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### International cooperation in combating modern forms of maritime piracy: Legal and policy dimensions

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## 4

### CHAPTER THREE: THE SECURITY COUNCIL'S MARITIME PIRACY RESOLUTIONS: A CRITICAL ASSESSMENT<sup>352</sup>

#### 4.1. INTRODUCTION

The United Nations Security Council (UNSC) has been among the most active international actors in addressing maritime piracy. Notably, within a relatively short time span (June 2008 – November 2012), it has unanimously adopted no less than eleven Resolutions dedicated entirely to the surge in the criminal phenomenon of piracy off the coast of Somalia.<sup>353</sup> When considered along with three earlier UNSC resolutions peripherally addressing piracy off the coast of Somalia,<sup>354</sup> and an additional two resolutions addressing piracy in the Gulf of Guinea,<sup>355</sup> the

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<sup>352</sup> This chapter was published as: Yaron Gottlieb, *The Security Council's Maritime Piracy Resolutions: A Critical Assessment*, 24 *Minn. J. Int'l L.* 1 2015.

<sup>353</sup> The UNSC first addressed piracy off the coast of Somalia as the primary subject matter of a resolution in June 2008, with the adoption of Resolution 1816, *supra* note 125. By November 2012, the UNSC had adopted ten additional resolutions on the subject. *See* S.C. Res. 1838, *supra* note 320; S.C. Res. 1846, *supra* note 320; S.C. Res. 1851, *supra* note 189; S.C. Res. 1897, *supra* note 320; S.C. Res. 1918, *supra* note 6; S.C. Res. 1950, *supra* note 321; S.C. Res. 1976, *supra* note 167; S.C. Res. 2015, U.N. Doc. S/RES/2015 (Oct. 24, 2011); S.C. Res. 2020, *supra* note 317; and S.C. Res. 2077, *supra* note 248. In Resolution 1844, piracy off the coast of Somalia was mentioned, although it was not the main issue. *See* S.C. Res. 1844, *supra* note 320. In light of the significant drop in piracy attacks off the coast of Somalia since 2013, the UNSC addressed Somali piracy in only one Resolution each year, notably for the purpose of extending the authorization provided in Resolution 1816 to enter Somali territorial waters – *see* S.C. Res. 2125, U.N. Doc. S/RES/2125 (Nov. 18, 2013); S.C. Res. 2184, U.N. Doc. S/RES/2184 (Nov. 12, 2014); S.C. Res. 2246, U.N. Doc. S/RES/2246 (Nov. 10, 2015).

<sup>354</sup> As noted in Chapter 2, the first UNSC Resolution making a reference to the threats posed by maritime piracy and armed robbery at sea off the coast of Somalia was Resolution 1676. The Security Council reiterated its concerns over piratical incidents in Resolutions 1772 and 1801 – *see supra* note 320.

UNSC's level of engagement with this issue can perhaps be compared only to its active role in countering terrorism following the attacks of September 11, 2001.<sup>356</sup>

From Resolution 1816 of June 2008 – the first Resolution focusing on piracy off the coast of Somalia – much attention has been given to the UNSC's authorizing States to enter Somali territorial waters (and later on, by Resolution 1851, also to act on Somali land). For example, Resolution 1816 was described by some commentators as a “unique in the history of United Nations Security Council resolutions.”<sup>357</sup> Though such an authorization is indeed uncommon, a closer look at its terms shows that it is much less revolutionary than originally portrayed.

Collectively, however, these resolutions (“the piracy Resolutions”) form a multifaceted approach and contain a number of innovative elements, at least some of which have been relatively overlooked. Notably, this is the first time that a crime of ordinary law characteristics has been the focus of resolutions adopted under Chapter VII of the UN Charter.

This chapter explores the various aspects of the piracy Resolutions. It begins by discussing the hybrid nature of maritime piracy, that is, an international crime with ordinary law characteristics. Parts 4.3 and 4.4 assess the UNSC's Chapter VII powers for addressing crimes that pose a threat to international peace and security, and analyzes the UNSC's typical use of these powers by examining three different categories of UNSC resolutions.

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<sup>355</sup> See S.C. Res. 2018, *supra* note 249; S.C. Res. 2039, *supra* note 249.

<sup>356</sup> For a discussion of the UNSC's prominent role in countering terrorism, see Ilias Bantekas, *The International Law of Terrorist Financing*, 97 AM. J. INT'L L. 315 (2003) (stating that “[i]n the aftermath of September 11, 2001, the Security Council became the focal point of discussions and the forum for the adoption of measures against terrorism”).

<sup>357</sup> Jane G. Dalton et al., *Introductory Note to United Nations Security Council: Piracy and Armed Robbery at Sea – Resolutions 1816, 1846 & 1851*, 48 INT'L LEGAL MATERIALS 129, 130 (2009).

Part 4.5 describes the development of Somali piracy as a UNSC issue, from one topic among others addressed in the context of the situation in Somalia to becoming the primary subject matter of Chapter VII resolutions. Part 4.6 examines whether piracy was in fact viewed by the UNSC as a threat to international peace and security, ultimately concluding that the piracy resolutions' association with the situation in Somalia has merely served as a vehicle for the UNSC to address the effects of Somali piracy on international navigation, trade, and safety on the high seas through its Chapter VII powers.

Part 4.7 addresses the ways in which the UNSC has attempted to address the legal shortcomings of the piracy definition of UNCLOS, described in Chapter One. The evolution in the piracy Resolutions towards a holistic approach is examined in Part 4.8, pointing also to a relative lack of action regarding two important, albeit controversial, counter-piracy measures: the criminalization of ransom payments to pirates, and the deployment of private security guards on board commercial ships. Part 4.9 discusses the ways in which the UNSC engaged the private sector, Part 4.10 examines the implications of the authorization for States to enter Somali waters, and Part 4.11 addresses the applicable legal paradigm governing the counter-piracy initiatives. Finally, Part 4.12 comments on the lack of binding obligations in the piracy Resolutions.

## **4.2. THE NATURE OF MARITIME PIRACY: AN INTERNATIONAL CRIME WITH ORDINARY LAW CRIME CHARACTERISTICS**

Piracy is considered the first offense to have been recognized as a crime against international law and subject to universal jurisdiction.<sup>358</sup> Piracy differs, however, from other international crimes

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<sup>358</sup> Shearer, *supra* note 26, ¶ 1; Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), *supra* note 68, ¶ 5, separate opinion of President Guillaume) (“Traditionally, customary international law did, however, recognize one

such as genocide and crimes against humanity in a number of ways. First, unlike other international crimes, which were usually codified in response to a certain situation or development of concern to the international community,<sup>359</sup> piracy was codified as a crime of international law at a time when piracy attacks were generally declining.<sup>360</sup> Accordingly, it would not be unreasonable to assume that the drafters of UNCLOS did not see piracy as a major threat requiring in-depth consideration and potential deviation from previous definitions.<sup>361</sup> The rich literature that has followed the recent surge of piracy incidents frequently criticizes the shortcomings of the UNCLOS definition and supports the assumption that the drafters' perception of piracy as a low-level risk at the time UNCLOS was negotiated led the drafters to adopt an imperfect definition of piracy.

Second, while many serious crimes were codified by instruments specifically created for the purpose of targeting that crime, such as the Genocide Convention, neither UNCLOS nor the 1958 High Seas Convention were introduced for the primary purpose of addressing criminal activity from a criminal justice perspective. In fact, both conventions are aimed, first and foremost, at regulating the various rights and duties of States with regard to the high seas (the High Seas Convention) or all sea zones (UNCLOS) and ensuring international cooperation with

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case of universal jurisdiction, that of piracy.”).

<sup>359</sup> See, e.g. the Genocide Convention (implementing methods for the prevention and punishment of genocide under international law in response to atrocities of World War II).

<sup>360</sup> See Richard Little, *Series Editor Foreword* of MARITIME PIRACY AND THE CONSTRUCTION OF GLOBAL GOVERNANCE, *supra* note 31, at xv, xvi (noting that “[a]lthough piracy has long been viewed as a persistent feature of international politics, by the middle of the 20th century . . . it was widely presupposed that piracy had become a thing of the past”); accord Jonathan Bellish, *supra* note 183, at 1.

<sup>361</sup> As explained in Chapter 1, the definition UNCLOS provided merely duplicated the substance of the definition as provided in the 1958 HSC.

regard to the management of those zones.<sup>362</sup> Although, in addition to piracy, UNCLOS addresses cooperation in combating other illegal activities committed on the high seas, such as slave trade<sup>363</sup> or illicit traffic in narcotic drugs or psychotropic substances,<sup>364</sup> its main focus is not the field of international criminal justice.<sup>365</sup> This factor may explain the adoption of a definition of piracy that contains ambiguities, as well as the lack of a detailed legal framework governing international cooperation in the fight against piracy.<sup>366</sup>

Third, different from other international crimes, the crime of piracy is defined based on the geographical location where the incident took place. If the incident took place on the high seas, or outside the jurisdiction of any state, it may qualify as piracy. Conversely, if the same act took place elsewhere, namely in an area under a particular state's jurisdiction, it is not considered piracy under international law.<sup>367</sup> Acts that would be deemed piracy but for the location in which they occurred are not explicitly defined by UNCLOS, but are typically referred to as "armed robbery at sea."<sup>368</sup> The geographical element is consequential for the purpose of exercising

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<sup>362</sup> See TANAKA, *supra* note 48, at 4–5 (explaining the two basic functions of the law of the sea).

<sup>363</sup> UNCLOS, at arts. 99, 110(b).

<sup>364</sup> UNCLOS, at art. 108.

<sup>365</sup> For a conclusion that the great majority of states are not responding to the threat of modern piracy consistently with the international norms enshrined by UNCLOS based on a survey of states' legislation regarding the crime of piracy and universal jurisdiction, see Dutton *in* MARITIME PIRACY AND THE CONSTRUCTION OF GLOBAL GOVERNANCE, *supra* note 31, at 72 ("[I]t is true that UNCLOS contains many provisions – not just piracy provisions – such that states may have committed to the entire treaty without focusing specifically on their duties under UNCLOS to repress piracy.").

<sup>366</sup> As compared with, for example, the modern Conventions on combating transnational organized crime and corruption. See, e.g., UNTOC; United Nations Convention Against Corruption [UNCAC], Doc. A/58/422., 2349 U.N.T.S 41.

<sup>367</sup> Beckman, *supra* note 6, at 516–17; see also discussion on the high sea requirement *supra* Chapter 1.

<sup>368</sup> See *supra* Part 2.6.

jurisdictional powers on the high seas,<sup>369</sup> recognized as reflecting the universal jurisdiction paradigm. It creates another distinction between piracy and other international crimes for which universal jurisdiction may be exercised regardless of the location of the incident.<sup>370</sup>

Indeed, it is predominantly the geographical location, rather than the heinous nature of the crime, which makes piracy a matter of concern for the international community.<sup>371</sup> In essence, the crime of piracy possesses the characteristics of an ordinary law crime. Piracy's primary objective is pecuniary gain and it consists of elements typically found in classical land-based offences, such as robbery and kidnapping. It does not require specific intent, like genocide, perpetrating large-scale atrocities similar to crimes against humanity, or committing crimes in the context of an armed conflict. However, acts of piracy are, by definition, committed outside the jurisdiction of any state. The recognition that all states share a common interest in ensuring

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<sup>369</sup> UNCLOS, at art. 105 (authorizing state seizure of ships and aircrafts under the control of pirates on the high seas or in any other place outside the jurisdiction of any state); *id.* at art. 110 (outlining circumstances in which a warship may properly board a foreign ship encountered on the high seas).

<sup>370</sup> Guilfoyle, *Shipping Interdiction*, *supra* note 55, at 43 (explaining that “[u]niversal jurisdiction to prescribe crimes such as war crimes or breaches of the Geneva Conventions of 1949 inheres in all states, regardless of where the offences were committed. By contrast, while all states have jurisdiction over piracy, that jurisdiction only exists where the prohibited acts are committed on the high seas or ‘outside the jurisdiction of any State.’ Violence committed against vessels within territorial or internal waters is not piracy at international law. The geographic scope of piracy is thus unusually limited for a crime subject to universal jurisdiction, and discussing it in the same terms as other universal crimes may not be entirely helpful”).

<sup>371</sup> The “heinousness” of the crime of piracy has been referred to as a rationale for viewing pirates as enemies of mankind (*hostis humani generis*). Nonetheless, as Harry Gould mentioned, this rationale has some flaws. First, if historically it were a practice universally condemned because of its heinous character, why was it a state sanctioned practice? Secondly, “the records of contemporary court cases indicate that piracy was regarded as no worse a crime than ordinary, terrestrial robbery, and less serious than murder.” It is therefore safe to assert that even if piratical acts were considered heinous in more ancient times, thereby supporting the development of the customary norm allowing all states to exercise jurisdiction over pirates, this rationale appears less persuasive today and does not reflect contemporary state practice. *See* Harry Gould, *Cicero’s Ghost: Rethinking the Social Construction of Piracy*, in *MARITIME PIRACY AND THE CONSTRUCTION OF GLOBAL GOVERNANCE*, *supra* note 31, at 33, 34.

freedom of navigation, security of property, and safety of persons on the high seas led to the crime's status as an international crime.<sup>372</sup> Piracy, therefore, is a crime of a *hybrid* nature: an international crime with ordinary law crime characteristics.

The piracy Resolutions presented a similar approach regarding the nature of piracy. In Resolution 1851,<sup>373</sup> the UNSC encouraged all states to implement UNTOC.<sup>374</sup> UNTOC, also known as “the Palermo Convention,” makes no mention of piracy. Yet, the use of the Palermo Convention as a legal platform to promote effective investigation and prosecution of piracy and armed robbery at sea attests to the prevailing view of piracy off the coast of Somalia as an organized criminal activity.

Four years later, the UNSC made an even clearer statement on the nature of piracy. In Resolution 2077, the UNSC emphasized that “the concerns about protection of the marine environment as well as resources should not be allowed to mask the *true nature of piracy off the coast of Somalia*[,] *which is a transnational criminal enterprise driven primarily by the opportunity for financial gain.*”<sup>375</sup> This assertion supports the view of piracy as an international crime with ordinary law crime characteristics, while also reflecting the rapid changes in the nature of Somali piracy from a loosely organized and opportunistic criminal activity to a well-

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<sup>372</sup>See *id.* (referring to these two rationales for viewing pirates as *hostis humani generis* as, respectively, the “functional explanation” and the “economic explanation”); *id.* at 35 (considering that the flaws found in the economic, functional, and heinousness approaches call for an additional explanation based on the Constructivist approach). As further discussed in Part 4.6, which addresses the question of whether piracy was viewed by the UNSC as a threat to international peace and security, this article submits that the UNSC’s active engagement was driven primarily by the economic explanation, namely the threat piracy off the coast of Somalia poses to the freedom of navigation on the high seas in an area of particular importance for commercial shipping.

