Entrepreneurship, Hardship, and Gamesmanship: Modern Piracy as a Dry Endeavor

Selina MacLaren
Entrepreneurship, Hardship, and Gamesmanship: Modern Piracy as a Dry Endeavor
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Abstract

Piracy has reemerged in the past decade, but international laws lag behind. While modern-day piracy threatens lives and industries, antipiracy efforts are constrained by international legal definitions written centuries ago to address a crime that looked radically different from its twenty-first-century counterpart. Today, piracy networks are increasingly sophisticated and land-based, but piracy laws define the crime as one occurring on the high seas. Handcuffed by the high seas requirement, nations prosecute only junior pirates while pirate kingpins operate from the safety of land.

In recent months, lower piracy rates have promised stability and masked the urgency of the threat. Although attacks have decreased, ransoms have skyrocketed and antipiracy successes come from methods resting on shaky legal foundations. The false sense of complacency in the antipiracy movement only heightens the need for a new definition of piracy.

This Comment seeks a solution that will maintain existing international maritime laws but interpret them in a way that extends the piracy definition to land-based activities. These adjustments will efficiently deter pirates without the legal precariousness of existing antipiracy methods. It uses maritime treaties, counterterrorism tools, and familiar legal doctrines to pull pirate kingpins into the purview of piracy laws.

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"In an honest service there is thin commons, low wages, and hard labor; in this, plenty and satiety, pleasure and ease, liberty and power; and who would not balance creditor on this side, when all the hazard that is run for it, at worst, is only a sour look or two at choking. No, a merry life and a short one, shall be my motto." —Bartholomew "Black Bart" Roberts, pirate.

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Mohammad Saaili Shibin was enjoying tea at an outdoor café in his hometown in Somalia when he was arrested. Authorities shuttled him into an American plane headed for Virginia, where he faced trial in US federal court. He

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had direct ties to pirate financiers and was accused of acting as a negotiator for pirates who had tortured hostages for eight months before obtaining a $5 million ransom. Mr. Shibin’s case epitomizes modern-day piracy: an evolving form of organized crime grounded in finance, negotiation, and the complications of extraterritoriality. These land-based activities are a far cry from the planks, hooks, and eye patches of Black Bart’s day, but the monetary motive remains.

There is no authoritative definition of piracy under customary international law. According to Blackstone, “piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there.” Blackstone similarly described the pirate as hostis humanigeneris—an enemy of the human race—who had committed “an offence against the universal law of society” and was punishable under “the law of nations, as a part of the common law.” Despite a long history of antipiracy efforts, international maritime laws have inconsistent piracy definitions and, as a result, significant enforcement obstacles. These weaknesses are exacerbated because modern piracy differs significantly from the crime addressed by the law of nations definitions still undergirding treaties today. Piracy has evolved, but the definitions have not.

Piracy was first codified in the 1958 Geneva Convention on the High Seas. The 1982 United Nations Convention on the Law of the Sea (UNCLOS), the generally accepted statement of the international maritime law, defines piracy as “illegal acts of violence or detention . . . committed for private ends by the crew or the passengers of a private ship . . . and directed: . . . on the high seas, against another ship.”

Understanding the territorial limits of piracy is essential to safeguarding ships because “some commentators estimate that up to 70 percent of recent attacks have occurred in . . . territorial waters.” Restricting piracy pursuit to the

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5 Id at 1068.
8 Id at Art 101.
high seas allows pirates to retreat to countries like Somalia that are institutionally incapable of capturing the pirates, and thus effectively exempts the perpetrators of these attacks from prosecution. The high seas restriction is couched in Westphalian sovereignty, the present system of international law that places emphasis on sovereign and equal nation-states. Notions of Westphalian sovereignty are evident in UNCLOS and UN Security Council Resolutions, which reaffirm territorial sovereignty.

Extraterritorial sovereignty may be necessary for the effective prosecution of pirates. Antipiracy efforts face an ongoing problem in that seizing states are reluctant to prosecute captured pirates, probably due to legal complexities and human rights implications. Extraterritorial sovereignty, and specifically the pursuit of pirates through more sophisticated means that include targeting profit and pirate kingpins, would decrease piracy levels at a low cost without implicating the constraints of sea-based pursuit.

In Section I, this Comment will explore the unique traits of modern-day piracy and show that, despite falling piracy rates in recent years, the crime remains an urgent international problem. Section II will consider existing antipiracy efforts and show these efforts' vulnerabilities. Section III explains the territorial sovereignty restrictions on antipiracy efforts, while Section IV elaborates on various international attempts to overcome these restrictions through treaties and resolutions. Finally, Section V suggests a new understanding of piracy that encompasses land-based activities, allowing nations to more aggressively and efficiently dismantle piracy organizations.

II. THE EVOLUTION OF PIRACY

There were 278 pirate attacks and 27 hijackings worldwide in 2012. Today, Somali pirates hold nine vessels and 147 hostages. There is reason,
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however, to believe that piracy is underreported.\(^4\) Somali waters and the Gulf of Aden are clearly the areas most plagued by modern piracy.\(^5\) This area is roughly 1.5 times the size of Western Europe, and geography exacerbates the problem: cargo ships transiting the Suez Canal are required to pass through the narrow strait between the Horn of Africa and the Arabian Peninsula.

Piracy includes the crimes of violence, detention, and depredation, and can happen on ships ranging from private yachts to oil supertankers.\(^7\) Pirates usually hijack a vessel with the goal to ransom both the vessel and its crew back to the owners. Pirate kingpins operate from land, researching hostages’ value online and directing the complex piracy organizations without threat of direct capture on the high seas. A single seizure can earn pirates $150,000—a significant figure compared to Somalia’s per capita GDP of $600.\(^8\) Considering the lack of economic opportunity for many Somalis, the high-risk/high-reward nature of piracy may be a rational choice in the absence of strong deterrence.

Pirates demonstrate a dangerous capacity for violence and an equally dangerous understanding of international law.\(^9\) This understanding is demonstrated by pirates’ claims that they are motivated by a desire to protect Somalia’s resources. “Perpetrators of certain recent maritime crimes in the region have claimed to be acting in defense of national environmental or fisheries’ interests, which might bring the scope of their actions out of the private and into the public domain.”\(^10\) While the claims may be truthful, they discrepancies may be attributable to different geographic samples, perhaps they also illustrate the difficulty of defining, monitoring, and recording piracy attacks.

\(^{13}\) Id; Eugene Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, ASIL Insights (American Society of International Law Feb 6, 2009), online at http://www.asil.org/insights090206.cfm (visited Apr 12, 2013).


\(^{15}\) Mike Madden, *Trading the Shield of Sovereignty for the Scales of Justice*, 21 USF Marit LJ 139, 154 (2009) (“Pirate attacks in Somali waters and the Gulf of Aden accounted for thirty-eight percent of all global attacks in 2008 (approximately triple the number of attacks that took place in the next most dangerous maritime areas off the coasts of Nigeria and Indonesia, respectively).”).


