijacking of Ships*, WALL ST. J. ONLINE, Feb. 16, 2011, <http://online.wsj.com/article/SB10001424052748703373404576148393224867726.html> (last visited Apr. 22, 2011).

60. See Johannes Ritter, *Auftakt im Piratenprozess: Erpresserischer Menschenraub*, FRANKFURTER ALLGEMEINE ZEITUNG, Nov. 22, 2010, <http://www.faz.net/s/RubFC06D389EE76479E9E76425072B196C3/Doc~ECB061BB8C9FE4A5E945A1CE0578AFD2B~ATpl~Ecommon~Scontent.html> (last visited Mar. 14, 2011); *Germany's First Pirate Trial in 400 Years Opens*, MAIL & GUARDIAN ONLINE, Nov. 22, 2010, <http://www.mg.co.za/article/2010-11-22-germanys-first-pirate-trial-in-400-years-opens> (last visited Mar. 14, 2011).

gauged by the diverging outcomes of initially similar piracy cases (as in the U.S. example), highlighting the continuing inadequacy of domestic piracy prosecutions.

The establishment of jurisdiction is not yet settled regarding cases where the nationality of the apprehending forces is different from the ship's flag state, and the still inadequate comparability and case law of piracy-related offences; thus, sentencing practices represent shortcomings of, and challenges to, national prosecutions for piracy. At least some states have ventured into putting piracy on trial, despite the costs of trial and the potential ensuing political asylum claim concerns. However, the majority of states still appear to have an aversion towards such a level of involvement.

States unwilling to prosecute suspected pirates, not least Western states, often cite a lack of adequately implemented international treaties or national laws pertaining to piracy prosecution,⁶¹ evidentiary problems (the sort of evidence acquired and the mode it had been acquired may not live up to the high Human Rights trial standard in the respective countries), and, although less readily admitted, concerns for potential asylum claims by suspected, and convicted pirates, as reasons for their refusal to prosecute.

While the first two aspects quite tellingly seem to constitute less of a concern, once piracy suspects are transferred to a more regionally connected third country (where available laws, and attention to Human Rights standards, most often are not really superior to the ones available in the transferor state), the asylum concern (for example, Norway's *Mullah Krekar* case)⁶² is at least a real, although perhaps not sufficiently, serious

61. In addressing those concerns, S.C. Res. 1918, U.N. Doc. S/RES/1918 (May 27, 2010), proposed by Russia, calls on all states to make piracy an offense under their domestic law and asks the UN Secretary-General to prepare a report on possible institutions to try pirates. Ironically, or in any case as an illustration of the urgency of implementing domestic piracy legislation, a mere two weeks later, the Russian navy released Somali pirates far at sea, citing precisely a lack of a clear legal basis for prosecuting them. Barry, *supra* note 44. Following up on UN SC Res. 1918, the Legal Committee of the International Maritime Organization, conducted a review of national legislation among Member States, not surprisingly confirming previous assessments which concluded that "implementing legislation on piracy is not currently harmonized among the 40 States" which replied to the IMO's request for submission of national legislation on piracy. See Int'l Maritime Org. [IMO], Legal Committee, 97th Sess., agenda item 9, IMO Doc. LEG 97/9, Sept. 10, 2010, available at <http://www.amtcc.com/imosite/meetings/IMOMeeting2010/LEG97/LEG%2097-9.pdf> (last visited Mar. 14, 2011). In furtherance of its mandate to assist States in the uniform and consistent application of provisions of UNCLOS, the Division for Ocean Affairs and the Law of the Sea (Office of Legal Affairs) now serves as the depository of a database containing a table of national piracy legislation based on the IMO's survey, and information about other States, see http://www.un.org/depts/los/piracy/piracy_national_legislation.htm (last visited Mar. 14, 2011).

62. Mullah Krekar, a Kurdish Sunni Islamist leader who came to Norway as a refugee from Northern Iraq in 1991, had his refugee status revoked in 2003 due to terrorist acts carried out in

one. After all, while asylum claims in the wake of piracy prosecutions, and other serious crimes, are and will be a fact to be taken into account, in that way the number of such asylum claims being added to the total number of claims would amount to only a tiny fraction of the overall case load and, as such, would not seem to justify a country refraining from actively taking part in piracy prosecutions.