<sup>373</sup>S.C. Res. 1851, *supra* note 189.

<sup>374</sup>*Id.*

<sup>375</sup>S.C. Res. 2077, *supra* note 248 (emphasis added).



organized transnational enterprise.<sup>376</sup>

### **4.3. THE SECURITY COUNCIL’S POWERS IN TREATING CRIMINAL PHENOMENA AS A THREAT TO PEACE AND SECURITY**

Under the UN Charter, the UNSC has “primary responsibility for the maintenance of international peace and security.”<sup>377</sup> Therefore, the UNSC addresses matters that can potentially disturb the peace, as well as crises that are underway.<sup>378</sup> The Charter does not provide a definition of what constitutes a threat to the peace.<sup>379</sup> Accordingly, the UNSC enjoys broad discretion in determining whether a threat exists within the meaning of Article 39 of the Charter.<sup>380</sup> This is particularly so with regard to the UNSC’s power to address a “threat to the

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<sup>376</sup> Compare the Report of the Monitoring Group on Somalia, *supra* note 245 ¶ 131 (“[i]n contrast to media reports that portray the pirates as professional, tightly organized and well-trained organizations, they are for the most part loosely organized and poorly trained, and their membership is fluid”), with U.N. Secretary-General, *Report of the Secretary-General on the Situation with Respect to Piracy and Armed Robbery at Sea Off the Coast of Somalia*, ¶ 60, U.N. Doc. S/2013/623 (Oct. 21, 2013) (“[S]omalia-based piracy is a criminal activity that has transnational aspects and that is driven by the quest for illicit profit.”).

<sup>377</sup> U.N. Charter art. 24, para 1.

<sup>378</sup> See Benedetto Conforti, *THE LAW AND PRACTICE OF THE UNITED NATIONS*, 175–76 (4th ed. 2010). The disturbing the peace function refers to the UNSC’s role under Chapter VI of the Charter, while addressing crises that are underway concerns the UNSC’s role under Chapter VII. *Id.*

<sup>379</sup> See Dan Pickard, *When Does Crime Become a Threat to International Peace and Security?*, 12 FLA. J. INT’L L. 1, 4 nn.9–10 (1998–2000).

<sup>380</sup> U.N. Charter, art. 39 (“[T]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”); see also Conforti, *supra* note 378, at 204; Michael Wood, *United Nations, Security Council*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW para. 18 (2007) (“The Security Council’s powers were intended, by the drafters of the UN Charter, to be broad and flexible. The powers of the Security Council within its core field of activity—the maintenance of international peace and security—tend to be ‘open-textured and discretionary.’”); David S. Koller, *Immunities of Foreign Ministers: Paragraph 61 of the Yerodia Judgment as it Pertains to the Security Council and*

peace,” which has been described as a vague and flexible hypothesis that, unlike aggression or breach of the peace, is not necessarily characterized by military operations or the use of military force.<sup>381</sup> Under “threat to the peace” powers, the Security Council has also addressed situations internal to a State that were considered to have a significant impact in the surrounding region.<sup>382</sup> Moreover, while the UNSC typically addresses a threat to peace and security in reference to a specific situation (usually in a certain country), the wording of Article 39 does not impose such a requirement as a prerequisite for the UNSC’s engagement. Accordingly, the UNSC may address a general phenomenon, so long as the UNSC considered that the situation reached the threshold of a threat within the meaning of Article 39.

The evolution in the UNSC’s practice clearly demonstrates that the UNSC has gradually taken a broader approach toward the concept of threats to peace and security – an approach that goes beyond viewing the existence of a threat as dependent upon the existence of a war or military conflict. Thus, in 1992, for example, the President of the UNSC noted that “The absence of war and military conflicts among States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.”<sup>383</sup> Similarly, in a 2007 statement, the President of the UNSC asserted that “development, peace and security and human rights are

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*the International Criminal Court*, 20 AM. U. INT’L L. REV. 7, 33 (2005) (“As the Council is not subordinate to any other organ and has its own *Kompetenz-Kompetenz*, it ‘has been given a virtual monopoly in the settlement of questions to do with the maintenance of peace.’”) (citing Mohammed Bedjaoul, *THE NEW WORLD ORDER AND THE SECURITY COUNCIL: TESTING THE LEGALITY OF ITS ACTS* 14, 128 (M. Njhoff ed., 1994)).

<sup>381</sup> Conforti, *supra* note 378, at 207.

<sup>382</sup> *Id.*

<sup>383</sup> U.N.S.C. Presidential Note, U.N. Doc. S/23500, (Jan. 31,1992); Bruno Simma et al., *THE CHARTER OF THE UNITED NATIONS - A COMMENTARY* 1277 (3rd ed. 2012) [hereinafter Simma].

interlinked and mutually reinforcing.”<sup>384</sup> The evolution of what has been deemed to constitute a threat to peace and security has also been noted by a number of scholars.<sup>385</sup>

Hence, it appears that *a priori* there exists no legal impediment that would prevent the UNSC from considering a criminal phenomenon a “threat to the peace” within the meaning of the UN Charter.<sup>386</sup> Indeed, under certain circumstances, criminal activities and criminal networks may significantly and negatively affect both international relations and domestic stability within a particular country, region, or even throughout the international community.

Consider, for example, the case of drug trafficking. As stated in an article published in 1992 by Keith Sellen, a U.S. Judge Advocate, “No security threat is as significant today as the drug trade.”<sup>387</sup> Judge Sellen continued by emphasizing that “drug trafficking anywhere threatens countries everywhere because it overwhelms producer countries, rendering them unable to prevent harm to others.”<sup>388</sup> He further highlighted that “In addition to its overwhelmingly disruptive internal influence on drug-producing countries, drug trafficking anywhere threatens countries everywhere because it causes tensions between producing and consuming nations.”<sup>389</sup>

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<sup>384</sup> S.C. Pres. Statement 2007/1, U.N. Doc. S/PRST/2007/1 (Jan. 8, 2007).

<sup>385</sup> See, e.g., Wood, *supra* note 380, at para. 26 (“[T]he concept of a ‘threat to the peace’ has expanded to include also internal conflicts, widespread deprivations of human rights, humanitarian disasters, and serious threats to democratic government.”); Pickard, *supra* note 379, at 7 (pointing to legal scholars who argue that egregious human rights violations themselves amount to a threat to international peace and security).

<sup>386</sup> See Pickard, *supra* note 379, at 3 (“This open-ended definition allows for the possible inclusion of individual international criminal acts perpetrated by non-state actors”).

<sup>387</sup> Keith L. Sellen, *The United Nations Security Council Veto in the New World Order*, 138 MIL. L. REV. 187, 192 (1992).

<sup>388</sup> *Id.* at 192–93.

<sup>389</sup> *Id.* at 193 (pointing to examples of the negative implications of drug trafficking such as the strained relations between the U.S. and Mexico).

The negative impacts of criminal activity, especially organized criminal activity, on peace and security have also been recognized by United Nations bodies assessing threats in the twenty-first century. In 2004, the U.N. High-Level Panel on Threats, Challenges and Change published a report identifying six clusters of threats, one of which was transnational organized crime.<sup>390</sup> A similar reference to organized crime as a threat to peace and security was made in a 2005 report authored by the former United Nations Secretary-General Kofi Anan.<sup>391</sup> These threats have not abated. For example, in November 2013 the Economist noted that insecurity deriving from the rise in violent crimes in Latin American countries “has become perhaps the single most pressing problem facing the region.”<sup>392</sup> Regional agreements also recognized the link (or at least the possible link) between threats posed by criminal activity and the security of States and regions. For example, the CARICOM Maritime and Airspace Security Cooperation Agreement, concluded in 2008 by Caribbean States, identified serious crimes – including maritime piracy – among the activities “likely to compromise the security of a State Party or the region.”<sup>393</sup>

The view that certain criminal activities may constitute a threat to peace and security was also recognized through UNSC Presidential Statements. In 2007, the President of the UNSC qualified drug-trafficking and related transnational criminal activity as a threat to international security,<sup>394</sup> and a 2012 Presidential Statement indicated that “[T]he Security Council acknowledges the evolving challenges and threats to international peace and security including

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<sup>390</sup> U.N. Secretary-General, *A More Secure World: Our Shared Responsibility: Rep. of the Secretary General's High Level Panel on Threats, Challenges and Changes*, 12, 25, U.N. Doc. A/59/565 (Dec. 2, 2004).

<sup>391</sup> Anan underscored that all the threats he listed, including organized crime, can “cause death or lessen life chances on a large scale. All of them [the threats enumerated] can undermine States as the basic unit of the international system.” U.N. Doc. A/59/205, para. 78 (Mar. 21, 2005); Simma, *supra* note 383, at 111.

<sup>392</sup> *Alternatives to the Iron Fist*, THE ECONOMIST, Nov. 16–22, 2013.

<sup>393</sup> See further discussion of this agreement *infra* Part 5.3.2.

<sup>394</sup> S.C. Pres. Statement 2009/32, U.N. Doc. S/PRST/2009/32 (Dec. 8, 2009); Simma, *supra* note 383, at 802.

armed conflicts, terrorism, proliferation of weapons of mass destruction and small arms and light weapons, transnational organized crime, piracy, drug and human trafficking.”<sup>395</sup>

Clearly, not every illicit sale of drugs or similar illegal activity has an impact that calls for the engagement of the Security Council. Yet, when certain conditions are present, such as when the criminal activity is widespread and impacts the rule of law and democratic process, or when states are unable or unwilling to address the criminal activity,<sup>396</sup> the UNSC may view the matter as posing a threat to international peace and security.

#### **4.4. THE SECURITY COUNCIL’S PRACTICE IN ADDRESSING CRIMINAL ACTS**

The UNSC has not shied away from addressing threats posed by criminal activities and directing States to take steps to mitigate them. Past interventions include instructing a State to surrender individuals to face trial in another State for acts of terrorism,<sup>397</sup> a demand to “halt all illegal drugs activities and work to virtually eliminate the illicit cultivation of opium poppy, the proceeds of which finance Taliban terrorist activities,”<sup>398</sup> requiring States to take steps to prevent the illicit trade in diamonds,<sup>399</sup> or the plundering of natural resources,<sup>400</sup> which fueled conflicts,

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<sup>395</sup> S.C. Pres. Statement 2012/16, U.N. Doc. S/PRST/2012/16 (Apr. 25, 2012); Simma, *supra* note 38383, at 1283.

<sup>396</sup> See Pickard, *supra* note 379 (suggesting several factors to aid the UNSC in deciding whether criminal actions by private actors amount to a threat to international peace and security, including transnational consequences, criminalized behavior, refusal or inability of the home nation to address the criminal violation, the use of force or the threat to commit violence, and the extent of the criminal violation must be egregious,).

<sup>397</sup> The “Lockerbie Case”, UNSC Resolutions 731 (Jan. 21, 1992) , 748 (31 March 1992), and 883 (11 Nov. 1993); and similarly the Resolutions that followed the failed attack against the Egyptian President in 1995 in Addis Ababa, requesting Sudan to extradite the alleged perpetrators to Ethiopia – Resolutions 1044 (January 31, 1996); 1054 (April 26, 1996), and 1070 (August 16, 1996).

<sup>398</sup> S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000).

<sup>399</sup> *Cf.* S.C. Res. 1173, U.N. Doc. S/RES/1173 (June 12, 1998) (referring to the situation in Angola). For resolutions

recognizing the link between illicit transfer of small arms and light weapons and criminal activities,<sup>401</sup> and deciding that all States shall take appropriate steps to facilitate the safe return of Iraqi cultural property removed from Iraqi institutions, including by establishing a prohibition on trade in or transfer of such items.<sup>402</sup>

UNSC Resolutions addressing criminal activity can be organized into three main categories:

**A. Resolutions where the criminal activity is the main subject-matter and is considered, by itself, to be a threat to peace and security, either in reference to a particular situation or in general.**

This category includes Resolutions addressing terrorism-related crimes<sup>403</sup> and serious international crimes, namely genocide, crimes against humanity, and war crimes.<sup>404</sup> Some of those Resolutions have been criticized as exceeding the Security Council's mandate and powers. The criticism regarding the thematic Resolutions (e.g. Resolutions 1373 and 1540) and the UNSC's self-created role as a "legislator" has been particularly strong.<sup>405</sup> Yet, it appears that this

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concerning the situation in Sierra Leone, see S.C. Res. 1306, U.N. Doc. S/RES/1306 (July 5, 2000); S.C. Res. 1446, U.N. Doc. S/RES/1446 (Dec. 4, 2002).

<sup>400</sup> For resolutions concerning the situation in the Democratic Republic of Congo, see S.C. Res. 1457, U.N. Doc. S/RES/1457 (Jan. 24, 2003); S.C. Res. 1499, U.N. Doc. S/RES/1499 (Aug. 13, 2003); S.C. Res. 1925, U.N. Doc. S/RES/1925 (May 28, 2010).

<sup>401</sup> S.C. Res. 2117, U.N. Doc. S/RES/2117 (Sept. 26, 2013).

<sup>402</sup> S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003).

<sup>403</sup> See S.C. Res. 883, *supra* note 397; S.C. Res. 1333, *supra* note 398; S.C. Res. 1373, *supra* note 305 (reaffirming that acts of international terrorism constitute a threat to international peace and security); *see also* S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004) (focusing on steps to be taken to prevent non-state actors, in particular terrorist groups, from obtaining nuclear, chemical or biological weapons).

<sup>404</sup> See S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (creating the International Criminal Tribunal for the Former Yugoslavia); S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (creating the International Criminal Tribunal for Rwanda).

<sup>405</sup> See generally Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 175 (2005).

criticism was not directed at the UNSC's decision to view the criminal activity concerned as a threat to the peace. Indeed, there should be little doubt today that a terrorist act similar to that of 9/11, for example, amounts to such a threat.

What characterizes the criminal activities addressed in these resolutions is not only their magnitude and heinous nature, but also that they are not considered classic, ordinary-law crimes, largely due to their political rather than profit-making motivation.