\(^{17}\) UNCLOS Art 101 (cited in note 7).

\(^{18}\) Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia* (cited in note 13).

\(^{19}\) Madden, 21 USF Marit L J at 152 (cited in note 15) (“[C]ontemporary Somali pirates are better armed and better organized than others have been in the past. These pirates employ automatic rifles and rocket propelled grenades (“RPG”) in their attacks.”).

\(^{20}\) Id at 153.
also indicate that pirates are aware that the international legal definition of piracy is restricted to private acts. These anti-fishing and anti-dumping claims evince a nuanced understanding of these international legal loopholes.

Even though the number of successful hijackings has fallen dramatically since the peak in 2009–11, ransoms have increased in price and pirates have diversified, getting money by “switching sides” to help antipiracy companies or engaging in other criminal activity like land-based kidnappings. Pirates are well organized and have their own packets of paperwork—even on letterhead—to deliver to their victims. Some companies now offer “kidnap and ransom” insurance policies to shipping companies, and in the event of a hijacking, these insurance companies will negotiate with the pirates and pay the agreed ransom.

Because piracy networks are becoming more sophisticated, any reported decline in piracy levels should be read with caution. As this Comment will demonstrate, purported successes in the fight against piracy may be short-lived, and promising statistics may be misleading.

Furthermore, the high seas limitation on piracy prosecution insulates those who are in charge of the criminal networks. Pirate kingpins, operating from the safety of land, should be the main targets of antipiracy efforts for the same intuitive reasons all criminal prosecution efforts attempt to capture the parties highest in the chain of command. Low-level pirates are less likely to be deterred because of greater financial need, and capturing low-level pirates does little to dismantle the network. The capture of pirate kingpins, however, provides the most deterrence at the smallest cost.

III. EXISTING ANTIPIRACY METHODS

A. Multinational Navy Patrols

An upsurge in piracy that began around 2008 led to international cooperation through multinational navy patrols. One coalition—the European


23 Id.

Union Naval Force (EUNAVFOR)—is coordinated by the United States and led by the US, UK, French, and Indian navies. It represents the first EU naval force and the first military involvement of the EU in Somalia. The coalition’s focus is limited to intervention and prevention—particularly the protection of ships belonging to the US World Food Program—rather than pursuit and apprehension. The maintenance cost of this coalition may not be justified in light of the fact that it provides little deterrence of acts of piracy that promise huge financial gains.

After the 2008 attacks and the deployment of the international coalition, the costs of piracy continued to increase. These costs came in the form of security and rerouting costs, and higher average ransom payments. Piracy in 2011 saw a lower success rate, but higher average ransoms, resulting in greater revenue for fewer hijackings.

B. Armed Security

A second and more recent form of antipiracy efforts is the use of weapons and security personnel onboard private ships. These armed guards either work for private security companies or are military personnel, and they make up a large and growing industry. These efforts have been successful in lowering piracy rates, but recent incidents make clear that armed security threatens to increase violence and death on the high seas.

Armed guards onboard ships occupy a hazy status under international law. UNCLOS Article 107 authorizes only warships to seize pirates and the International Maritime Organization (IMO) issued warnings against the use of weapons onboard private ships. Armed security also raises the risks of pirates.

26 Id.
27 Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia* (cited in note 13).
28 In 2011, the shipping industry’s security and rerouting costs were between $5.3 billion and $5.5 billion. The average ransom increased to around $5 million in 2011 from $4 million in 2010. The number of hostages increased from 1090 in 2010 to 1118 in 2011. See Dempsey, *With Pirates, EU Takes on Graver Risks* (cited in note 25) (citing a report by One Earth Future Foundation).
29 Id.
31 See, for example, Muneeza Naqvi, *India, Italy Wrangle Over Indian Fishermen Killing* (The Huffington Post Feb 22, 2012), online at http://www.huffingtonpost.com/huff-wires/20120222/as-india-ship-firing/ (visited Apr 8, 2013) (describing the recent shooting deaths of two Indian fishermen, allegedly mistaken for pirates by Italian marines serving as part of an on-board security team).
possessing and discharging weapons with claims of self-defense. Furthermore, under international law, pirates are civilians, not combatants, and civilians may only be targeted in immediate self-defense. For these reasons, private guards cannot pursue, board, or seize suspected pirate ships in the absence of an overt attack with a clear aggressor.

While the use of armed private security is widely considered an effective solution in recent years, its similarities to international navy coalitions make clear that private security may likewise prove to be an insufficient deterrent. Security personnel onboard cargo ships operate in much the same way the international coalition operates. While pirates' lower success rates seem to indicate the efficacy of using security personnel, the increasing revenue gained by pirates suggests that underlying problems still persist. Thus, despite the apparent success of the armed security solution, a closer look at the numbers reveal the solution's vulnerabilities.

C. Land-Based Pursuit

An on-land attack in May 2012—the first of its kind—may have sent an important message to pirates, but it is too early to tell if such messages have any real deterrent effect. The on-land attack was an air raid designed to destroy pirates' equipment. It was based on Operation Atalanta, a EU mandate off the Horn of Africa. Operation Atalanta was expanded on March 23, 2012 by EUNAVFOR to extend to December 2014. This expansion also extended the mandate to Somali coastal territory and internal waters. The purpose of this extension was envisaged to target pirate infrastructure on beaches from air rather than to allow on-land pursuit by marines. The Somali government accepted this extension as a new form of collaboration and commended the May air raid.


34 Somalia Pirates: EU Approves Attacks on Land Bases (cited in note 24).


36 Somalia Pirates: EU Approves Attacks on Land Bases (cited in note 24).

Nations disagree about the desirability of land-based antipiracy pursuit. As a result, the extension is restricted. Helicopters may attack pirate infrastructure such as boats and gasoline reserves along the shoreline with machine guns, but marines may not set foot on ground, helicopters may not target people, and rockets are not to be used. These restrictions are significant in addressing several nations’ concerns that the extension of Operation Atalanta would put civilians at risk—a particularly valid concern for two reasons. First, pirates are deeply embedded in the local population, contributing both ransom money and local vices to poverty-stricken communities. Second, the collective experience in Afghanistan has evidenced the great risk posed to civilians in NATO bombings.

The May airstrike destroyed three or five skiffs (depending on the source) and other material including “four ladders, a half tanker of fuel, two fishing nets and mobiles,” according to a self-professed pirate at the incident. The nearest village was eleven miles away and no pirates or civilians were wounded, but an elder from the village stated that the attack frightened civilians, and urged Westerners to target pirates carefully. Locals reported that what they believed to be European spy planes scoped out the area in the preceding days, prompting fishermen to forgo fishing. Lt. Comdr. Jacqueline Sheriff, a spokesperson for the EU’s antipiracy force, called the airstrike “a fantastic opportunity” and declared the EU’s mission to “make life more difficult for these guys.”