What is needed in any case is a comprehensive approach to modern piracy legislation, addressing evidentiary and implementation concerns and creating a broad basis of national jurisdictions with, as close as possible, similar approaches, procedures, and sentences for comparable acts of piracy—until, perhaps, a future international institution for such a purpose may be established. One of the challenges of the UNCLOS consists in the fact that, even if fully and widely implemented, this Convention is rather silent (as opposed to the Rome Statute of the ICC) as to exactly what jurisdictional steps a state is to take, what sentences to impose, *mutatis mutandis*. While states having ratified the ICC Statute also still had to implement the treaty through domestic implementing legislation, the ICC Statute at least listed very specific minimum requirements, the floor, where states were free to raise the ceiling in their national laws,⁶³ applying, for example, even higher standards with respect to the definition as to what acts constitute genocide, as may be illustrated by comparing German and U.S.

Kurdistan by Ansar al-Islam, an Islamist group whose original leader, at the time, was Mullah Krekar. Since February 2003, Krekar has an expulsion order against him which has been suspended pending Iraqi government guarantees that he will not face torture or execution. Norway is committed to international treaties which prohibit the expulsion of an individual without such a guarantee. The death penalty remains on the books in the Kurdistan region and while most death sentences have been changed into life sentences since the Kurdistan authorities took power in 1992, the exception being eleven alleged members of that very group (Ansar al-Islam), who were hanged in the regional capital of Arbil in October 2006. As of December 8, 2006, Mullah Krekar had been on the UN terror list, and on November 8, 2007 he had been judged by the Norwegian High Court as a “danger to national security.” See Vilde Helljesen et al., *Høyesterett: Mulla Krekar fare fro rikets sikkerhet*, NRK, Nov. 8, 2011, <http://www.nrk.no/nyheter/1.3987075> (last visited Mar. 15, 2011), and Norges Høyesterett [Supreme Court of Norway], Nov. 8, 2007, HR-2007-01869-A (case no. 2007/207) (Nor.). Despite repeated threats to the lives of various leading politicians in his country of refuge, he remains in Norway precisely because he might face the death penalty if deported to Iraq. See, e.g., Paal Wergeland, *PST vurderer å pågripe Mulla Krekar*, NRK, June 11, 2010, <http://www.nrk.no/nyheter/norge/1.7163982> (last visited Mar. 15, 2011).

63. In this same way, State legislatures within a federal republic, according to the “New Federalism,” may raise the ceiling of (human) rights within their State constitutions (by containing a greater number and broader definitions of rights) above the federal minimum floor. See Kermit L. Hall, *Of Floors and Ceilings: The New Federalism and State Bills of Rights*, in *THE BILL OF RIGHTS IN MODERN AMERICA: AFTER 200 YEARS* 202 (David J. Bodenhamer & James W. Ely, Jr. eds., Indiana Univ. Press 1993).

national legislation in that respect.⁶⁴ UNCLOS, of course, is silent in regard to sentences, and barely even imposes a duty on states to prosecute at all. Thus, drafting more standardized, modern anti-piracy legislation, as a minimum floor for national prosecutions, would be a worthwhile endeavor in enhancing the prosecutorial regime to fight piracy, though it still would leave the proclaimed problem of political asylum requests unaffected.

IV. A PIRATE AND A REFUGEE

While some of the concerns pertaining to potential asylum claims by suspected pirates may be rejected, based on Article 1F of the 1951 Refugee Convention, pertaining to the exclusion of refugee status, that clause itself may not be sufficient to put states unwilling to prosecute pirates in their own courts at ease. To be sure, the so-called Exclusion Clause stipulates, *inter alia*, that the provisions of the Refugee Convention “shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity,” or “(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee,” or “(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.”⁶⁵ Due to the vagueness of its wording, subsection (c) has barely been used, and, depending on the particular case, subsection (a) may be stretching the description of piracy too far, as may also be apparent from the wording and language employed in UN SC Res. 1816 and 1838 pertaining to the situation in Somalia, mentioned