**B. Resolutions where the criminal activity is not the main subject-matter, but is considered to be directly linked to the threat to peace and security.**

This category includes Resolutions that addressed criminal activities of a classic, ordinary-law nature, such as trafficking in drugs and illicit trade in diamonds.<sup>406</sup> In general, the primary purpose of addressing those activities has not been tackling the criminal activity as such (though clearly this would be a welcome result), but rather to prevent its undesired contribution to the main subject matter of the Resolution (terrorism, an armed conflict, etc.), which constitutes the threat to peace and security.<sup>407</sup> Resolution 1333, where the UNSC demanded the cessation of illegal drug activities and cultivation of opium, “the proceeds of which financed Taliban terrorist activities,”<sup>408</sup> is an example of Resolutions that fall into this category.

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<sup>406</sup> See, e.g., Resolutions, *supra* notes 399-402.

<sup>407</sup> An example for a potential exception is S.C. Res. 1499, *supra* note 400, which was dedicated solely to the plunder of natural resources in the Democratic Republic of the Congo. Yet, it was not a stand-alone Resolution but rather part of a series of Resolutions on the situation in the Democratic Republic of the Congo (such as S.C. Res. 1457, *supra* note 400) which highlighted the direct link between the plunder and fueling the armed conflict in the country.

<sup>408</sup> S.C. Res. 1333, *supra* note 398.

**C. Resolutions where the criminal activity is not the main subject-matter and the resolution does not establish a clear link between the criminal activity and peace and security.**

With the more comprehensive approach taken by the UNSC to what constitutes a threat to peace and security, it is not uncommon for UNSC Resolutions to address various issues of concern without defining them as threats to peace and security and without making a clear link to the primary threat that triggered the Resolutions (as was done, for example, between drug-trafficking and terrorism in the aforementioned Resolution 1333). A Resolution that falls within this category is Resolution 1483, which followed the 2003 invasion of Iraq. In that Resolution, the UNSC decided, *inter alia*, that “all Member States shall take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq National Museum, the National Library, and other locations in Iraq since the adoption of resolution 661 (1990) of 6 August 1990, including by establishing a prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed . . . .”<sup>409</sup> No express connection was made between this demand and the situation in Iraq, which, as the UNSC stated in the Resolution, continued to constitute a threat to international peace and security.<sup>410</sup>

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<sup>409</sup> S.C. Res. 1483, *supra* note 402.

<sup>410</sup> *Id.* An argument can be made, however, that the demand to address the illicit traffic in artifacts, though not explicitly linked to any concrete threat to peace and security, was nonetheless connected to the main subject-matter of the Resolution, which was the rebuilding of Iraq. On the relationships between the protection of cultural property and threats to peace and security, see Francioni and Lanzarini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14(4) EUR. J. INT’L L. 619, 630 (2003) (arguing that “the destruction of cultural heritage in itself cannot be reasonably said to reach the threshold of a ‘threat’ under Article 39”). *But see* Irina Bokova, *Culture under Fire*, N. Y. TIMES (Apr. 6, 2012), [http://www.nytimes.com/2012/04/07/opinion/culture-under-fire.html?\\_r=0](http://www.nytimes.com/2012/04/07/opinion/culture-under-fire.html?_r=0)



#### 4.5. THE SOMALI PIRACY RESOLUTIONS

The UNSC first began addressing piratical acts off the coast of Somalia in November 2005, after the matter was brought to its attention by the International Maritime Organization (IMO).<sup>411</sup> In a Presidential Statement related to the situation in Somalia, the UNSC expressed “serious concern over the increasing incidents of piracy off the coast of Somalia.”<sup>412</sup> The UNSC further condemned the “recent hijackings of vessels in the area, particularly of ships carrying humanitarian supplies to Somalia. The Council urged the TFIs [Transitional Federal Institutions], regional actors and relevant international organizations to work together to address this problem.”<sup>413</sup>

A few months later, in March 2006, the UNSC made a reference to piracy in the context of another Presidential Statement on the situation in Somalia. The UNSC took note of the IMO resolution A.979(24), adopted on 23 November 2005, concerning the increasing incidents of piracy and armed robbery against ships in the waters off the coast of Somalia. The Council encouraged “Member States whose naval vessels and military aircraft operate in international waters and airspace adjacent to the coast of Somalia to be vigilant to any incident of piracy therein and to take appropriate action to protect merchant shipping, in particular the transportation of humanitarian aid, against any such act, in line with relevant international law.” The Council further urged “co-operation among all States, particularly regional States, and active

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(“Protecting culture is a security issue. There can be no lasting peace without respect. Attacks against cultural heritage are attacks against the very identity of communities. They mark a symbolic and real step up in the escalation of a conflict, leading to devastation that can be irreparable and whose impact lasts long after the dust has settled.”).

<sup>411</sup> See Dalton, et al., *supra* note 357, at 129.

<sup>412</sup> S.C. Pres. Statement 2005/54, at 2, U.N. Doc. S/PRST/2005/54 (Nov. 9, 2005).

<sup>413</sup> *Id.* at 2.

prosecution of piracy offences.”<sup>414</sup>

Shortly afterwards, in May 2006, the UNSC adopted its first Chapter VII Resolution where piracy was addressed. Similar to the Presidential Statements, the first Chapter VII Resolution was adopted in the context of the UNSC’s Resolutions on the situation in Somalia, a topic of concern for the UNSC since 1992.<sup>415</sup> The reference to piracy was made in the preamble of UNSC Resolution 1676, where the UNSC expressed its concern over “the increasing incidents of piracy and armed robbery against ships in waters off the coast of Somalia, and its impact on security in Somalia.”<sup>416</sup>

A year later, the UNSC first addressed piracy in the operative section of a Chapter VII Resolution. In Resolution 1772, the UNSC again stressed its concern over the upsurge in piracy off the Somali coast and encouraged “Member States whose naval vessels and military aircraft operate in international waters and airspace adjacent to the coast of Somalia to be vigilant to any incident of piracy therein and to take appropriate action to protect merchant shipping, in particular the transportation of humanitarian aid, against any such act, in line with relevant international law.”<sup>417</sup> The reference to ensuring the safety of transportation of humanitarian aid followed attacks on aid ships in the waters off Somalia, which led the United Nations World Food Programme (WFP) to appeal for international action against piracy, warning that piracy posed a serious threat to relief deliveries in Somalia.<sup>418</sup> In Resolution 1801, adopted in February

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<sup>414</sup> S.C. Pres. Statement, at 3, U.N. Doc. S/PRST/2006/11 (Mar. 15, 2006).

<sup>415</sup> S.C. Res. 733, U.N. Doc. S/RES/733 (Jan. 23, 1992).

<sup>416</sup> S.C. Res. 1676, *supra* note 320.

<sup>417</sup> S.C. Res. 1772, *supra* note 320.

<sup>418</sup> *Somalia: Pirates attack UN aid ship, prompting call for action*, UN NEWS CENTRE (May 20, 2007), <http://www.un.org/apps/news/story.asp?NewsID=22609&Cr=Somalia&Cr1#.UrqoWtJDsu0>. Previous piracy attacks of that nature included the targeting of an aid ship carrying humanitarian support following the 2004 tsunami.

2008, the UNSC reiterated its concerns over piracy off the coast of Somalia and continued to encourage Member States to be vigilant and take appropriate action to protect merchant ships and humanitarian aid.<sup>419</sup>

Those first three Resolutions (1676, 1772, and 1801) addressed piracy among other points of concern, rather than as the primary subject-matter of the Resolution. The Resolutions did not establish a direct link between piracy and the threat to peace and security, other than by pointing to the interference with the transportation of humanitarian aid. Accordingly, and depending on the view regarding the possible link between the humanitarian aid and the threat to peace and security, those three Resolutions can be classified as falling either under “category B” or “category C” described above.

Before the adoption of Resolution 1801, work was already underway to adopt a robust mechanism to counter piracy. In November 2007, the IMO Assembly adopted Resolution A. 1002(25), which, *inter alia*, requested the Transitional Federal Government (TFG) to advise the UNSC that it consented to warships (or other appropriate ships or aircraft operating in the Indian Ocean) to enter its territorial sea when engaging in counter-piracy operations.<sup>420</sup> On February 27, 2008, the Permanent Representative of the Somali Republic to the United Nations conveyed the consent of the TFG for “urgent assistance in securing the territorial and international waters off the coast of Somalia for the safe conduct of shipping and navigation.”<sup>421</sup> Thus the groundwork and the framework for Security Council Resolution 1816 were established.<sup>422</sup>

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*Pirates hijack tsunami aid ship*, BBC NEWS (June 30, 2005), <http://news.bbc.co.uk/2/hi/africa/4636695.stm>.

<sup>419</sup> S.C. Res. 1801, *supra* note 320.

<sup>420</sup> Int’l Maritime Org. Res. A.1002 (25), U.N. Doc. A 25/Res.1002 (Nov. 29, 2007).

<sup>421</sup> S.C. Res. 1816, *supra* note 125, (making a reference to the letter dated February 27, 2008).

<sup>422</sup> Dalton et al., *supra* note 357, at 130.

UNSC Resolution 1816, adopted in June 2008,<sup>423</sup> was the first among the series of Chapter VII Resolutions that created a paradigm shift with regard to the role of the UNSC in addressing criminal activities of ordinary-law characteristics. It was *entirely dedicated* to piracy and armed robbery at sea and the threats those crimes pose. Specifically, the Resolution addressed “the threat that acts of piracy and armed robbery against vessels pose to the prompt, safe and effective delivery of humanitarian aid to Somalia, the safety of commercial maritime routes, and international navigation.”<sup>424</sup>

Fully focused on a criminal phenomenon, Resolution 1816 and the subsequent piracy Resolutions would ostensibly appear to be “category A” Resolutions, as described above because criminal activity was the main subject-matter and was considered, by itself, to be a threat to peace and security. However, the piracy Resolutions differ from the other “Category A” Resolutions in two main ways. First, they are the first Resolutions that address a criminal activity *of ordinary law characteristics* as the primary subject matter. As such, the piracy Resolutions created a *new category* of UNSC Chapter VII Resolution – Resolutions where a criminal activity of ordinary law characteristics is the primary subject matter. Second, while “category A” Resolutions clearly established that the criminal activity concerned (e.g. terrorism) poses a threat to international peace and security, the piracy Resolutions stopped short of making such an explicit determination. Notwithstanding this fact and as will be explained below, it is argued that the Somali piracy Resolutions *de facto* treated piracy as such a threat.

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<sup>423</sup> S.C. Res. 1816, *supra* note 125.

<sup>424</sup> *Id.*

#### 4.6. PIRACY AS A THREAT TO INTERNATIONAL PEACE AND SECURITY?

The paradigm shift embodied in the piracy Resolutions, namely the creation of a new category of Chapter VII Resolutions, led to some confusion with regard to the view of piracy as a threat to peace and security. For example, Benedetto Conforti concluded that “the Council has declared as a ‘threat to the peace’ under Article 39 piracy and acts of robbery at sea committed off the coast of Somalia.”<sup>425</sup> Douglas Guilfoyle, on the other hand, observed that “It is the situation in Somalia which constitutes the threat to international peace and security, not the piracy and armed robbery as such.”<sup>426</sup>

This latter position appears to be more consistent with the wording of the piracy Resolutions, which included a paragraph stating 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 to international peace and security in the region.”<sup>427</sup> Neither one of the piracy Resolutions contained an explicit reference to piracy as a threat to peace and security – whether in general or in relation to the situation in Somalia.

By referring to piracy as “merely” exacerbating the situation in Somalia, the UNSC took a cautious approach, likely because a number of States were reluctant to accept piracy as a threat to the peace in the discussion that preceded the adoption of Resolution 1816.<sup>428</sup> States’

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<sup>425</sup> Conforti, *supra* note 378378, at 208.

<sup>426</sup> Guilfoyle, *UN Security Council Resolution 1816*, *supra* note 74, at 695; *see also* Heinze, *supra* note 147, at 55; Treves, *Piracy and the International Law of the Sea*, *supra* note 285, at 124 (noting that the link between piracy off the coast of Somalia and the notion of threats to peace and security was made by the UNSC indirectly).

<sup>427</sup> S.C. Res. 1816, *supra* note 125, (emphasis added).

<sup>428</sup> See Simma, *supra* note 383, at 1283 (mentioning the positions expressed by countries such as Indonesia, South Africa and China).

reservations over such a qualification were also expressed during the first general debate at the UNSC over piracy, which took place on November 19, 2012. In that debate, “most speakers agreed that piracy still represented a threat to international peace and security. Dissenting from that view, the representative of Argentina said that unless a situation had engendered Council action under Chapter VII for other reasons, such as the situation in Somalia, piracy was not under the competence of the body; it was, rather under the framework of the Convention on the Law of the Sea.”<sup>429</sup> The reticence over defining piracy as a general threat to peace and security was also present in addressing piracy in the Gulf of Guinea. Neither UNSC Resolutions regarding piracy in the Gulf of Guinea made the determination that piracy is a threat to the peace (and therefore were not adopted under Chapter VII). The Resolutions also affirmed that they “apply only with respect to the situation in the Gulf of Guinea.”<sup>430</sup>

Notwithstanding the cautious approach of the UNSC, a more nuanced understanding of the piracy Resolutions is appropriate. While the UNSC stopped short of explicitly defining piracy as a threat to peace and security (in comparison, for example, to its view of terrorism), as a practical matter, it treated piracy as a threat to peace and security.

Indeed, it was the general repercussions of piracy, rather than its negative contribution to the situation in Somalia, which served as the main driving force behind the exceptionally intensive engagement of the UNSC in the matter. This conclusion is supported by the concerns

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<sup>429</sup> Press Release, Security Council, Delegations in Security Council Note Progress in Combating Piracy, but Warn ‘Pirates Will Quickly Be Back in Their Skiffs’ if Attention Diverted, U.N. Press Release SC/10820 (Nov. 19, 2012) [hereinafter Progress in Combating Piracy], available at <http://www.un.org/News/Press/docs/2012/sc10820.doc.htm>.

<sup>430</sup> S.C. Res. 2018, *supra* note 249; S.C. Res. 2039, *supra* note 249. Also, in both Resolutions the UNSC expressed “its deep concern about the threat that piracy and armed robbery at sea in the Gulf of Guinea pose to international navigation, *security* and the economic development of states in the region” (emphasis added). *Accord Simma, supra* note 383, at 1283.

expressed by the UNSC in the piracy Resolutions.