The expansion of Operation Atalanta to Somali beaches is an unfruitful method of combating piracy. As shown by the May airstrike, such land attacks

38 Dempsey, With Pirates, EU Takes on Greater Risks (cited in note 25):
39 Id.
41 Id.
43 Id.
44 Id.
45 Gettleman, Toughening Its Stand (cited in note 37).
disrupt the livelihood of locals, despite the restrictions on the mandate that preclude direct civilian attack. The attacks are also not financially harmful to pirates. The skiffs most likely to be stored on land are small twenty-foot fiberglass or plastic skiffs filled with foam; the more valuable twin-engine skiffs are stored at sea. As discussed earlier, piracy continues to be profitable despite lower attack rates because ransom prices have increased. Targeting piracy infrastructure is thus misguided, providing little deterrence to pirates and instead threatening local civilians. Instead, land-based antipiracy measures should be carefully cabined to target activities that are most likely to be conducted by pirate kingpins, such as cyber research on hostages' worth.

IV. TERRITORIAL SOVEREIGNTY AND JUS COGENS

A. Piracy as a Peremptory Norm

Antipiracy efforts are constrained by rules of territorial sovereignty. A preliminary question that may overcome this constraint is whether combatting piracy—declared hostis humani generis—is an international peremptory norm, also known as jus cogens, which literally translates to “compelling law.” These norms are universally binding and inalienable. The principle of jus cogens forbids states to enter treaties that violate certain peremptory norms. A peremptory norm is “a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” International peremptory norms trump territorial sovereignty and void inconsistent treaties.

Peremptory norms find their roots in a 1758 discussion grounded in natural law. The first enforcement in world history of international norms
upon individuals occurred in the Nuremberg Trials. Since then, peremptory norms defining criminal offenses have increased in number.\textsuperscript{53} Ulrich Scheuner has identified three groups of peremptory norms:

The first that comes into consideration encompasses the maxims of international law which protect the foundations of law, peace and humanity in the international order and which at present are considered by nations as the minimum standard for their mutual relations. . . A second group of rules and principles is comprised in the rules of peaceful cooperation in the sphere of international law which protects fundamental common interests. . . A third sphere of imperative norms regards the protection of humanity, especially of the most essential human rights. . . Those rules which protect human dignity, personal and racial equality, life and personal freedom can certainly be acknowledged as inalienable law.\textsuperscript{54}

Combatting piracy probably falls under the second category because pirate-free waters are certainly a fundamental common interest. All trading nations are invested in the prospect of transporting cargo without threat of violence. Perhaps the "peaceful cooperation" language in Scheuner's analysis indicates not only that combating piracy is a peremptory norm, but cooperation with antipiracy efforts is itself a norm. Such a reading may require Somalia to consent to any land-based pursuit of pirates. This is not controversial because thus far the Somali government has cooperated, eager for help in dealing with a problem it cannot alone solve. However, such a reading, when taken to its logical conclusion, may mean that no state can claim territorial sovereignty to block pursuit of pirates within its borders. This exercise in thought shows the inevitable tension between territorial sovereignty and peremptory norms, and the enduring struggle to find a balance between an under-inclusive and over-inclusive definition of piracy.

B. Somali Territorial Sovereignty

In the eighteenth century, it was generally accepted that a state could claim sovereignty over a territorial sea if the state was capable of exercising sovereignty there and protecting the waters.\textsuperscript{55} UNCLOS, however, lays out a more

\textsuperscript{53} See, for example, International Military Tribunal (Nuremberg), Judgments and Sentences, 41 Am J Intl L 172, 205 (1947).


quantifiable rule that applies uniformly to all states. Under UNCLOS, every state has the right to claim twelve nautical miles off the coastline. This rule applies even if the state is unable to protect and regulate those waters. It is this twelve-mile area off the coast of Somalia that serves as a legal safe harbor for pirates.

With the goal of preventing pirates from availing themselves of the protection of Somali territorial sovereignty, scholars have suggested changes to the UNCLOS provision or its interpretation. These changes are sometimes justified with reference to innocent passage, the concept (laid out in UNCLOS Section 3) that allows a vessel to pass through another state's territorial waters, subject only to the limitation that the passage does not threaten the "peace, good order or security of the coastal State." At least one scholar has determined that the right of innocent passage already curtails a State's sovereignty and thus sets the foundation for an expansion of universal jurisdiction in counter-piracy efforts. There are obvious limitations to proposed changes to the relevant UNCLOS provision. For example, the "high seas" requirement cannot be eliminated altogether: "high seas" is synonymous with international waters, and an elimination of this restriction would result in an international treaty that opens territorial waters for entry by any and all nations. It is widely accepted that such a change to UNCLOS would lead to inter-state conflict.

Other scholars have suggested the addition of a protocol to Article 100 of UNCLOS, providing international parties the ability to pursue pirates in territorial waters under certain closely defined circumstances. The most common circumstance permitting such pursuit would be the inability of a state to police its own waters. The United Nations Security Council and IMO would determine whether a state has the ability to protect its own waters. A related academic

56 UNCLOS, Art 3 (cited in note 7) ("Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding twelve nautical miles, measured from baselines determined in accordance with this Convention.").

57 Doby, 41 J Mar L & Com at 574 (cited in note 55), citing Madden, 21 USF Marit L J at 157–58 (cited in note 15); see also UNCLOS Arts 17–26 (cited in note 7).


59 Id ("By removing the "high seas" requirement, foreign naval vessels receive a blanket right to enter any State's territorial seas to combat piracy which will create multiple opportunities for abuse.").

60 Doby, 41 J Mar L & Com at 574 (cited in note 55).

**At**aching a protocol to article 100 of UNCLOS may provide international forces with a **limited** right to respond in specific situations where States cannot protect their own territorial seas from piracy. A protocol could recognize and emphasize the State's sovereignty while also providing a prompt response to rising levels of piracy. The United Nations Security Council might designate, after consultation with IMO, those States deemed incapable of policing their own territorial seas. Such designation might be reviewed at specified intervals and renewed, as necessary.
suggestion is the ability for a state to make its own determination that it is not adequately equipped to police its own waters, and thereby voluntarily forfeit its territorial sovereignty if and when it is unable to meet its international “obligations.”

A final approach is a change in interpretation rather than substance. At least one scholar has suggested that Somalia cannot have a territorial sea because it is a failed state. Under this proposed solution, any failed state would leave its waters open for foreign naval intervention. This change leaves open the problem of defining a failed state, and may not apply in the context of Somalia, which has a weak government but is still recognized as a sovereign entity by the international community. In order for this final proposal to succeed, one of two things would be necessary. First, the international community may have to tighten its recognition of sovereignty, declaring Somalia and related weak states as failed states. This would deprive weak states of a host of international legal rights both within and without UNCLOS and would also result in huge political complications. Alternatively, UNCLOS can be read as applying only to strong states, and weak states are denied sovereignty for the limited exercise of recognizing territorial waters. Both of these options presuppose the solution—a reduced sovereignty for Somalia. A viable solution must show how Somalia’s sovereignty can be made compatible with international rule of law. Any solution that scales back Somalia’s sovereignty presupposes the resolution of a much greater obstacle than counter-piracy: the derogation of territorial sovereignty.