64. The diverging definitions of genocide employed by Germany, a State Party to the Rome Statute, and the United States, still a non-party to the International Criminal Court, are quite illustrative with a view to the minimum floor versus the raised ceiling discussion. While the Genocide Convention and the Rome Statute define genocide as the commission of certain criminal acts “with intent to destroy, in whole or in part,” a national, ethnic, racial, or religious group, as such, 18 U.S.C. § 1091(a) requires a “specific intent to destroy, in whole or in *substantial* part;” thus, limiting the applicability of the provision quite distinctively. Section 6 of the German Code of Crimes Against International Law, on the other hand, emphasizes that in certain cases the objective requirements of genocide may already be fulfilled if the punishable conduct is directed at a single person. Thus, while the Rome Statute initially refers to killing and causing serious bodily or mental harm to “members” of the group, and forcibly transferring “children,” the German domestic penal law declares that whoever kills or harms in a certain way “a member” of the group, or transfers “a child” of the group may already be punishable for committing genocide. For a more detailed discussion, see Tom Syring, *The Crime of Crimes Before the Courts: National and International Jurisdictional Approaches with Respect to Punishing Genocide* (forthcoming 2011) (on file with author).

65. Convention Relating to the Status of Refugees, July 28, 1951, GA Res. 2198 (XXI), 189 U.N.T.S. 150 [hereinafter Refugee Convention]; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, 19 U.S.T. 6223.

previously.⁶⁶ However, in a recent statement regarding Article 1F, the UNHCR underlined that a “serious non-political crime” in the sense of Article 1F(b) could consist of arson and rape, but also murder and robbery.⁶⁷

Thus, as many cases involving piracy may include some acts of robbery or other “serious crimes” within the meaning of the Exclusion Clause in Article 1F, some refugee claims put forward by apprehended pirates may be denied based on that stipulation. On the other hand, as the majority of arrests by necessity pertain to unsuccessful pirates, and hence involve inchoate acts, rejection of potential asylum claims may nevertheless not be as readily available based on the Exclusion Clause contained in Article 1F. Furthermore, even where appropriate, a suspected pirate, irrespective of the outcome of a potential trial, may not be returnable to Somalia due to the principle of *non-refoulement*⁶⁸ and the well-known, dangerous security situation in that country.

Therefore, either way, the unwillingness of states to share the judicial burden of prosecuting pirate suspects based on concerns of potential asylum claims being made by apprehended persons may be understandable, though not equally justifiable. In any case, the problem now, it seems, consists not

66. S.C. Res. 1836, U.N. Doc. S/Res/1836 (Sept. 29, 2008).

67. UN High Commissioner for Refugees, UNHCR Statement on Article 1F of the 1951 Convention, at 20, July 2009, available at <http://www.unhcr.org/refworld/docid/4a5de292.html> (last visited Mar. 16, 2011). While the statement was originally issued in the context of a preliminary ruling referenced to the Court of Justice of the European Communities from the German Federal Administrative Court regarding the interpretation of a qualification directive pertaining to the granting of refugee status to persons included in terrorist lists, its interpretive value is valid in the present context as well. Furthermore, the ECJ, in its decision on November 9, 2010, held that “support of an organization included on the EU list of organizations involved in terrorist acts may, but does not automatically, constitute a serious non-political crime or an act contrary to the purposes and principles of the United Nations. . . .” According to the Court, a finding that there are serious reasons for such an assessment is conditional, should be determined on a case-by-case basis, and will depend on the particular circumstances of the case and an individual’s responsibility for carrying out the acts in question. See Tom Syring, *Introductory Note to the Court of Justice of the European Union: Preconditions for Exclusion from Refugee Status (Fed. Republic of Ger. v. B & D)*, 50 I.L.M. 114 (2011). Hence, even if an incident of piracy, in general, were to be subsumed under Article 1F, sufficiently establishing the respective pirate’s particular contribution to the prohibited act may still pose a significant challenge.

68. Refugee Convention, *supra* note 65, art. 33(1); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3(1), Dec. 10, 1984, 1465 U.N.T.S. 85, S. Treaty Doc. No. 100-20 (1988). “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.” *Id.* See also *supra* note 62, discussing the Norwegian case *Mullah Krekar* of which, although not pertaining to piracy, quite vividly highlights the limits of the Exclusion Clause in Article 1F.

only in how to distinguish a pirate from a refugee, or even in how to prove a suspect's pirate activity, but in how to deal with the insight that one person may actually be both: a pirate and a refugee.