The first concern stated in all the Resolutions was “the threat that acts of piracy and armed robbery against vessels pose to the prompt, safe and effective delivery of humanitarian aid to Somalia.”<sup>431</sup> As mentioned, a number of piracy attacks against ships carrying aid took place between 2005 and 2007. Nonetheless, this concern was addressed early on by providing naval protection to ships delivering humanitarian aid, an initiative that had already been welcomed by the UNSC in Resolution 1801.<sup>432</sup> Indeed, as the Somali piracy model evolved between 2008 and 2012, when most piracy Resolutions were adopted, the pirates moved on from attacking humanitarian ships, and began primarily targeting commercial ships.<sup>433</sup> Consequently, the importance of this concern was diminished, as evidenced by the fact that it was not mentioned in all of the piracy Resolutions.<sup>434</sup>

Additionally, the UNSC chose not to impose targeted sanctions on individuals or entities involved in piracy, despite the fact that Resolution 1844 explicitly provided for the imposition of such sanctions on those designated “as obstructing the delivery of humanitarian assistance to Somalia, or access to, or distribution of, humanitarian assistance in Somalia,”<sup>435</sup> the clear added value in imposing such sanctions,<sup>436</sup> and despite the concrete information for potential listing of

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<sup>431</sup> S.C. Res. 1816, *supra* note 125, ¶1. Most Resolutions followed by Resolution 1816 contained similar wording.

<sup>432</sup> See S.C. Res. 1801, *supra* note 320. In Resolution 1801, the UNSC welcomed “the contribution made by France to protect the World Food Programme naval convoys and the support now provided by Denmark to this end.” *Id.*

<sup>433</sup> See United Nations Institute for Training and Research (UNITAR), *UNOSAT Global Report on Maritime Piracy: A Geospatial Analysis 1995–2013*, at 12 (July 7, 2013) [hereinafter UNITAR] (“The first targets of Somali pirates were World Food Programme (WFP) ships. It was the UN that asked the international community for the means to protect these vessels. . . . The pirates then moved on to other targets.”), [https://unosat.web.cern.ch/unosat/unitar/publications/UNITAR\\_UNOSAT\\_Piracy\\_1995-2013.pdf](https://unosat.web.cern.ch/unosat/unitar/publications/UNITAR_UNOSAT_Piracy_1995-2013.pdf).

<sup>434</sup> See, e.g., S.C. Res. 1918, *supra* note 6; S.C. Res. 1976, *supra* note 167 (failing to mention this concern).

<sup>435</sup> S.C. Res. 1844, *supra* note 320.

<sup>436</sup> See Report of the Financial Action Task Force [hereinafter FATF] on “Organised Maritime Piracy and Related

piracy kingpins provided by the Monitoring Group on Somalia.<sup>437</sup> This serves as another indication that the concern related to the safe delivery of humanitarian aid played only a secondary role in motivating the UNSC to adopt the piracy Resolutions.<sup>438</sup> Thus, while this concern was relevant, particularly during the first stages of the counter-piracy initiative, it cannot justify the adoption of a very significant number of Chapter VII Resolutions within a relatively short period of time.

Nor can the overall situation in Somalia explain the UNSC's particularly active involvement in countering piracy. Somalia has been a fragile state for over two decades,<sup>439</sup> and the UNSC has already taken various steps to address the situation, such as imposing an arms

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Kidnapping for Ransom”, July 2011, available at <http://www.fatf-gafi.org/media/fatf/documents/reports/organised%20maritime%20piracy%20and%20related%20kidnapping%20for%20ransom.pdf> [noting that “Targeting financial activity of pirates, especially pirate financiers and instigators, through asset freezes and the seizure and confiscation of the proceeds and instrumentalities of piracy could help to (1) disrupt financial support to pirate organisations, (2) track and seize (either through post-conviction or non-conviction based forfeiture, depending on the jurisdiction) assets enabling pirate operations, (3) prevent pirates from using the international banking system and other formal financial systems, and (4) prevent pirates from using cash couriers and other informal-value transfer mechanisms to transmit funds. The disruptive impact of targeted financial sanctions is generally considered to be most effective when they are implemented globally (e.g., by the UN) since the designated entity cannot as easily turn to third country financial institutions to evade sanctions.”]

<sup>437</sup> See *infra* Part 4.8(a) (addressing the ransom payments issue).

<sup>438</sup> But see Kevin McGahan & Terence Lee, *Frames, Humanitarianism, and Legitimacy – Explaining the Anti-Piracy Regime in the Gulf of Aden*, in *MAR. PIRACY AND THE CONSTR. OF GLOBAL GOVERNANCE* 149 (Michael J. Struett, Jon D. Carlson & Mark T. Nance ed., 2013) (arguing that humanitarian considerations were a primary factor behind the counter-piracy initiatives off the coast of Somalia).

<sup>439</sup> For a discussion on this concept and its application in the context of Somalia, see World Bank, *Pirate Trails: Tracking the Illicit Financial Flows from Pirate Activities off the Horn of Africa*, at 26–28, (Nov. 1, 2013) (a study conducted in cooperation with the United Nations Office on Drugs and Crime (UNODC) and the International Criminal Police Organization (INTERPOL)), available at [http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/Pirate\\_Trails\\_World\\_Bank\\_UNODC\\_Interpول\\_report.pdf](http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/Pirate_Trails_World_Bank_UNODC_Interpول_report.pdf).



embargo on Somalia.<sup>440</sup> No evidence exists to indicate that the spike in piracy attacks reflected a similar deterioration of the overall situation in Somalia. In addition, while piracy revenues have probably supported other illegal activities,<sup>441</sup> as well as disputing factions vying for power in the country, it has not been established that piracy played a role similar to that of exploitation of natural resources in fueling conflicts. As expressed in a number of Resolutions, the main concern relating to ransom payments was that they might continue and fuel piratical activities, not that they would negatively contribute to the situation in Somalia.<sup>442</sup> In fact, there have been no indications that the pirates are engaging in hostilities within Somalia.<sup>443</sup>

Moreover, during the period when the piracy Resolutions were adopted, the UNSC continued to adopt other Resolutions related to the general situation in Somalia, addressing a variety of issues other than piracy.<sup>444</sup> If the main concerns over piracy were its implications for the continuing crisis in Somalia, it would have been reasonable to expect that the counter-piracy

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<sup>440</sup> The arms embargo was imposed through the adoption of UNSC Resolution 733, *supra* note 415. Subsequent resolutions elaborated, amended and introduced exemptions to it. See SECURITY COUNCIL COMMITTEE PURSUANT TO RESOLUTIONS 751 (1992) AND 1907 (2009) CONCERNING SOMALIA AND ERITREA, <http://www.un.org/sc/committees/751/>.

<sup>441</sup> See S.C. Res. 1851, *supra* note 189, (expressing concern over “the role piracy may play in financing embargo violations by armed groups.”). See also Report of the Monitoring Group on Somalia, *supra* note 245, para.13 (“Ransoms from piracy and kidnapping have been used to finance arms embargo violations.”); *id.* at para. 107 (“Exorbitant ransom payments have fueled the growth of [armed criminal] groups, including the procurement of arms and equipment and the maintenance of militia establishments in violation of the arms embargo.”).

<sup>442</sup> See Report of the Monitoring Group on Somalia, *supra* note 245 (stating that escalating ransom payments are fueling the growth of piracy in waters off the coast of Somalia); S.C. Res. 2020, *supra* note 317, ¶3, (“[P]irates are turning increasingly to kidnapping and hostage-taking, and that these activities help generate funding to purchase weapons, gain recruits, and continue their operational activities, thereby jeopardizing the safety and security of innocent civilians and restricting the flow of free commerce.”); *accord* S.C. Res. 1851, *supra* note 189 (referencing similar concerns); S.C. Res. 1846, *supra* note 296.

<sup>443</sup> See Douglas Guilfoyle, *The Laws of War and the Fight Against Somali Piracy: Combatants or Criminals?*, 11 MELB. J. INT’L L. 141, 144 (2010) (“[Somali pirates] conduct no hostilities within Somalia.”).

<sup>444</sup> See, e.g., S.C. Res. 1844, *supra* note 320 (mentioning piracy only in its preamble).

measures would have been incorporated into those Resolutions (similar to “category B” or “category C” Resolutions). Instead, the UNSC chose to address piracy off the coast of Somalia in separate, stand-alone Resolutions. This conclusion is bolstered by the lack of references in the piracy Resolutions to other Somalia-related Resolutions.<sup>445</sup>

Another concern that could have explained the UNSC active engagement was the potential link between piracy and terrorist activities, particularly because terrorism was already explicitly defined as a threat to peace and security. Shortly after the outbreak of piracy incidents off the coast of Somalia, a number of authors characterized these acts as “maritime terrorism” or “terrorism at sea.”<sup>446</sup> Nonetheless, despite certain similarities between pirates and terrorists,<sup>447</sup> there are also clear distinctions. Somali pirates operate primarily for financial gain and cannot be considered terrorists.<sup>448</sup> Moreover, “no solid links have ever been established between Somali

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<sup>445</sup> Compare S.C. Res. 1844, *supra* note 320 (addressing the situation in Somalia and referencing previous resolutions on Somalia), and S.C. Res. 1814, U.N. Doc. S/RES/1814 (May 15, 2008) (same), with S.C. Res. 1816, *supra* note 125 (making no such reference). Subsequent piracy Resolutions continued with the approach of mentioning mostly previous piracy Resolutions rather than other Somalia-related Resolutions.

<sup>446</sup> See, e.g., Nicole Stillwell, *Robbers or Robinhoods?: A Study of the Somali Piracy Crisis and a Call to Develop an International Framework to Combat Maritime Terrorism*, 7 Loy. Mar. L.J. 127 (2009); Milena Sterio, *Fighting Piracy in Somalia (and Elsewhere): Why More is Needed*, 33 Fordham Int’l L.J. 372, 372 (2009-2010) (“[T]he Somali pirates are dangerous. They are sea terrorists.”). Milena Sterio’s position appears to have changed over time. See Milena Sterio, *Piracy Off the Coast of Somalia: The Argument for Pirate Prosecutions in the National Courts of Kenya, The Seychelles, and Mauritius*, 4 Amsterdam L.F. 104, 107 (2012) (“It should also be noted that Somali pirates’ motivation lies primarily in the prospect of such a significant financial gain.”).

<sup>447</sup> See Heinze, *supra* note 147, at 63 (“[B]oth [pirates and terrorists] are non-state armed groups that carry out attacks against civilians, neither group fits naturally within the basic parameters . . . required to qualify [them] as a belligerent or ‘party’ to an armed conflict, nor do individual pirates or terrorist seem to qualify as lawful combatants under the Third Geneva Convention.”).

<sup>448</sup> *Id.* Heinze also mentioned that terrorist attacks, such as 9/11, have involved a substantially greater degree of violence than has piratical activity. *Id.*

piracy and any terrorist groups.”<sup>449</sup> The interaction between pirates and the Somali-based Al-Shabaab terrorist group was, at the most, on an opportunistic and ad hoc basis.<sup>450</sup> One commentator even contended that Al-Shabaab was in fact fighting piracy and had contributed to the decline in piracy attacks.<sup>451</sup> The UNSC was therefore careful not to base its intervention on such tenuous links.

It is therefore evident that other concerns served as the main impetus for the piracy Resolutions. Specifically, it is submitted that the concerns driving the piracy Resolutions were those mentioned in Resolution 1816 regarding the threat of piracy to “the safety of commercial maritime routes, and international navigation.”<sup>452</sup> Not surprisingly, in that Resolution the UNSC encouraged, “in particular, States *interested in the use of commercial maritime routes off the coast of Somalia* to increase and coordinate their efforts, in cooperation with the Transitional Federal Government of Somalia (TFG), to deter acts of piracy and armed robbery at sea.”<sup>453</sup> States that were affected the most by Somali piracy became the major contributors to the

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<sup>449</sup> Sterio, *Pirate Prosecutions*, *supra* note 446. See also Andreas S. Kolb, Tim René Salomon & Julian Udich, *Paying Danegeld to Pirates: Humanitarian Necessity or Financing Jihadists*, 15 MAX PLANCK Y.B. OF UNITED NATIONS L. 105, 155 (2011) [hereinafter Kolb, Salomon & Udich], available at [http://www.mpil.de/files/pdf3/mpunyb\\_03\\_kolb.pdf](http://www.mpil.de/files/pdf3/mpunyb_03_kolb.pdf) (“[T]he evidence so far is insufficient to demonstrate that piratical activities off the Somali coast generally lead to the provision of funds to the al-Shabaab.”).

<sup>450</sup> See Sterio, *Pirate Prosecutions*, *supra* note 446, at 107. See also the Lang Report, *supra* note 53, para. 24 (“While a major alliance between the pirates and Al-Shabaab has not yet materialized, local complicities have been noted.”); Fin. Action Task Force (FATF), *supra* note 436 (confirming that no clearly evident link has been established between pirates and Al-Shabaab, and referring to “anecdotes” whereby the pirates paid “docking fees” or “taxes” to Al-Shabaab).

<sup>451</sup> Currun Singh, *Al Shabab Fights the Pirates*, N.Y. TIMES (Oct. 22, 2013), [http://www.nytimes.com/2013/10/23/opinion/international/al-shabab-fights-the-pirates.html?\\_r=0](http://www.nytimes.com/2013/10/23/opinion/international/al-shabab-fights-the-pirates.html?_r=0).

<sup>452</sup> S.C. Res. 1816, *supra* note 125, ¶2.

<sup>453</sup> *Id.* at 2 (emphasis added). This paragraph of the Resolution was referred to by the European Council Joint Action that created Operation Atalanta in November 2008. See Council Decision 2012/174/CFSP of 23 March 2012, 2012 O.J. (L 89) 69 (EU).

counter-piracy undertakings.<sup>454</sup> Indeed, the concerns related to international navigation and the safety of commercial routes were the only concerns reiterated in all the piracy Resolutions,<sup>455</sup> and were a common theme in the UNSC discussions on piracy off the coast of Somalia.<sup>456</sup> Later Resolutions added the concerns over the safety of seafarers and innocent civilians and the risks to vulnerable ships, including fishing activities.<sup>457</sup> The UNSC also expressed its grave concerns over the extended range of the piracy threat into the western Indian Ocean and adjacent sea areas and the increase in pirate capacities.<sup>458</sup>

What characterizes these concerns is that they have little to do with exacerbating the situation in Somalia. Rather, they relate to risks posed by piratical activity to the international community as a whole. This was also reflected in statements made by States and international bodies, referring to Somali piracy as a “global threat,”<sup>459</sup> and “a threat to international

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<sup>454</sup> See Christian Bueger and Jan Stockbruegger, *Security Communities, Alliances, and Macrosecuritization – The Practices of Counter-Piracy Governance*, in MARITIME PIRACY AND THE CONSTRUCTION OF GLOBAL GOVERNANCE, *supra* note 31, at 116 (stating that “countries that are affected the most by Somali piracy contribute the major parts to military action in the arena. Of the 30 States with the highest shares in global merchandise trade, 22 have a naval presence in the Gulf of Aden. Moreover, they also control more than 80 percent of global shipping fleets.”).