Thus, it is clear that territorial sovereignty principles are a major constraint to prosecution of any land-based or territorial sea-based pirate activities. Many international criminal lawyers consider rule of law and territorial sovereignty to be directly at odds with one another. But it is important to note that if sovereignty were strengthened in Somalia, allowing the nation to prosecute pirates within its territorial sea, the international crime of piracy could be solved. Although sovereignty does not unnecessarily constrain the rule of law,
international criminal law may be seen to impede sovereignty under certain circumstances because it generally adopts a broad view of extraterritorial jurisdiction.\textsuperscript{65}

The solutions suggested for overcoming territorial sovereignty to prosecute international criminals that violate peremptory norms may also apply in other situations, like in Sierra Leone, where rebel forces were fighting a weak government that could not control the factions. Ultimately, arguments can be made that reduced sovereignty is most effective for criminal prosecution, and counterarguments can be advanced that increased sovereignty (through strengthening the nation) would achieve the same end. It is not entirely clear whether Somalia’s sovereignty is a desirable goal or an impediment to antipiracy efforts.

C. Universal Jurisdiction

Universal jurisdiction holds that a nation can prosecute offenses to which it has no connection at all. Piracy was the world’s first universal jurisdiction crime.\textsuperscript{66} Universal jurisdiction is necessary in antipiracy efforts because documents like the Rome Convention and UNCLOS apply only to parties of the treaties—that is, signatory parties.\textsuperscript{67} Pirates by definition operate privately, and thus are not parties to the treaties. Universal jurisdiction creates a venue for prosecution of any person who meets the definition of a pirate.\textsuperscript{68} Thus, under the theory of universal jurisdiction, a person who meets the international definition of a pirate can be captured and prosecuted in a nation, under that nation’s laws, without any tie to the nation.

Universal jurisdiction is also anticipated by existing international maritime law documents. For example, the Rome Convention arguably implies universal jurisdiction in calling for prosecution by signatory states “without delay” and treating piracy as an offense of a “grave nature.”\textsuperscript{69} UNCLOS Article 105 expressly gives member states authority to prosecute captured pirates.\textsuperscript{70}

\begin{itemize}
\item \textsuperscript{65} Id. ("International criminal law has traditionally adopted a broad view of extraterritorial jurisdiction.").
\item \textsuperscript{67} Houghton, 16 Tulsa J Comp & Intl L at 269–70 (cited in note 66).
\item \textsuperscript{68} Id.
\item \textsuperscript{69} Id at 270–71.
\item \textsuperscript{70} Id at 271.
\end{itemize}
Nonetheless, universal jurisdiction is not the magic bullet in antipiracy enforcement because it does not, in and of itself, permit land-based pursuit. This is evident from the recent case of *US v Ali*, the US's first universal jurisdiction prosecution of a Somali pirate. In this case, the US became one of only three countries in the world to use universal jurisdiction against a Somali pirate. The US government lied to a suspected pirate to get him to come onto US soil, making capture possible. This illustrates that actual means of capture are necessary before universal jurisdiction may be exercised. Universal jurisdiction merely establishes who may prosecute; it does not seek to redefine piracy.

V. INTERNATIONAL MARITIME LAW

While it is clear that existing antipiracy solutions are not viable in the long-term, the search for an alternative begins with an understanding of international maritime law as established in treaties and resolutions. International law relies on domestic antipiracy statutes for enforcement. “Thus piracy, as a legal offense, exists in two forms: piracy jure gentium (under the law of nations) and piracy as defined by municipal law.” This Section focuses on the broader piracy jure gentium, as seen in treaties and resolutions. The relevant treaties encompass the many definitions of piracy that were understood as controlling under customary international law before ratification.

A. UNCLOS and the Rome Convention Compared

The two primary international laws guiding antipiracy efforts are UNCLOS and the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, more commonly known as the Rome Convention. UNCLOS, the established statement of international maritime law, has been called a “constitution of the oceans” and codifies the generally

71 870 F Supp 2d 10 (DDC 2012).
73 Id.
74 *Ali*, 870 F Supp 2d at 17.
accepted definition of piracy.⁷⁸ The Rome Convention was adopted during the UNCLOS ratification process and was a product of UN action through the International Maritime Organization.⁷⁹ Both UNCLOS and the Convention share the goals of increasing maritime safety and reducing violence on the high seas, but the two bear important differences, particularly regarding the territorial limits on piracy law enforcement.

Broadly speaking, UNCLOS indicates that international law restricts the definition of piracy to acts occurring on water. Articles 105 and 110 of UNCLOS address pirate seizure and ship-to-ship encounters on the high seas. The official commentary on Article 101 of UNCLOS states: “Piracy can be committed only on the high seas or in a place situation outside the territorial jurisdiction of any State.”⁸⁰ Further, UNCLOS includes in its piracy definition the requirement that “any illegal acts of violence or detention” be directed “on the high seas” or “in a place outside the jurisdiction of any State.”⁸¹ An explanatory note for a similar provision that provided the foundation for UNCLOS emphasizes that the act must take place outside of the territorial jurisdiction of any one state.⁸²

The 1958 Geneva Convention on High Seas (Geneva LOS)⁸³ was the predecessor to UNCLOS, and thus the two have nearly identical provisions on piracy. The United States, which has not ratified UNCLOS, is a party to Geneva LOS, but nearly all other major players in the fight against maritime piracy are parties to UNCLOS.⁸⁴ The International Law Commission, in drafting the piracy provisions of the Geneva LOS, relied heavily on Harvard’s 1932 Draft Convention on Piracy. It states, in part: “all individuals—perpetrators and facilitators alike—must be physically present on the high seas during the commission of the actus reus to be guilty of the piracy jure gentium.” This

⁸¹ UNCLOS Art 101 (cited in note 7).
⁸³ Kelley, 95 Minn L Rev at 2297 (cited in note 32).
⁸⁴ Id at 2296.
language and history behind UNCLOS supports a definition of piracy that precludes criminal liability for pirate kingpins operating from land.

Further, UNCLOS's provision for "hot pursuit" of suspected pirates appears at first to overcome the possibility of safe retreat for pirates but in fact is subject to many limitations. The provision specifies only governmental ships may engage in hot pursuit, and only in situations where the pursuing state believes the suspected pirate has broken that state's law. The pursuing ship must give the piratical vessel a clear signal to stop before engaging in pursuit, and the hot pursuit is only permitted outside of the pursuing ship's territorial waters if the pursuit is uninterrupted and outside of other states' territorial waters. These limitations effectively nullify the "hot pursuit" benefits by preventing pursuit in the territorial waters of nations that are unable to capture the suspected pirates.

But UNCLOS does not quite settle whether piracy can occur on land. Other sources can be read to indicate that piracy affirmatively may occur on land. One such source—and probably the most legally binding source supporting the possibility of land-based piracy—is the Rome Convention, which "mandate[s] that its state parties establish jurisdiction over acts that would otherwise constitute piracy under UNCLOS." Unlike UNCLOS, the Rome Convention has no express territorial limitation. The benefits of the Rome Convention come from its coverage of two gaps left by UNCLOS. First, states under the Convention are required to establish jurisdiction over acts of maritime violence within their territorial waters. Second, state parties are required to establish jurisdiction over nationals who have committed maritime violence on the high seas. These jurisdictional requirements force signatories to act well beyond what is required under UNCLOS. Importantly, the Rome Convention, unlike UNCLOS, does not limit piracy to the high seas, but rather discusses piracy within the territorial waters of Member States.

Notwithstanding this broad treatment of piracy, the Rome Convention contains significant limitations on the pursuit of pirates. Article 7 of the Convention gives states discretion in arresting pirate suspects, and the Convention, like UNCLOS, prevents pursuit of pirates into the sovereign waters.
of another nation. Further, the Rome Convention signatories are prohibited from seizing ships without a specific connection to the vessel. In this sense, the Convention is narrower in scope than UNCLOS, which permits a Member State to board a suspected pirate ship without a specific connection, so long as the ship is on the high seas or in the state's territorial waters. These limitations appear to cripple the otherwise far-reaching antipiracy provisions of the Convention, and despite its apparent benefits, it has only been invoked to establish jurisdiction in one reported case.

It becomes clear, then, that both UNCLOS and the Rome Convention contain provisions accommodating the pursuit of piracy on land. While the latter is broader and more amenable to land-based piracy prosecution, both UNCLOS and the Convention vacillate on the international status of land-based piracy.

B. UN Security Council Resolutions Responding to Piracy

Under Chapter VI of the UN Charter, the UN Security Council may authorize the use of military force against threats to international security. A number of UN Security Council Resolutions passed under this chapter have expressly permitted foreign navies to patrol and capture pirates within the territorial waters of Somalia, and even on land.

The first such resolution was passed in June 2008. It authorized any foreign navy to enter Somali territorial waters and use all necessary force to combat piracy that would be consistent with the treatment of piracy by international law, if that piracy had instead been committed on the high seas. This resolution stressed that it was limited to Somalia and did not alter customary international rule. A second resolution, passed in October 2008, used similar language. A third resolution, passed in December 2008, authorized any and all countries combating piracy off the Somali coast to engage pirates on land or sea provided there is advance consent by the then-ruling Transitional Federal Government.

90 Houghton, 16 Tulsa J Comp & Intl L at 275 (cited in note 66).
91 Id.
92 Kontorovich, International Legal Responses to Piracy off the Coast of Somalia (cited in note 13), citing United States v Shi, 525 F3d 709, 721 (9th Cir 2008).
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The consent requirement did not pose a significant obstacle to action because the TFG was eager for international assistance. In addition to these resolutions dealing with territorial issues, other resolutions address the related issue of piracy facilitation. Note, however, that these UN Security Council Resolutions reaffirm the customary international legal norm of territorial sovereignty, even while calling for sweeping measures to combat piracy facilitation.

Related to these resolutions, a Security Council presidential statement was released in 2012 to highlight future trends in the Council’s approach to piracy. This statement emphasizes the issue’s global dimensions and calls for the development of new rules of deployment for private security contracts. Not all members were comfortable with the statement. Argentina, for example, opposed the Council’s assertion of jurisdiction on the ground that, in the absence of extraordinary circumstances (including Somalia’s state of piracy), piracy falls under UNCLOS and is not within the Council’s domain. Responding to these concerns, the Security Council imposed limitations on the resolutions, first affirming that the resolutions applied solely to Somalia’s piracy situation and did not alter customary international law, and secondly requiring that any action within Somali territory comport with international law and be approved by the Somali government.


Security Council Res No 1950, UN Doc S/RES/1950 *5 (2011) (calling on member states “to assist Somalia . . . to bring to justice those who are using Somali territory to plan, facilitate, or undertake criminal acts of piracy and armed robbery at sea”); Security Council Res No 2020, UN Doc S/RES/2020 *5 (2011) (“[r]ecognizing the need to investigate and prosecute . . . anyone who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy who illicitly plan, organize, facilitate, or finance and profit from such attacks”).

Kontorovich, International Legal Responses to Piracy off the Coast of Somalia (cited in note 13) (“The text accompanying the resolutions and statements made by Council members stressed that the resolutions applied solely to the Somali situation, and would not establish any precedent of customary international law.”).


Kontorovich, International Legal Responses to Piracy off the Coast of Somalia (cited in note 13) (noting that the transitional Somali government welcomed these resolutions because it was too weak to

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It is paramount to note that in practice, "the authority given by these resolutions has gone largely if not entirely unutilized." The impracticability of the resolutions arises because they are inadequate in providing sufficient legal guideposts to foreign navies. By creating an exception to the rule for Somalia, rather than blessing the UN’s antipiracy efforts on a broader level, the resolutions may be read to reinforce the sovereignty restrictions of customary international law. As a result, foreign navies hesitate to enforce the resolutions.

C. Regional Piracy Laws

Regional agreements are a third solution to antipiracy efforts, and are perhaps the most logical in light of the regionally constrained nature of piracy. For example, the 2009 Djibouti Code of Conduct (DCC) is an instrument of cooperation between nine states located near the Gulf of Aden, including the Somalia TFG. The DCC requires states to arrest pirates if they have the capacity to do so, but many signatories including Somalia lack such capacity. Furthermore, the DCC does not allow pursuit of pirates into territorial waters without express consent. This example suggests that existing regional agreements may do little to strengthen enforcement above and beyond what is already provided by existing UN resolutions and treaties because regional agreements are constrained by the signatories’ capacities. In other words, nations with greater capacities for piracy prosecution and equally strong stakes in maritime safety frequently are not located in the threatened region. Despite the regional nature of piracy, a large number of nations have a stake in the outcome of antipiracy efforts due to the area’s value as a commercial shipping route. As such, the antipiracy effort should involve international rather than regional cooperation and enforcement.

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102 Id.
103 Davey, A Pirate Looks at the Twenty-First Century at 1212 (cited in note 97):

While the Resolutions have been helpful in combating piracy in some respects, they have not provided adequate legal guideposts to foreign navies. The Resolutions presume to authorize an enormous exception in the case of Somalia to customary international law, rather than blessing the anti-piracy activities that the UN is encouraging as customary international law, with the result that some foreign navies are reluctant to engage in activities that constitute the exception to the rule.