<sup>455</sup> Compare, for example, to concerns related to the delivery of humanitarian aid, which were not mentioned in Resolutions 1976 and 1918. See S.C. Res. 1976, *supra* note 167; S.C. Res. 1918, *supra* note 6.

<sup>456</sup> See UN Security Council Meeting Record 6046, December 16, 2008, S/PV.6046 (2008), available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Somalia%20SPV%206046.pdf> (recounting the statements made by States following the adoption of Resolution 1851).

<sup>457</sup> See S.C. Res. 2077, *supra* note 248.

<sup>458</sup> See S.C. Res. 1851, *supra* note 189; S.C. Res. 2077, *supra* note 248.

<sup>459</sup> Press Release, Security Council, Security Council Asks Nations with Military Capacity in Area to ‘Actively Fight Piracy’ on High Seas off Somalia, U.N. Press Release SC/9467 (Oct. 7, 2012), available at <http://www.un.org/News/Press/docs/2008/sc9467.doc.htm> (“The representative of France said the Somali pirates were a global threat.”).

security.”<sup>460</sup>

Somali piracy caused tremendous financial damage,<sup>461</sup> necessitated the engagement of the world navies far beyond simply escorting ships carrying humanitarian aid, prompted the implementation of various measures by the shipping industries (e.g. changing shipping routes and deploying private guards), and demanded the active involvement of international and regional bodies. The risks posed to commercial maritime routes led to the creation of counter-piracy naval coalitions such as the Combined Task Force (CTF) 151, whose diverse membership includes countries such as Turkey, Australia, Pakistan, South Korea, and Singapore,<sup>462</sup> and the European Union Atalanta Operation, the first joint military operation of the European Union.<sup>463</sup> It led to the active engagement of countries located far from Somalia. For example, Japan, whose economy depends to a great extent on importing energy resources and raw materials and exporting of manufactured goods, all of which hinge on the security of sea lanes,<sup>464</sup> promulgated

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<sup>460</sup> European Parliament Resolution of May 10, 2012 on Maritime Piracy (2011/2962(RSP)), 2013 O.J. (C 261 E) 34, 35 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:261E:0034:0040:EN:PDF> (“[P]iracy represents a threat to international security and regional stability.”).

<sup>461</sup> See World Bank, *supra* note 439 (estimating between \$339 million and \$413 million claimed in ransoms for acts of piracy off the coast of Somalia and the Horn of Africa between April 2005 and December 2012). See also World Bank, *The Pirates of Somalia: Ending the Threat, Rebuilding a Nation* (Apr. 11, 2013), available at <http://siteresources.worldbank.org/INTAFRICA/Resources/pirates-of-somalia-main-report-web.pdf> (estimating that Somali piracy causes an \$18 billion loss to world trade each year).

<sup>462</sup> See, e.g., *Singapore sends 151 servicemen to join anti-piracy patrols in Gulf of Aden*, HELLENIC SHIPPING NEWS (Mar. 18, 2014), <http://www.hellenicshippingnews.com/News.aspx?ElementId=6275050f-8c01-4794-93b4-326a46cc1df1>.

<sup>463</sup> See EUNAVFOR SOMALIA, <http://eunavfor.eu/mission/>.

<sup>464</sup> ASIAN-AFRICAN LEGAL CONSULTATIVE ORG., THE LAW OF THE SEA, para. 36 (2013) available at <http://www.aalco.int/52ndsession/lowofthesea2013.pdf>; see also UN Security Council Meeting Record 6046, *supra* note 456 (showing Japan’s representative saying anti-piracy measures, “are directly linked to the survival and prosperity of our country. The issue of piracy is both a challenge for the international community and a matter related to the protection of the lives and assets of our own citizens.”).

the Law on the Punishment of and the Measures against Acts of Piracy in 2009 as a domestic measure to enforce UNSC Resolutions.<sup>465</sup> It also passed legislation approving the deployment of private armed guards on Japan-registered vessels,<sup>466</sup> actively participated in counter-piracy operations off the coast of Somalia,<sup>467</sup> and prosecuted Somali nationals suspected of piracy.<sup>468</sup>

In that regard, the description provided by the U.S. State Department of the threats posed by Somali piracy is telling. According to the State Department's webpage, "[N]inety percent of the world's commerce travels by sea, as does more than half of the world's petroleum. Many of the ships carrying goods and oil travel through the Gulf of Aden, off the coast of Somalia. By 2009, it threatened the free flow of international commerce and energy supplies, which threatened the world economy. This was in addition to the threat posed to World Food Program shipping which was delivering vital food aid to the vulnerable Somali population."<sup>469</sup> This description makes no mention of piracy's role in exacerbating the situation in Somalia and, as already explained, the concern related to the delivery of humanitarian aid cannot be understood as the main reason behind the exceptional number of Resolutions dedicated to maritime piracy. The remaining concern expressed by the U.S., a permanent UNSC member and among the

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<sup>465</sup> Zou Keyuan, *Maritime Enforcement of United Nations Security Council Resolutions: Use of Force and Coercive Measures*, 26 INT'L J. MARINE & COASTAL L. 235, 240 (2011).

<sup>466</sup> See further discussion below regarding the deployment of private guards, *infra* note 552.

<sup>467</sup> See Franz-Stefan Gady, *Japan Extends Anti-Piracy Mission off Somalia For Another Year*, *The Diplomat* (June 22, 2016), available at <http://thediplomat.com/2016/06/japan-extends-anti-piracy-mission-off-somalia-for-another-year> (describing Japan's participation in the Combined Task Force 151 since its inception in 2009 and the decision of the Japanese Government to extend the participation for another year); the Nave Atropos case in the Seychelles, *supra* note 96 (describing the role of a Japanese naval vessel and helicopter in locating and identifying the piracy vessel used in the attack against the Nave Atropos).

<sup>468</sup> See Masami Ito, *12-year Term Urged in Somalis' Piracy Trial*, *THE JAPAN TIMES* (Jan. 29, 2013), <http://www.japantimes.co.jp/news/2013/01/29/national/12-year-term-urged-in-somalis-piracy-trial/#.Ur8GsNJDsu0>.

<sup>469</sup> U.S. DEP'T OF STATE, *Threats from Piracy off Coast of Somalia*, <http://www.state.gov/t/pm/ppa/piracy/c32661.htm>.

leading States in the counter-piracy initiatives, is the threat to the freedom of navigation on the high seas in an area of particular importance for commercial shipping.

The nature of the primary concerns emanating from Somali piracy explains why the UNSC chose to address piracy separately from other aspects related to the situation in Somalia and why, even where authorization was given to carry out operations on land, such authorization was limited to counter-piracy initiatives, rather than allowing additional activities related to other threats posed by the situation in Somalia.<sup>470</sup> It is also not surprising that the UNSC did not elaborate on or detail the precise ways in which piracy exacerbates the situation in Somalia. The nature of the concerns also explains why, in many ways, the piracy Resolutions resemble other UNSC Resolutions that address a general threat to peace and security (such as Resolution 1373 on terrorism) by pointing to the applicable legal instruments, relevant counter-piracy mechanisms, the importance of bringing suspects to justice, and requesting international cooperation to facilitate such prosecutions.

The above assessment of the various concerns that triggered the UNSC intervention leads to the conclusion that the link to the situation in Somalia has served as nothing more than a *vehicle* for the UNSC to address, through its Chapter VII powers, the severe consequences of Somali piracy to international navigation, trade, and safety upon the high seas. Without explicitly determining that piracy poses a threat to peace and security, the piracy Resolutions *de facto* treated piratical attacks off the coast of Somalia as such a threat.

The discussions over the UNSC engagement in this field also reflect the continuous debate regarding the mandate and role of the Security Council in addressing security threats. Piracy lies at the intersection between “classic threats” on the one hand, and more modern, yet

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<sup>470</sup> See discussion below regarding the authorization to operate on Somali territory, granted by UNSC in S.C. Res. 1851, *supra* note 189.



controversial, threats on the other.<sup>471</sup> As an international crime, it would be befitting to address piracy as a classic threat.<sup>472</sup> Yet, piracy's ordinary law crime characteristics would suggest that it can be categorized as a threat to human security<sup>473</sup> or as one related to instability.<sup>474</sup> The various concerns mentioned in the piracy Resolutions – from threats to safe navigation to the security of innocent civilians – show that the piracy threat cannot be precisely classified as belonging to one specific “threat” category. It is perhaps this hybrid nature of piracy that can explain the uniqueness of the Somali piracy Resolutions as the first to address a criminal activity of ordinary law characteristics as the primary subject matter of UNSC Resolutions. It is plausible that the UNSC stopped short of expressly defining piracy as a threat to peace and security for exactly this reason (avoiding possible criticism for stepping beyond its mandate), while it nonetheless addressed piratical acts taking place in the context of the situation in Somalia as if they indeed amount to such threats. .

Be that as it may, the Somali piracy Resolutions are an additional step in the UNSC's evolution. They opened the way for addressing other criminal phenomena of an ordinary-law nature as the main subject-matter of Chapter VII Resolutions. Whether the UNSC's practice will continue to evolve in that direction or whether the Somali piracy Resolutions will be considered as a *sui generis* intervention is remain to be seen.

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<sup>471</sup> See Simma, *supra* note 383, at 1280–91 (discussing various categories of “threats” within the meaning of Article 39 of the UN Charter).

<sup>472</sup> This, indeed, is the position taken in Simma's commentary, where piracy was addressed in the chapter concerning “classical security threats,” which also addresses threats emanating from proliferation, terrorism, and internal armed conflicts. *Id.* at 1280–83.

<sup>473</sup> See S.C. Res. 2077, *supra* note 35448, ¶ 16 (recognizing concerns that piratical activities are jeopardizing the safety and security of innocent civilians).

<sup>474</sup> See Simma, *supra* note 383, at 1284–91.



It appears, however, that the existing environment governing the current UNSC work, particularly the various competing views of its role in addressing matters not considered as “classic threats,” will likely dictate a need to link the threat posed by a criminal activity to a certain situation in a country or a region. The reluctance expressed by certain countries to view maritime piracy as, by itself, a general threat to peace and security within the meaning of Article 39 of the UN Charter, is one indication for the need to establish such a link.<sup>475</sup>

Another indication of the need for a link to a particular situation derives from a comparison to the piracy Resolutions concerning the Gulf of Guinea.<sup>476</sup> Though piratical acts in that region are not a new phenomenon,<sup>477</sup> they have only in recent years (and perhaps also in light of piracy attacks off the coast of Somalia) drawn the attention of the UNSC. In August 2011, the first Presidential Statement on piracy and armed robbery in the Gulf of Guinea was issued. In the Statement, “[T]he members of the Security Council expressed concern over the increase in piracy, maritime armed robbery and reports of hostage-taking in the Gulf of Guinea and its damaging impact on security, trade and economic activities in the subregion.”<sup>478</sup> Two months later, this concern was reiterated, this time through Resolution 2018, the first piracy

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<sup>475</sup> See Progress in Combating Piracy, *supra* note 429. For an example of the impact of such statements and the guidelines for the interpretation of UNSC Resolutions, see Accordance With International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, 403, ¶ 94 (July 22) [hereinafter Kosovo Advisory Opinion] (“The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption.”).

<sup>476</sup> The ICJ also mentions a guideline where the Court will analyze “other resolutions of the Security Council on the same issue.” Kosovo Advisory Opinion, *supra* note 475, at ¶ 94.

<sup>477</sup> See, e.g., INTERNATIONAL CRISIS GROUP, THE GULF OF GUINEA: THE NEW DANGER ZONE 6–12 (2012), available at <http://www.crisisgroup.org/~media/Files/africa/central-africa/195-the-gulf-of-guinea-the-new-danger-zone-english.pdf>.

<sup>478</sup> Press Release, Security Council, Press Statement on Piracy, Maritime Armed Robbery in Gulf of Guinea, U.N. Press Release SC/10372 (Aug. 30, 2011).

Resolution adopted in reference to piratical acts in the Gulf of Guinea. Though the Resolution's title is "peace and security in Africa," and despite mentioning security as one of the concerns, this Resolution – as well as the subsequent one on this matter (Resolution 2039) – was not adopted under Chapter VII.

The fact that the UNSC has yet to intervene in the third region infested by piratical acts, Southeast Asia, further demonstrates that the UNSC feels that it must link its Chapter VII counter-piracy actions to a specific situation. The piracy models and the counter-piracy initiatives in the three regions concerned – Somalia, Gulf of Guinea, and Southeast Asia – differ from one region to the other. Yet, what the two latter regions have in common is that the littoral countries have not been considered by the UNSC as unwilling or unable to counter the piratical acts.

On the other hand, in the context of piracy off the coast of Somalia, the incapability of Somali authorities to handle the piracy threats was among the reasons for the UNSC engagement. For example, in the preamble of Resolution 1816, the UNSC took into account "the crisis situation in Somalia, and the *lack of capacity* of the Transitional Federal Government (TFG) to interdict pirates or patrol and secure either the international sea lanes off the coast of Somalia or Somalia's territorial waters."<sup>479</sup> It therefore appears that, in addition to a link to an existing Chapter VII situation, a key factor for future UNSC intervention in piracy might be the inability or unwillingness of the country concerned to counter the criminal phenomenon.<sup>480</sup>

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<sup>479</sup> S.C. Res. 1816, *supra* note 125, ¶ 7 (emphasis added); *see also* S.C. Res. 1851, *supra* note 189, at ¶ 5; S.C. Res. 1897, *supra* note 320, at ¶ 5.

<sup>480</sup> See Pickard, *supra* note 379, at 16.