VI. A NEW APPROACH

While the ideal solution is a top-down approach that strengthens the Somali government and fosters economic opportunity for those Somalis who currently rely on criminal activity for their livelihood, this solution is a long-term policy goal, and not an immediate legal response to the changing dynamics of piracy. The following frameworks draw analogies between modern-day piracy networks and existing international crimes and doctrines in order to show that international maritime law should be read to include land-based activity in the definition of piracy. This approach would permit strong governments with a stake in safe maritime passage to dismantle piracy networks without resorting to violence or high-cost patrol measures. It satisfies criminal law goals by allowing for retribution against the most culpable criminals, and it would have the same deterrent effect as armed guards without costing private companies profit or innocent fishermen their lives. These solutions work where navy patrols, armed security, and infrastructure destruction fail because they overcome constraints of territorial sovereignty while maintaining the structure of existing international maritime law.

A. Aiding and Abetting

First and foremost, the international community should expand the *jus cogens* piracy definition to include providing material support to pirates. Historically, aiding and abetting liability for piracy has been consistently confirmed across various jurisdictions.\(^{105}\) There are three general categories of facilitating under aiding and abetting jurisprudence: (1) counsel and procurement; (2) material assistance; and (3) profit.\(^{106}\) Each of these three types of aid is provided within today's increasingly sophisticated piracy networks. The most important type of aid consists of hostage information generated through online research by land-based pirate kingpins. Other important types of aid are hostage negotiations, accounting, and even hospitality for hostages.\(^{107}\) These nodes of aid are crucial because complex support industries have developed to facilitate piracy from the evident safety of land, and these facilitators are traceable through low-resource, non-violent methods. The facilitators—many of them professionals with legitimate income opportunities elsewhere—are also

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106 Id at 256.

107 Houghton, 16 Tulsa J Comp & Intl L at 262 (cited in note 66).
more likely to respond to deterrence efforts than are pirates engaging in actual attacks on the high seas.

1. Aiding and abetting liability and its elements in existing international treaties.

Both UNCLOS Article 110 and Geneva LOS Article 15 create three separate offenses, all called piracy. One of these three offenses includes “any act of inciting or of intentionally facilitating an act [of piracy].” The high seas requirement is excluded from the third piracy offense of facilitation in both, indicating that under UNCLOS and Geneva LOS, facilitation of piracy can happen on land. This facilitation would constitute one type of piracy and thus would be prosecutable independently of the capture of a high seas pirate.

The Rome Convention likewise addresses facilitation. Attempting or abetting the commission of any of the acts described as piracy is an offense. The Rome Convention goes further to declare that threats to commit certain offenses—specifically, an act of violence, damage to a ship, or destruction to navigational facilities—constitute an offense in itself. Some have argued that the Convention's threat provision does not apply to piracy because the Convention is addressing terrorist threats that happen on the high seas, as distinct from piracy. While the motivating factor for enactment of the Convention was indeed a terrorist attack and the history of the treaty confirms an impetus of counterterrorism, nothing in the Rome Convention expressly restricts any of the provisions to terrorism. The Convention does not require the attack to be for either private or public ends. The language of the fourth preambular paragraph makes clear that navigational safety was a primary concern of the parties, implying that prosecution of a particular “type” of criminal was less important than the level of the threat. This navigation-centric approach fully supports the pursuit of land-based activities that may create a threat as great as, or even greater than, that posed by pirates patrolling the high seas.

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108 UNCLOS, Art 101(c) (cited in note 7).
110 The Rome Convention at Art 3 (cited in note 77).
111 Id.
113 See The Rome Convention, Preamble (cited in note 77).
Domestic piracy laws, often modeled on international treaties, would have to restructure and expand to accommodate the new *jus cogens* piracy definition. Currently, for example, the US law on piracy facilitation does not apply to material supporters of piracy.\(^\text{114}\) Contrary to this legislative gap, the US government has issued policy guidance declaring a goal to disrupt pirates' financial backing and target the suppliers of their fuel, outboard motors, ladders, and other supplies.\(^\text{115}\)

The elements of international aiding and abetting liability is discussed in *Doe I v Unocal Corp*\(^\text{116}\) and illustrated by *Prosecutor v Furundžija*,\(^\text{117}\) wherein the International Tribunal for the former Yugoslavia held that "the actus reus of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."\(^\text{118}\) The Commission noted that the act need not be a necessary element for the perpetration of the crime, so long as it "make[s] a significant difference to the commission of the criminal act."\(^\text{119}\) Further, the mens rea of aiding and abetting liability under international law appears to be "reasonable knowledge" that the action will assist the perpetrator of the crime.\(^\text{120}\) A positive intent to commit the crime is not necessary.

2. Challenges in applying aiding and abetting to piracy.

The issue of aiding and abetting in the piracy context faces the challenge of timing limitations and the risk of over-inclusivity. For example, in the recent case of *US v Ali*,\(^\text{121}\) the US federal court found that the Geneva LOS includes

\(^{114}\) Daniel Pines, *Maritime Piracy: Changes in US Law Needed to Combat This Critical National Security Concern*, 36 Seattle U L Rev 69, 120 n 435 (2012) ("While US statutes already prohibit providing ammunition or provisions to pirates, 18 USC § 1657, and knowingly receiving pirated property, 18 USC § 1660, ... these provisions are shotgun approaches to the problem and do not cover as many acts as a material-support-to-piracy statute would.").


\(^{116}\) 395 F3d 932, 950 (9th Cir 2002).

\(^{117}\) 38 ILM 317 (1999).

\(^{118}\) Id at 365.

\(^{119}\) Unocal Corp, 395 F3d at 950, quoting *Furundžija*, 38 ILM at 364; see also *Unocal Corp*, 395 F3d at 950, quoting *Prosecutor v Musema*, ICTR-96-13-T (Jan 27, 2000) (stating that the actus reus of aiding and abetting is "all acts of assistance in the form of either physical or moral support" that "substantially contribute to the commission of the crime.").

\(^{120}\) Unocal Corp, 395 F3d at 950, quoting *Furundžija*, 38 ILM at 366 (internal quotation marks omitted).

\(^{121}\) 885 F Supp 2d 17 (DDC 2012) (vacated in part by *US v Ali*, 885 F Supp 2d 55 (DDC 2012)). Note that while this case acknowledged that UNCLOS's aiding and abetting is synonymous with the US domestic legal doctrine of aiding and abetting, the court ultimately vacated the opinion
aiding and abetting within the prohibition of piracy.\textsuperscript{122} This conclusion supports the argument advanced in this section. The defendant, however, was not a pirate kingpin but rather a ransom negotiator. The court based its aiding and abetting finding on the Geneva LOS language extending the piracy definition to those “intentionally facilitating” piratical acts. A strong argument can be made that facilitation is not synonymous with all aiding and abetting because facilitation seems to have an ex ante component.\textsuperscript{123} That is, one cannot facilitate a crime after it has occurred. Defining the aiding and abetting portion of piracy and tying it to treaty language depends in turn on delineating when an act of piracy begins and ends.

On the one hand, the taking of a hostage is the entire primary act of piracy because it is only this attack—and not the subsequent negotiations—that directly impact the safety of navigation; the Geneva LOS, UNCLOS, and the Rome Convention all center on ensuring safe navigation. Under this approach, ransom negotiators cannot be held liable for aiding and abetting piracy under international treaties. On the other hand, the traits of modern-day piracy and commercial shipping make it such that more often than not the real threat to commercial shipping is the ex post cost of ransoms. As such, modern piracy includes the act of ransom negotiation. Under this approach, ransom negotiators are clearly liable for aiding and abetting piracy.

Holding ransom negotiators liable for aiding and abetting piracy raises the difficult question of why ransom negotiators on behalf of shipping companies are not similarly liable. After all, it takes two to negotiate. If piracy includes the act of negotiation, then shipping companies and governments will be precluded from retrieving hostages for fear of violating international treaties. While this may have a strong deterrent effect on hostage-taking overall, it is not a realistic option and puts lives at risk in direct contravention of the most basic UN Charter preambulatory principles.

3. A solution that permits aiding and abetting liability to apply in the piracy context.

“Intentionally facilitating” in international treaties should be read as a form of aiding and abetting, but with a stronger mens rea requirement. This would require a departure from the language of \textit{Furundzija}, in which a reasonable

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\textsuperscript{123} See, for example, Kontorovich, \textit{From Prof Eugene Kontorovich, About Today's Piracy Decision} (cited in note 72).
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entrepreneurship, hardship, and gamesmanship

knowledge of the crime, rather than a positive intent for the crime to happen, was considered sufficient.\(^{124}\)

There are two reasons why a higher mens rea requirement can be read into piracy aiding and abetting than seen in Furundziya. First, a claim of necessity can be made. Furundziya dealt with human rights offenses. Using a looser mens rea requirement implicates shipping companies’ hostage negotiators, which is necessary in order to prevent an intrusion into a core UN Charter principle—the preservation of life. In contrast, human rights offenses are not necessary to preserve this principle. Second, the language of “intentionally facilitating” implies a higher mens rea requirement than mere aiding and abetting, and innocent ransom negotiators can be protected from liability by disclaiming intent. In order to keep the Rome Convention consistent with UNCLOS and the Geneva LOS, the latter treaties should be read to require a higher mens rea as well.

Thus, an understanding of treaty language couched in a slightly altered Furundziya standard supports the conclusion that piracy encompasses land-based activities. Treaties would be benefited by express recognition that aiding and abetting activities can occur on land and even after the attack, but such recognition is not necessary.

B. Anticipatory Self-Defense and Counterterrorism

Antipiracy efforts can be further strengthened and justified by adopting the counterterrorism doctrine of anticipatory self-defense. The adoption is logical because piracy and terrorism are widely recognized as closely related criminal activities and are often analogized with one another.\(^{125}\) Piracy and terrorism often share a direct financial connection.\(^ {126}\) Further, the two categories of crime are linked historically, and this common historical basis is reflected in their qualities and consequences.\(^ {127}\) Finally, the broad definition of piracy in

\(^{124}\) See, for example, Douglas R. Burgess, Jr., Hostis Humanae Generi: Piracy, Terrorism and a New International Law, 13 U Miami Intl & Comp L Rev 293, 293 (2006); Steven R. Swanson, Terrorism, Piracy, and the Alien Tort Statute, 40 Rutgers L J 159, 159–60 (2008).

\(^{125}\) Madden, 21 USF Marit L J at 153 (cited in note 15): “Pirate endeavors may now serve as a source of funds for terrorist and insurgent groups. Academic commentators have long speculated about the links that exist between terrorist organizations and pirates. Even the United Nations Security Council . . . is now prepared to admit the connection may exist in and around Somalia.

\(^{127}\) Burgess, 13 U Miami Intl & Comp L Rev at 297–98 (cited in note 125) (“Piracy is, in fact, the legal genesis of modern organized terrorism. The commonalities between the two are profound,
international law can accommodate acts of maritime piracy. While UNCLOS language restricts piracy to acts committed “for private ends,” in practice, the motives behind piratical acts are only analyzed to the extent necessary to ensure that the act was not an accident. Thus, the broad understanding of piracy leaves room for the possibility that “private ends” are religious or political, and so maritime terrorism committed for ideological reasons may qualify as piracy.

Anticipatory self-defense is sometimes raised as a justification for counterterrorism attacks. The concept of anticipatory self-defense is applicable to piracy because capture of pirate kingpins on land would constitute self-defense from almost inevitable future piracy. Anticipatory self-defense would offer a new doctrinal tool for overcoming the constraints of territorial sovereignty. In other words, it would function as a justification for limited intrusions into pirate-harboring nations, permitting nations to capture pirate kingpins on land.

There exist some important differences, however, between anticipatory self-defense in the context of terrorism versus piracy. In the terrorism context, anticipatory self-defense is only justified if the assassination conforms to all of the settled rules of warfare, follows intelligence assessments that point to preparations for warfare by the attacked party, and develops from carefully calculated judgments that assassination is the least harmful self-defense in terms of civilian protection. These conditions are inapplicable to antipiracy attacks not only because the piracy context envisions capture rather than assassination, but also because pirates are viewed as civilians and thus, by definition, cannot be engaged in warfare. Any anticipatory self-defense provided for antipiracy attacks within a noncompliant state’s territory would be free of these conditions. The warfare distinction may seem weak considering the factual similarities and financial connections between pirates and terrorists, but it is strong enough to preclude an anticipatory self-defense claim.

However, international warfare law ought not be entirely dispositive in light of treaty language. The Rome Convention hints at an international commitment to anticipatory self-defense. Art 3 § 2 makes the threat of any piracy action a crime if that threat is likely to endanger safe navigation. As explained in Section V.A, the threat provision is applicable to piracy. This

from their aims, methods, and motivations on the one hand, and the deleterious effects on and legal responses of the victimized state on the other.”.)

128 UNCLOS Art 101.

129 Houghton, 16 Tulsa J Comp & Intl L at 263 (cited in note 66).


131 The Rome Convention at Art 3 (cited in note 77).
indicates an international legal commitment to preventative capture of pirates on the basis of a threat rather than an actual attack. This legal commitment in some way mirrors the logic of the US 2002 National Security Statement of the Bush administration.\footnote{Full Text: Bush’s National Security Strategy, NY Times (Sept 20, 2002), online at http://www.nytimes.com/2002/09/20/politics/2STEXT_FULL.html?pagewanted=all (visited Apr 12, 2013).} There, the magnitude of the harm and the unresponsiveness of terrorists to deterrence measures justified the use of preventative force in the face of imminent harm. A similar logic applies here in that the harm is great to commercial activity and low-level pirates are not easily deterred.