Nonetheless, the decline of piracy off the coast of Somalia and the continuous threat posed by piratical acts in the Gulf of Guinea,<sup>481</sup> as well as the reported increase in attacks of piratical nature in Southeast Asia,<sup>482</sup> may shift the attention of the UNSC and possibly lead to a more intensive engagement following an in-depth assessment of the ability and willingness of the countries in those two regions to face the challenges posed by maritime piracy. The UNSC could choose to affect a possible intervention in either the Gulf of Guinea or Southeast Asia by addressing piracy as a stand-alone phenomenon or as part of a broader criminal threat.<sup>483</sup>

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<sup>481</sup> See INTERNATIONAL CRISIS GROUP, *supra* note 477 (entitled “The Gulf of Guinea: The New Danger Zone”); accord UNITAR, *supra* note 433, at 5 (concluding that the number of attacks in the Gulf of Guinea show no sign of decreasing, and pointing out that attacks in the high seas have increased, while attacks in ports are on the decrease); Kaija Hurlburt & D. Conor Seyle, *The Human Cost of Maritime Piracy 2012* 12–21 (Oceans Beyond Piracy, Working Paper, 2013), available at <http://oceansbeyondpiracy.org/publications/human-cost-maritime-piracy-2012> (showing that for the first time since 2012, there has been a swing from east to west in incidents of African piracy: more seafarers were subjected to attacks and boardings by West African piracy than by Somalia-based piracy).

<sup>482</sup> See Patrick Winn, *The World Has a New Piracy Hotspot*, GLOBAL POST (Mar. 27, 2014, 00:56 AM), <http://www.globalpost.com/dispatch/news/regions/asia-pacific/indonesia/140326/malacca-strait-piracy-hotspot> (stating that while pirate attacks in Somali waters plummeted 95 percent, piracy in South-East Asia is accelerating, pointing to a 700 percent increase in just five years). *But see* UNITAR, *supra* note 433, at 31 (observing a slight decrease with regard to attacks in South-East Asia/Malacca, though with no significant trend in the number of attacks, or in their severity). No less disconcerting are the signs that pirates in South-East Asia may have adopted the piracy modalities of their counterparts in Somalia or the Gulf of Guinea, moving from primarily stealing cargo to kidnapping crewmembers. *See Pirates Kidnap 3 on Singapore Tanker Off Malaysia*, HINDUSTAN TIMES (Apr. 23, 2014), <http://www.hindustantimes.com/world-news/pirates-kidnap-three-on-singapore-tanker-off-malaysia/article1-1211179.aspx>. Though it is premature to reach conclusive findings, this case may show that South-East Asia pirates have adopted the Somali “kidnap for ransom” model as well as the Gulf of Guinea fuel-pilfering objective. *See id.*

<sup>483</sup> See S.C. Res. 2039, *supra* note 249, at ¶ 18 (expressing concern “about the serious threats to international peace and stability in different regions of the world, in particular in West Africa and the Sahel Region, posed by transnational organized crime, including illicit weapons and drug trafficking, piracy and armed robbery at sea.”).

#### 4.7. THE PIRACY RESOLUTIONS AS A TOOL TO ADDRESS LEGAL SHORTCOMINGS OF UNCLOS

From the very first piracy Resolution, Resolution 1816, and repeatedly in all the Resolutions that followed, the UNSC affirmed that “international law, as reflected in UNCLOS, sets out the legal framework applicable to combating piracy and armed robbery, as well as other ocean activities.”<sup>484</sup>

It is widely agreed, however, that UNCLOS’ legal framework has shortcomings that can undermine counter-piracy initiatives. First, UNCLOS does not require that States enact domestic anti-piracy laws. As a result, when Somali piracy emerged as an acute problem, many countries did not have adequate domestic legislation to address it.<sup>485</sup>

In addition and as explained in Chapter One, the definition of piracy as provided in Article 101 of UNCLOS raises difficulties and poses many interpretative challenges. Interpretative difficulties also arose over other provisions in the piracy section of UNCLOS, such as with regard to the legality of transfer agreements of suspected pirates to third countries in light of the wording of Article 105 of UNCLOS.<sup>486</sup>

The interpretive challenges posed by UNCLOS have not gone unnoticed by the UNSC. For example, the UNSC has repeatedly encouraged States to criminalize piracy under their domestic law.<sup>487</sup> Early on, the UNSC voiced its concern “that the lack of capacity, domestic

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<sup>484</sup> S.C. Res. 1816, *supra* note 125, at ¶ 4. This paragraph was integrated in the subsequent piracy Resolutions referring both to the situation off the coast of Somalia and to piracy in the Gulf of Guinea. *See* S.C. Res. 2018, *supra* note 249, at ¶ 6.

<sup>485</sup> *See* Introduction, *supra* note 6.

<sup>486</sup> *See* discussion in *supra* Chapter 2.

<sup>487</sup> *See* S.C. Res. 1897, *supra* note 320, at 2 (noting that there is a “need for States to criminalize piracy under their domestic law”). This was the first Resolution in which the UNSC intervened on this point. In the following Resolution, Resolution 1918, the importance of criminalizing piracy under national laws was prominently featured. S.C. Res. 1918, *supra* note 6. The UNSC commended those States that have amended their domestic law in order to

legislation, and clarity about how to dispose of pirates after their capture, has hindered more robust international action against the pirates off the coast of Somalia and in some cases led to pirates being released without facing justice.”<sup>488</sup> Concerned by the prevalence of the practice of “catch and release,” where suspected pirates are caught and, shortly afterwards, released by the naval forces at sea,<sup>489</sup> the UNSC reiterated its “concern over a large number of persons suspected of piracy having to be released without facing justice, *reaffirming* that the failure to prosecute persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia undermines anti-piracy efforts of the international community and *being determined* to create conditions to ensure that pirates are held accountable.”<sup>490</sup>

In light of this strong statement, the UNSC took a number of steps to address the shortcomings of the UNCLOS definition of piracy and assist States in bringing pirates to justice. First, from the very first piracy Resolutions, the UNSC systematically referred to piracy and “armed robbery at sea” together. The repeated reference to the two concepts (“piracy” and “armed robbery at sea”) was meant to ensure that acts of a piratical nature would be addressed, regardless of their geographical location (i.e. high seas or territorial waters); that all acts connected with piracy, such as preparatory acts, would be addressed; and that possible future acts

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criminalize piracy and stressed the need for States to continue their efforts in this regard while noting, with concern, that the domestic law of a number of States lacks provisions criminalizing piracy and/or procedural provisions for effective criminal prosecution of suspected pirates. *Id.* They continued by calling on all States, including States in the region, to criminalize piracy under their domestic law. *Id.* at ¶ 2. Later Resolutions reiterated the call to criminalize piracy and expanded the scope of such criminalization. *See* S.C. Res. 1976, *supra* note 167.

<sup>488</sup> S.C. Res. 1851, *supra* note 35389, ¶ 9; *accord* S.C. Res. 1897, *supra* note 320, ¶ 8.

<sup>489</sup> *See* Lang Report, *supra* note 53, ¶ 59 (providing a case study describing the commanding forces’ decision to release seven suspects after confiscating the weapons found on their boat). According to the Report, an average of nine out of ten captured pirates are never actually prosecuted. *Id.* ¶ 43.

<sup>490</sup> S.C. Res. 1976, *supra* note 167, ¶ 5; *accord* S.C. Res. 2020, *supra* note 317, ¶ 15.

involving only one ship would be covered.<sup>491</sup> The piracy Resolutions, however, neglected to define “piracy” and “armed robbery at sea.” While an express reference to the UNCLOS definition of piracy may have seemed redundant in light of the general reference by the Resolutions to UNCLOS as the applicable legal framework, “armed robbery at sea” is neither mentioned nor defined in UNCLOS or in any other international convention. A reference by UNSC to the IMO definition could have guided States and prevented potential discrepancies between the practices of various national jurisdictions.

In addition, while continuing to systematically mention the applicability of UNCLOS, the UNSC gradually referred to additional international instruments that can fill the gaps identified in UNCLOS. This included a repeated reference to the potential application of SUA Convention,<sup>492</sup> which, as the UNSC explained, “provides for parties to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation.”<sup>493</sup> In addition, as addressed above, Resolution 1851 noted the potential application of UNTOC.

Both the SUA Convention and UNTOC not only enable prosecution in situations which are not covered by the piracy section of UNCLOS – such as certain piratical acts carried out in territorial waters – but also provide for robust cooperation mechanisms with regard to extradition and mutual legal assistance, which are not detailed in the UNCLOS piracy section.<sup>494</sup> For

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<sup>491</sup> See Treves, *Developments*, *supra* note 147, at 403; Treves, *Piracy and the International Law of the Sea*, *supra* note 285, at 125.

<sup>492</sup> The SUA Convention was first referenced in Resolution 1846. S.C. Res. 1846, *supra* note 296, ¶ 32.

<sup>493</sup> S.C. Res. 1846, *supra* note 296.

<sup>494</sup> For UNTOC see the detailed provisions on extradition (Article 16) and mutual legal assistance (Article 18); The SUA Convention established that the offences defined in Article 3 of the Convention are extraditable (Article 11). See also the discussion over the application of these conventions in Roach, *supra* note 243, and Cheah Wui Ling,

example, by implementing the relevant provisions of SUA and UNTOC on transfer of suspects, States can overcome the potential difficulty of Article 105 of UNCLOS, which has been interpreted by some commentators as permitting only the State that seized the suspected pirates to try them.<sup>495</sup>

In light of the growing threats of piratical attacks against fixed platforms, in particular in the Gulf of Guinea, the UNSC also noted, “that applicable international legal instruments provide for parties to create criminal offences, establish jurisdiction, and prosecute or extradite for prosecution, persons responsible for or suspected of seizing or exercising control over a ship or fixed platform by force or threat thereof or any other form of intimidation.”<sup>496</sup> The UNSC chose not to mention a specific convention, making only a general reference to “applicable international legal instruments.” These may include the abovementioned SUA Convention and UNTOC, as well as the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, adopted under the SUA Convention.<sup>497</sup>

Just as interesting is the reference made by the UNSC in Resolution 2018 to the legal basis for the prosecution of suspects who committed “threats” and “any other form of intimidation.” As discussed above, it is unclear whether the UNCLOS definition of piracy encompasses threats to commit violence. To ensure that such acts do not go unpunished, the UNSC mentioned the

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*Extradition and Mutual Legal Assistance*, *supra* note 243.

<sup>495</sup>Article 8 of the SUA Convention provides for delivery of any person who is suspected to have committed one of the offences listed in Article 3 of the Convention. “UNSCR 1851 seeks to remind States that under certain conditions they might have a duty to accept delivery of pirates and to try them for offences under the SUA Convention (although this involves a strained reading of Art. 8). This appears to be an attempt to harness positive obligations in SUA to fill lacunae in the general law of piracy.” Guilfoyle, *UN Security Council Resolution 1816*, *supra* note 4264.

<sup>496</sup>S.C. Res. 2018, *supra* note 249, (emphasis added).

<sup>497</sup>1988 Protocol, *supra* note 162.

applicability of international legal instruments in the matter, rather than relying solely on UNCLOS.<sup>498</sup>

The UNSC took an even more proactive approach in Resolution 1976. In that Resolution, rather than simply noting the applicability of various instruments, the UNSC urged “all States, including States in the region, to criminalize piracy under their domestic law, emphasizing the importance of criminalizing incitement, facilitation, conspiracy and attempts to commit acts of piracy.”<sup>499</sup> Acts of incitement and facilitation are explicitly mentioned in the piracy definition, but,<sup>500</sup> as previously explained, conspiracy and attempt to commit piracy are not. As a result, Resolution 1976 encouraged States to substantially expand the range of piratical actions that could be prosecuted.

A similarly broad interpretational paradigm was later expressed by the UNSC with regard to the question of “dry land piracy,” or the facilitation of piratical acts by persons who are on land. In Resolution 2015, the UNSC underlined the importance for courts “to have jurisdiction to be exercised over not only suspects captured at sea, but also 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.”<sup>501</sup> In Resolution 2020, the UNSC noted with appreciation the “ongoing efforts within the CGPCS and the United Nations Secretariat to explore possible additional mechanisms to effectively prosecute persons

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<sup>498</sup> See, e.g., 1988 Protocol, *supra* note 162, at art. 2 (emphasis added) (“Any person commits an offence if that person unlawfully and intentionally: (a) seizes or exercises control over a fixed platform by force or threat thereof or any other form of intimidation”). The wording of Resolution 2018 is the same as that of the Protocol. See S.C. Res. 2018, *supra* note 249.

<sup>499</sup> S.C. Res. 1976, *supra* note 35367.

<sup>500</sup> UNCLOS, at art. 101(c).

<sup>501</sup> S.C. Res. 2015, *supra* note 353. The UNSC reiterated this point in Resolutions 2020, 2077, and 2125. S.C. Res. 2020, *supra* note 317; S.C. Res. 2077, *supra* note 248; S.C. Res. 2125, *supra* note 353.



suspected of piracy and armed robbery at sea off the coast of Somalia, including those ashore who incite or intentionally facilitate acts of piracy.”<sup>502</sup>

None of the statements made in Resolutions 1976, 2015, or 2020 are binding.<sup>503</sup> However, urging States to criminalize and exercise jurisdiction over acts that do not fall squarely within the UNCLOS definition of piracy may be perceived as an attempt by the Council to broaden the scope of the UNCLOS definition.

While the purpose behind expressing a broad interpretational approach is certainly understood, it nonetheless raises a number of difficulties. First, it can support those arguing against a “hyperactive Security Council”<sup>504</sup> and criticizing UNSC’s role as a “world legislator.”<sup>505</sup> It can also be argued that, by providing its own interpretation of what constitutes piracy, the UNSC encroached on the competency of the International Tribunal for the Law of the Sea, which has jurisdiction over questions concerning the interpretation of UNCLOS.<sup>506</sup>

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<sup>502</sup> S.C. Res. 2020, *supra* note 317 (emphasis added).

<sup>503</sup> Compare, for example, with UNSC Resolution 1373, *supra* note 305, where the UNSC decided that States “shall” criminalize certain acts that support terrorist activities. S.C. Res. 1373, and with UNSC Resolution 1540, *supra* note 403, where the UNSC decided that all States *shall* adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery.

<sup>504</sup> Simon Chesterman et al., *The Security Council and the Rule of Law*, 103 AM. SOC’Y INT’L L. PROC. 245, 252 (2009).

<sup>505</sup> Talmon, *supra* note 405, at 175 (“It may thus be argued that any provision in a binding Security Council resolution that conflicts with an applicable treaty provision has the effect of an *ad hoc* or even permanent *de facto* amendment to the treaty, which is to say an alteration of the treaty without alteration to its text.”). Professor Talmon has also referred to the first piracy Resolution as another indicator that the UNSC is exercising legislative powers. Chesterman et al., *supra* note 504, at 251. *But see* Treves, *Developments supra* note 147, at 404 (“[The UNSC] framed the relevant resolutions very cautiously. It has introduced a number of limitations which make the provisions adopted less revolutionary than they might appear, and seem aimed, in particular, at fending off possible criticism of the Council acting as a ‘legislator.’”).

<sup>506</sup> See UNCLOS, art. 288; *id.* at annex VI (providing the “Statute of the International Tribunal for the Law of the

In addition, the piracy Resolutions may create ambiguities with regard to the powers of States when applying their national laws concerning piracy. Though there is nothing to prevent a State from defining piracy under its national law in a more expansive manner than it is defined under UNCLOS, the unique powers conferred by UNCLOS – notably seizure of a pirate vessel and arresting piracy suspects (Article 105, UNCLOS) – may be exercised only where the acts committed fall within the scope of the piracy definition under Article 101 of UNCLOS. A State which interdicted a ship on the high seas based on a broader view of piracy under its national legislation (for example, with regard to the crimes of conspiracy and attempt to commit piracy), may be in violation of international law and can be held liable for any loss or damage caused by the unlawful seizure (Article 106, UNCLOS).

Further, while the UNSC did not express its position on the contours of piracy in a binding manner, its views can still impact the decisions of national courts. An example of this impact is the decision of the U.S. Court of Appeals in the case of *Shibin*.<sup>507</sup> In that case, the defendant served as a negotiator and operated only from Somali land and its territorial waters. The defendant claimed that in order for his facilitating conduct to amount to piracy within the meaning of the piracy definition under UNCLOS, his conduct must also have been carried out on the high seas. The Court, however, rejected this argument, based, *inter alia*, on the UNSC piracy Resolutions. The Court mentioned that “Additionally, *Shibin*’s argument is inconsistent with the interpretation of Article 101 given by various international authorities, including the United Nations Security Council.”<sup>508</sup> It then quoted the relevant paragraphs from Resolutions 1976 and 2020 and stated that “These sources reflect, without ambiguity, the international viewpoint that

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Sea”).

<sup>507</sup> *United States v. Shibin*, *supra* note 188.

<sup>508</sup> *Id.* at 241.

piracy committed on the high seas is an act against all nations and all humankind and that persons committing those acts on the high seas, *as well as those supporting those acts from anywhere*, may be prosecuted by any nation under international law.”<sup>509</sup>

Clearly, the UNSC Resolutions and their interpretation of the crime of piracy as also encompassing land-based activities guided the Court in reaching its decision. The difficulty here is not necessarily the substantive interpretation of Article 101(c) of UNCLOS to include “dry land piracy,” or the outcome of the criminal proceedings in this case – both of which this author supports. Rather, the concern is that the UNSC’s piracy Resolutions, which can be understood as *de facto* treaty interpretation (if not legislation), may serve to tilt the balance towards conviction and can therefore potentially undermine the defendant’s rights, notably the general principle under criminal law of *in dubio pro reo*.

In that respect, the UNSC could have perhaps taken a more prudent approach in addressing the definitional aspects of piracy by, for example, urging States to criminalize “acts of piratical nature.” This phrase can potentially include activities that do not fall squarely within the UNCLOS piracy definition (e.g. conspiracy), without creating uncertainties with regard to States’ powers and the interpretation of the term “piracy” under Article 101 of UNCLOS.

Another noteworthy point related to the interpretation of UNCLOS concerns the “private ends” element. As mentioned in Chapter One, this element is among the most controversial and potentially consequential elements of the crime of piracy as defined by UNCLOS. Scholarly debate generally presents two points of view regarding the interpretation of this phrase, the first focuses on the distinction between private as opposed to politically motivated acts, and it often considers “private ends” to mean pecuniary goals. Conversely, the second interpretive approach

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<sup>509</sup> *Id.* at 242 (emphasis in original).

is based on an objective test which distinguishes the term “private” from the term “public” (in the meaning of state sanctioned acts), thereby viewing all acts of violence that lack a State’s authority as those committed for “private ends” within the meaning of Article 101.

The piracy Resolutions were not intended to solve this scholarly debate. Nonetheless, in Resolution 2077, the UNSC stated that “the concerns about protection of the marine environment as well as resources should not be allowed to mask the true nature of piracy off the coast of Somalia which is a transnational criminal enterprise driven primarily by the opportunity for financial gain.”<sup>510</sup> By doing so, the UNSC (perhaps unintentionally) provided an additional basis to ensure that, regardless of the test chosen, the “private ends” element will not serve as an obstacle to prosecution. If the subjective private/political test is applied, the predominance of a pecuniary gain objective would ensure fulfillment of the element. If the objective private/public test is invoked, the reference to a “transnational criminal enterprise” will support viewing the acts as private, rather than as State-sponsored undertakings.

In conclusion of this Part, the UNSC attempted to address some of the main gaps and flaws identified in UNCLOS legal framework through the piracy Resolutions. However, as with other aspects of the piracy Resolutions discussed above, the UNSC’s approach was somewhat contradictory. On the one hand, the UNSC expressed a cautious approach by making a systematic reference to the applicability of UNCLOS, highlighting that the Resolutions are not designed to create new customary law, and opting to encourage or urge countries to act, for instance, to pass appropriate legislation, rather than requiring them to do so (in comparison to counter-terrorism Resolutions such as UNSC Resolution 1373). On the other hand, the broad interpretational view espoused by the UNSC, along with the positions it expressed on certain

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<sup>510</sup> S.C. Res. 2077, *supra* note 248, (emphasis added).

points, reflect a proactive approach. This proactive approach has drawn criticism from some who believe that this latest evolution in UNSC practice is too far-fetched.

#### 4.8 TOWARDS A HOLISTIC APPROACH

Combating piracy undoubtedly calls for a comprehensive and holistic approach, which addresses both the threat at sea and its root causes, while engaging as many pertinent actors from different fields of expertise as possible.<sup>511</sup>

The holistic paradigm echoes the common understanding that national and international security are becoming increasingly interrelated.<sup>512</sup> Thus, criminal activities that are typically addressed by national authorities may require mechanisms that transcend national boundaries. This approach has been present in the piracy Resolutions, where the UNSC stressed its respect for the sovereignty of the coastal states,<sup>513</sup> and their primary responsibility in addressing

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<sup>511</sup> The delegate from the Republic of South Africa argued for a more holistic approach after the adoption of Resolution 2077. Press Release, Security Council, Unremitting Piracy off Somalia's Coast Prompts Security Council to Renew 'Authorizations' for International Action for Another Year, U.N. Press Release SC/10824 (Nov. 21, 2012) ("Welcoming the action and noting his country's participation in the struggle against piracy, South Africa's representative stressed, however, that the solution to the problem demanded holistic solutions."). The delegate from the People's Republic of China emphasized the need to address the root causes of piracy following the adoption of Resolution 1816. U.N. SCOR, 63d Sess., 5902d mtg. at 5, U.N. Doc. S/PV.5902 (June 2, 2008) ("The international community, while helping Somalia to combat piracy, should focus its attention on removing the root causes of the current situation in Somalia."). The representative from the People's Republic of China reiterated this position in the context of the discussion over the adoption of Resolution 1846. See Press Release, Security Council, Security Council Decides States, Regional Organizations May Use 'All Necessary Means' To Fight Piracy Off Somalia Coast For 12-Month Period, U.N. Press Release SC/9514 (Dec. 2, 2008).

<sup>512</sup> See generally G.A. Res. 41/90, ¶ 28, U.N. Doc. A/RES/41/90 (Dec. 4, 1986).

<sup>513</sup> See, e.g., S.C. Res. 1816, *supra* note 125 (emphasizing "respect for the sovereignty, territorial integrity, political independence and unity of Somalia"); S.C. Res. 2018, *supra* note 249, (expressing concern for the "respect for the sovereignty and territorial integrity of the States of the Gulf of Guinea and their neighbours").

piracy,<sup>514</sup> while at the same time recognizing the need for the involvement of other actors on both the regional and international level.<sup>515</sup>

The evolution of the piracy Resolutions further reflects this comprehensive and inclusive approach. First, the piracy Resolutions and other UNSC instruments repeatedly refer to the need to adopt a comprehensive strategy and to address the underlying causes of piracy.<sup>516</sup> Further, in addition to reiterating the principles mentioned in previous Resolutions and renewing the authorizations provided therein, almost every Resolution that followed Resolution 1816

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<sup>514</sup> In the West Africa Resolutions, the UNSC emphasized that states in the region have to take a leadership role in countering piracy and armed robbery at sea in the Gulf of Guinea. S.C. Res. 2018 *supra* note 249; S.C. Res. 2039, *supra* note 249.

<sup>515</sup> Regarding Somalia, the Piracy Resolutions emphasize the crisis situation in that country and the inability of the Transitional Federal Government (TFG) to combat piracy in order to rationalize the authorization to enter Somali waters. S.C. Res. 1816, *supra* note 125. In the West Africa Resolutions the Security Council noted “the need for international assistance as part of a comprehensive strategy to support national and regional efforts to assist States in the region with their efforts to address piracy and armed robbery at sea in the Gulf of Guinea.” S.C. Res. 2018, *supra* note 249; S.C. Res. 2039, *supra* note 249.

<sup>516</sup> Resolutions 1976 and 1838 address these concerns in the Somalia context. *See, e.g.*, S.C. Res. 1976, *supra* note 167 (“Emphasizing the importance of finding a comprehensive solution to the problem of piracy and armed robbery at sea off the coast of Somalia.”); S.C. Res. 1838, *supra* note 320 (“Emphasizing that peace and stability, the strengthening of State institutions, economic and social development and respect for human rights and the rule of law are necessary to create the conditions for a full eradication of piracy and armed robbery at sea off the coast of Somalia.”). Resolutions 2039 and 2018 emphasize these needs in the Gulf of Guinea context. S.C. Res. 2039, *supra* note 249 (“Noting the importance of adopting a comprehensive approach led by the countries of the region to counter the threat of piracy and armed robbery at sea in the Gulf of Guinea and their underlying causes.”); S.C. Res. 2018, *supra* note 249 (“Emphasizing the importance of finding a comprehensive solution to the problem of piracy and armed robbery at sea in the Gulf of Guinea.”); *see generally* Press Release, Security Council, Press Statement on Piracy, Maritime Armed Robbery in Gulf of Guinea, *supra* note 478 (“[T]he members of the Council underlined the need for regional coordination and leadership in developing a comprehensive strategy to address this threat.”); U.N. President of the S.C., Statement by the President of the Security Council, ¶ 9, U.N. Doc. S/PRST/2013/13 (Aug. 14, 2013) (“The Security Council stresses the importance of adopting a comprehensive approach led by the countries of the region to counter the threat of piracy and armed robbery at sea in the Gulf of Guinea, as well as related criminal activities, and to address their underlying causes.”).

addressed new aspects or mentioned new instruments or actors involved in combating maritime piracy.<sup>517</sup>

Thus, the Resolutions made explicit reference to the importance of combating all forms of piracy, including incitement, conspiracy, and attempts to commit piracy.<sup>518</sup> The Resolutions have addressed a variety of issues that have emerged as incidents of piracy escalated, such as the recruitment of child pirates and the need to assist the seafarers who are victimized by pirates.<sup>519</sup> One Resolution also requested that States and regional organizations consider possible ways to seek and allow for the effective contribution of the Somali diaspora to anti-piracy efforts.<sup>520</sup> Relevant legal instruments beyond UNCLOS were mentioned with a view toward establishing a broad legal framework that would enable prosecution of suspects and cooperation among States.<sup>521</sup>

In addition, while the first piracy Resolutions addressed only States and a limited number of international and regional organizations, subsequent Resolutions addressed a growing number of the organizations involved.<sup>522</sup> The UNSC laid the foundations for the creation of the Contact Group on Piracy off the Coast of Somalia (CGPCS), an informal, ad hoc, international

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<sup>517</sup> See also Treves, *Developments*, *supra* note 147, at 402–04 (noting that the later piracy Resolutions, while repeating the main points made in the early ones, have become richer and more nuanced by taking into account the growing knowledge of the phenomenon brought to the attention of the Security Council).

<sup>518</sup> See discussion above on UNSC interventions to address the shortcomings of UNCLOS.

<sup>519</sup> See S.C. Res. 2077, *supra* note 248.

<sup>520</sup> S.C. Res. 2015, *supra* note 353.

<sup>521</sup> See discussion above on UNSC interventions to address the shortcomings of UNCLOS.

<sup>522</sup> *Cf.* S.C. Res. 2077, *supra* note 248 (referring to the Regional Anti-Piracy Prosecution & Intelligence Coordination Centre in Seychelles); S.C. Res. 1950, *supra* note 321 (welcoming the work of INTERPOL and Europol).

cooperation mechanism,<sup>523</sup> and continuously noted with appreciation the coordination role the CGPCS played.<sup>524</sup> In doing so, the UNSC actively contributed to the development of a modern international governance paradigm, which is based on the joint work of both classical bodies (like the UNSC itself) and loose, informal networks (like the CGPCS). Through its Resolutions, the UNSC also engaged the private sector<sup>525</sup> and recognized the importance of using public information tools to raise awareness and inform the public of the dangers posed by piracy.<sup>526</sup>

However, the UNSC was less involved in other aspects of counter-piracy. For example, early on, the international community recognized that an all-encompassing paradigm to eradicate piracy must include land-based solutions, such as the rebuilding of Somali institutions. In a briefing that followed the adoption of Resolution 1851, the UN Secretary General stated that, “Anti-piracy efforts, therefore, must be placed in the context of a comprehensive approach that fostered an inclusive peace process in Somalia and assisted the parties to rebuild security, governance capacity, addressed human rights issues and harnessed economic opportunities

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<sup>523</sup> The CPGCS was established in 2009 pursuant to S.C. Res. 1851, *supra* note 189 (encouraging “all States and regional organizations fighting piracy and armed robbery at sea off the coast of Somalia to establish an international cooperation mechanism to act as a common point of contact between and among states, regional and international organizations on all aspects of combating piracy and armed robbery at sea off Somalia’s coast.”). See further discussion on the CGPCS *infra* Chapter 5.