Ultimately, the idea of anticipatory self-defense, while not entirely viable outside the warfare context, is certainly useful in giving substance to the Rome Convention’s threat provision. Anticipatory self-defense in the counterterrorism context explains the application envisioned by the Rome Convention language. Perhaps just as importantly, counterterrorism efforts can aid in bolstering antipiracy reform by riding the wave of more precise prosecution. Specifically, the expansion of antipiracy efforts to include prosecution of land-based piracy may be unpalatable to an international legal community that fears encroachments on territorial sovereignty. But prosecution of land-based piracy could be justified (and explained to a cautious observer) as necessary for counterterrorism efforts. Reframing antipiracy law to address the real—albeit tenuous—connection between terrorists and pirates would garner the attention necessary for more salient prosecution and enforcement efforts.

C. From Definitions to Prosecutions

Once we have established that pirates can operate from land, states must establish how to capture these pirates in light of territorial sovereignty concerns. Aiding and abetting liability, coupled with anticipatory self-defense measures, are perfectly compatible with existing treaties’ piracy definitions if those definitions are read to comport with jus cogens principles.

Importantly, the fight against piracy is generally recognized as a peremptory norm. Thus, any failure to cooperate in this fight is arguably a violation of jus cogens. More convincingly, any limitation of piracy to the high seas—either in regional treaties, domestic laws, or states’ interpretations of UNCLOS language—is a jus cogens violation.\footnote{Fedeli, The Rights and Liabilities of Private Actors at *8 (cited in note 88), citing Antonio Cassese, International Law 141 (Oxford University Press 2005) (2001) and Davey, A Pirate Looks At the Twenty-First Century at 1216–17 (cited in note 97).} Related to this requirement that nations must recognize land-based piracy is the requirement that nations cooperate in the peremptory norm of antipiracy efforts. Thus, both restricting
the definition of piracy and impeding other nations' efforts to exercise jurisdiction over pirates are violations of *jus cogens*.

This view has uncertain implications for the validity of UNCLOS. On the one hand, some scholars have hinted that UNCLOS may be void for its restrictions on states' abilities to prosecute pirates. On the other hand, perhaps UNCLOS does not restrict the ability of states to fulfill the peremptory norm of combatting piracy; it merely defines piracy. But, functionally speaking, restricting the parameters of a crime definition is identical to restricting the ability of states to combat that crime.

In either event, the entirety of UNCLOS need not be voided. Rather, any provisions restricting piracy to the high seas, and any reading that UNCLOS excludes land-based piracy, are void. Under UNCLOS Article 105, all states can prosecute the activity circumscribed by the piracy definition. When this definition is expanded to include land-based activity, a nation is able to pursue pirate kingpins under universal jurisdiction, regardless of the nation's tie to the specific crime.

UNCLOS's and other treaties' piracy definitions need not be altered, but a provision clarifying the land-based permissibility of aiding and abetting would be helpful. More importantly, pursuit of pirate kingpins on land should be acknowledged as a peremptory norm, and any state that is unable to meet its international obligation to pursue such suspects should partially forfeit its treaty-based territorial sovereignty rights. Failed states that are unable to officially forfeit such rights should be considered automatically exempt from treaties' territorial sovereignty protections. Pursuit into territorial waters and on beaches would be forbidden. This serves the dual purpose of strengthening territorial sovereignty and protecting local populations from actions that might exacerbate piracy, a crime sometimes executed to avenge the foreign exploitation of local


> There is an argument that the UNCLOS provisions on piracy violate *jus cogens* by limiting piracy to the high seas. Universal jurisdiction over acts of piracy, some scholars suggest, is a peremptory norm, and a treaty is void if it limits the power of states to criminalize acts of maritime violence.

135 Fedeli, *The Rights and Liabilities of Private Actors* at *6–7* (cited in note 88) ("States may enter into treaties that circumscribe the definition of piracy, as long as the treaty does not prohibit or limit the power of states to exercise jurisdiction over such activity.").

136 Id at *8*.

137 Houghton, 16 Tulsa J Comp & Intl L at 269–70 (cited in note 66).

138 See, for example, Doby, 41 J Mar L & Com at 575 (cited in note 55), citing Dr. Lawrence Azubuike, *International Law Regime Against Piracy*, 15 Ann Surv Intl & Comp L 43, 54 (2009) (Instead of altering the UNCLOS definition, Dr. Kenyuan suggests that any State should “forfeit its UNCLOS rights [if] unable to discharge its international responsibility.").
resources. Thus, Somalia would engage in a sort of trade-of-rights: in exchange for stronger control over its valuable territorial seas and beaches, it would surrender certain sovereignty rights to permit nations to investigate, pursue, and prosecute pirate kingpins operating safely on land.

VII. CONCLUSION

"An eighteenth-century document should not be interpreted to bar measures essential to the defense against twenty-first century threats." 139 Although modern-day piracy looks very different from the piracy originally circumscribed by existing piracy definitions, UNCLOS, the Geneva LOS, and the Rome Convention need not be thrown out wholesale. Rather, the existing legal framework can accommodate the evolving state of piracy.

This Comment seeks an alternative solution with three goals in mind. First, the new approach must create efficient deterrence, expending resources on the capture of pirate kingpins and financiers rather than low-level pirates who are unlikely to be deterred. Second, the new approach must recognize the evolving nature of piracy networks, including land-based kidnappings and infiltration of pirates into private security companies. Related to this goal is the need to avoid mistaking declining attack rates for piracy eradication. Finally, the new approach should use existing legal frameworks, including maritime treaties and the counterterrorism agenda.

The approach operates from a consequentialist or functionalist standpoint, which suggests that limiting intentional facilitation liability to actions on the high seas cuts against broad attempts by all states to criminalize such behavior. Construing international law to restrict piracy to the high seas defeats the purpose and the object of the various antipiracy statutes. The existing safe harbor provided by territorial waters provides no deterrent effect to the crime of piracy, and arming ships may lead to grave legal difficulties. Focusing on the intentional facilitation of piracy as the crux of the crime’s international law definition is narrow enough to protect territorial sovereignty concerns but broad enough to satisfy a centuries-old peremptory norm.

The proposed solution both constricts and expands existing piracy law. To further territorial sovereignty, it constricts international law to exclude physical hot pursuit within territorial waters and on land in the absence of express consent and bilateral treaties. To target piracy efficiently, it expands piracy law to include aiding and abetting in the piracy definition. It uses the framework of

anticipatory self-defense to justify limited intrusions into noncompliant nations. Finally, it establishes eradication of land-based pirate kingpin activities as a peremptory norm, thus laying the groundwork for nations to exercise universal jurisdiction over land-based pirates even in the absence of express consent from harboring nations. The solution recognizes the unique qualities of modern-day piracy and compels international cooperation in the fight against a uniquely international crime.