<sup>524</sup> Cf. S.C. Res. 1976, *supra* note 167 (calling upon states and regional organizations “to further increase their coordination to effectively deter, prevent and respond to pirate attacks, including through the CGPCS,” commending the CGPCS for its contributions to such endeavors as developing an “updated version of the Best Management Practices to Deter Piracy off the Coast of Somalia and in the Arabian Sea Area (BMP),” and encouraging the CGPCS to contribute to the work related to the procedures for the preservation of evidence that may be used in criminal proceedings); S.C. Res. 1897, *supra* note 320 (commending “the work of the CGPCS to facilitate coordination in order to deter acts of piracy and armed robbery at sea off the coast of Somalia.”).

<sup>525</sup> Cf. S.C. Res. 1950, *supra* note 321 (urging both state and non-state actors affected by piracy, most notably the international shipping community, to contribute to the Trust Funds created to combat piracy); see also *infra* Part 4.9.

<sup>526</sup> S.C. Res. 2077, *supra* note 248.



throughout the country.”<sup>527</sup> Typically, capacity building and similar initiatives would be addressed by other bodies (e.g. the United Nations Development Programme - UNDP). Accordingly, the UNSC added its voice and weight in underscoring this important general aspect,<sup>528</sup> but did not engage in detailed instructions, so as to avoid encroaching on the mandates of other bodies.

The relative lack of UNSC involvement was also notable on two important, albeit controversial, counter-piracy measures: the criminalization of ransom payments to pirates and the deployment of private security guards on board commercial ships.

#### 4.8.1. The question of ransom payments

The Somali piracy model is based on hijacking ships for ransom. Considering that no instrument of international law specifically addresses the problem of ransom payments to pirates,<sup>529</sup> and in light of the leading role of the UNSC in addressing Somali piracy, one would have expected that the UNSC would have considered the issue. Indeed, in its November 2008 report, the Monitoring Group on Somalia recommended that “[T]he Security Council take under consideration the issue of ransom payments for the release of vessels hijacked off the Somali coast, and the linkage between ransom payments and arms embargo violations, and adopt a common position on the

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<sup>527</sup> Press Release, Security Council, Security Council Authorizes States To Use Land-Based Operations In Somalia, As Part Of Fight Against Piracy Off Coast, Unanimously Adopting 1851 (2008), U.N. Press Release SC/9541 (Dec. 16, 2008).

<sup>528</sup> Cf. S.C. Res. 2077, *supra* note 248 (“[P]eace and stability within Somalia, the strengthening of State institutions, economic and social development and respect for human rights and the rule of law are necessary to create the conditions for a durable eradication of piracy and armed robbery at sea off the coast of Somalia.”).

<sup>529</sup> Kolb, Salomon & Udich, *supra* note 449, at 121.

legality of such payments.”<sup>530</sup> In light of “the inapplicability of the International Convention for the Suppression of the Financing of Terrorism, the illegality of ransom payments to pirates on the international level could only result from Security Council resolutions.”<sup>531</sup>

Accordingly, the UNSC could have taken various steps to address this topic. Nonetheless, though the UNSC expressed early on its concern “over the finding contained in the 20 November 2008 report of the Monitoring Group on Somalia that escalating ransom payments are fueling the growth of piracy off the coast of Somalia,”<sup>532</sup> it took no such step. Nor did the UNSC seek to thoroughly consider the matter through, for example, requesting the UN Secretary-General to explore the various aspects of ransom payments and report back to the UNSC, as was done with the Lang Report. Moreover, by urging States “to take appropriate actions under their *existing domestic law* to prevent the illicit financing of acts of piracy and the laundering of its proceeds,”<sup>533</sup> it became clear that the UNSC would not intervene in States’ decisions regarding whether to consider ransom payments as illicit financing of piracy.

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<sup>530</sup> Report of the Monitoring Group on Somalia, *supra* note 245, para. 271.

<sup>531</sup> Kolb, Salomon & Udich, *supra* note 449, at 138. Other authors, however, argued that the Terrorism Financing Convention can be applicable to counter maritime piracy, cf. Cheah Wui Ling, *Extradition and Mutual Legal Assistance*, *supra* note 243 (arguing that both the SUA Convention and the Terrorism Financing Convention “are sometimes misunderstood as only applicable to typical terrorist crimes or crimes with a terrorist-motive... the relevant treaty provisions do not impose such a motive requirement. Rather, they focus on certain harmful acts committed rather than the objectives underlying the acts. There is no legal obstacle to applying these treaties to piracy or serious maritime crimes if other treaty requirements are met.” She concludes that the Terrorism Financing Convention “could apply to acts that finance the taking of hostages and the endangerment of maritime navigation, as defined in the 1979 Hostages Convention and the 1988 SUA respectively.”); Roach, *supra* note 243, at 408 (concluding that “[T]he methods and processes by which ransoms are paid to the pirates operating off the coast of Somalia seem to fit squarely within these definitions [of the Terrorism Financing Convention]”).

<sup>532</sup> S.C. Res. 1846, *supra* note 296. The UNSC reiterated its concerns in subsequent Resolutions. See S.C. Res. 2077, *supra* note 248; S.C. Res. 1950, *supra* note 321; S.C. Res. 1897, *supra* note 320; S.C. Res. 1851, *supra* note 189.

<sup>533</sup> S.C. Res. 1950, *supra* note 321 (emphasis added).

The backdrop for the UNSC’s silence on the matter is the controversy surrounding the criminalization of ransom payments. While some countries, such as Italy and Colombia, have enacted legislation forbidding victims and their families from making ransom payments, or even negotiating with kidnappers,<sup>534</sup> others, such as the United Kingdom, have not passed similar laws.<sup>535</sup> Moreover, it has been reported in some instances that even public authorities have engaged in ransom negotiations.<sup>536</sup>

Additionally, any effort to require or even encourage States to criminalize ransom payments to pirates would encounter legal hurdles such as human rights consideration and could draw opposition from the shipping industry. This debate is not unique to piracy. Indeed, the UNSC has been grappling with the question of how to address ransom payments to terrorists and extremists groups.<sup>537</sup> This multifaceted controversy may explain why the UNSC, as well as the Lang Report, shied away from espousing a clear stance in the matter.<sup>538</sup>

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<sup>534</sup> See Walter Block & Patrick Tinsley, *Should the Law Prohibit Paying Ransom to Kidnappers?*, 6(2) AM. REV. POL. ECON. 40, 41–42 (Dec. 2008).

<sup>535</sup> See Kolb, Salomon & Udich, *supra* note 449, at 159.

<sup>536</sup> See *id.* at 156 (mentioning the involvement of German authorities in guiding ship owners through the process of ransom negotiations).

<sup>537</sup> Resolution 1373 forbids all financing of terrorism. S.C. Res. 1373, *supra* note 305. For further discussion on the applicability of Resolution 1373 to ransom payments, see Kolb, Salomon & Udich, *supra* note 449, at 139–51. Yet, it was not before 2014 that the UNSC expressed a clear stance on ransom payments to terrorist groups. In Resolution 2133 of January 27, 2014, the UNSC called upon Member States “to prevent terrorists from benefiting directly or indirectly from ransom payments.” S.C. Res. 2133, ¶ 3, U.N. Doc. S/RES/2133 (Jan. 27, 2014). The UNSC further recognized “the need to continue expert discussions on kidnap for ransom by terrorists.” *Id.* at ¶ 6. Nonetheless, states’ practices remain inconsistent. See, e.g., Michelle Nichols, *U.N. Security Council Urges End to Ransom Payments to Extremists*, REUTERS (Jan. 27, 2014, 5:21PM), <http://www.reuters.com/article/2014/01/27/us-kidnappings-ransoms-un-idUSBREA0Q1RI20140127> (“The United States and Britain do not pay ransoms, but some European governments do.”).

<sup>538</sup> The Lang Report did not discuss the criminalization of ransom payments. See Lang Report, *supra* note 53, ¶ 100. Perhaps aware of the difficulty in reaching a consensus on that issue, Lang alternatively proposed that “the adoption

Notwithstanding the difficulties associated with addressing ransom payments in a general manner, the UNSC could have tackled the issue using a narrower and more “chirurgical” mechanism. For instance, the UNSC could have prohibited making ransom payments to individuals or entities subject to the UNSC’s targeted sanctions regime. While, as mentioned, the UNSC continues to refrain from issuing an overall prohibition of ransom payment in the context of terrorism, it has banned ransom payments to individuals and entities listed on the Consolidated List created pursuant to resolutions 1267 (1999) and 1333 (2000), which identify members of Al Qaida and the Taliban. In Resolution 1904, the Security Council confirmed that the requirements to freeze the assets and ensure that no other source of funding is made available to terrorist groups, “shall also apply to the payment of ransoms to individuals, groups, undertakings or entities on the Consolidated List.”<sup>539</sup>

In the context of Somalia, the UNSC could have applied a regime similar to the one embodied in Resolution 1904. Namely, the UNSC could have prohibited ransom payments to individuals or entities listed on the Consolidated List created pursuant to Resolution 1844. This list is comprised of individuals and entities designated by the Security Council Committee concerning Somalia and Eritrea, created pursuant to Resolutions 751(1992) and 1907(2009).<sup>540</sup>

Alternatively, even absent an explicit prohibition, a similar result could have perhaps been

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of individual sanctions against instigators by the Security Council . . . could be made effective more quickly, without criminalizing the payment of ransoms.” *Id.*

<sup>539</sup> See S.C. Res. 1904, ¶ 26, U.N. Doc. S/RES/1904 (Dec. 17, 2009). Resolution 1904’s explicit prohibition of ransom payments to listed terrorist groups was reportedly introduced by Algeria. See Fidet Mansour, *Algeria seeks to end ransom payments to terrorists*, MAGHAREBIA (Nov. 9, 2009), [http://www.magharebia.com/cocoon/awi/xhtml1/en\\_GB/features/awi/features/2009/11/09/feature-01](http://www.magharebia.com/cocoon/awi/xhtml1/en_GB/features/awi/features/2009/11/09/feature-01).

<sup>540</sup> See SECURITY COUNCIL COMMITTEE PURSUANT TO RESOLUTIONS 751 (1992) AND 1907 (2009) *supra* note 440 (providing background of the Committee, criteria for designation of individuals and entities, and the current Consolidated List).

obtained by listing suspected pirates – notably the piracy kingpins – on the Consolidated List. Since in Resolution 1844 the UNSC expressed its grave concern over piracy incidents, one can argue that in applying Resolution 1844, UN Member States are obligated to prevent the payment of ransom to pirates inscribed on the Consolidated List.<sup>541</sup>

Calls for such action by the UNSC were made in both the Lang Report, which recommended applying individual sanctions against instigators based on Resolution 1844,<sup>542</sup> and by the Monitoring Group on Somalia. The latter, in its November 2008 report, noted that it “believes that some leading figures in piracy syndicates are responsible for arms embargo violations and should be considered for targeted sanctions imposed by Security Council resolution 1844 of 20 November 2008.”<sup>543</sup> In that report, the Monitoring Group mentioned specific individuals who led piracy activities at the time.<sup>544</sup>

The evidence collected by the Monitoring Group could have been used by the UNSC and its Somalia/Eritrea Sanctions Committee for the purpose of designating the individuals on the Consolidated List. However, the UNSC did not move forward with sanctions in its piracy Resolutions. In some of its later Resolutions, the UNSC only mentioned “its intention to keep under review the possibility of applying targeted sanctions against such individuals and entities if

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<sup>541</sup> See Kolb, Salomon & Udich, *supra* note 449, at 155–56 (reaching a similar conclusion with regard to ransom payments to piracy groups operating from Al-Shabaab strongholds). The authors, however, pointed to the fact that international state practice calls into question the understanding that Resolution 1844 imposes such an obligation. *Id.*

<sup>542</sup> See Lang Report, *supra* note 53, at ¶ 100.

<sup>543</sup> *Id.* at ¶ 123.

<sup>544</sup> See Report of Monitoring Group, *supra* note 245, ¶ 134 (“The Monitoring Group has already described the involvement in piracy of Garaad Mohamud Mohamed and Mohamed Abdi Hassan ‘Afweyne’, both leaders of the central Somalia network based in Harardheere. Information received by the Monitoring Group indicates that they were joined in 2005 by Farah Hirsi Kulan ‘Boyah’, a long-term acquaintance, and perpetrated several acts of piracy together.”).

they meet the listing criteria set out in paragraph 8 resolution 1844 (2008).”<sup>545</sup> To date, only one individual (Mohamed Sa’id “Atom”) included on the Consolidated List has reportedly engaged in piracy activities. Though, as the Consolidated List indicates, his involvement in piracy was not the primary reason behind his addition to the List.<sup>546</sup>

In conclusion, while the UNSC was called to actively engage and even lead the discussions on the international level over the criminalization of ransom payments, and while it also had the opportunity to address the topic in a more limited manner by using targeted sanctions, the UNSC chose not to intervene at all. The most likely reason for UNSC’s failure to act is the lack of consensus among States over the matter. Consequently, other bodies had to address the subject.<sup>547</sup> Unfortunately, those bodies lack the power and authority of the UNSC and their contribution could not replace that of the UNSC.

#### 4.8.2. Private Security Guards On-Board Commercial Ships

A second contentious issue on which the UNSC did not readily engage concerns the deployment of private security guards on board commercial ships in order to deter and counter piracy attacks. In light of the interest expressed by the private industry – and by some States – in exploring the

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<sup>545</sup> See S.C. Res. 1976, *supra* note 167; *see also* S.C. Res. 2125, *supra* note 353; S.C. Res. 2077, *supra* note 248.

<sup>546</sup> According to the Consolidated List, Mohamed Sa’id Atom is a militia leader implicated in various illegal acts, including kidnapping, piracy and terrorism. Atom’s militia may also have played a role in the June 2008 kidnapping of a German couple by pirates. *See* U.N. Security Council Committee, List of Individuals and Entities Subject to the Measures Imposed by Paragraphs 1, 3 and 7 of Security Council Resolution 1844 (2008) (Apr. 12, 2010), [http://www.un.org/sc/committees/751/pdf/1844\\_cons\\_list.pdf](http://www.un.org/sc/committees/751/pdf/1844_cons_list.pdf) (last updated Sept. 24, 2014).

<sup>547</sup> For example, the Prime Minister of the United Kingdom established a fourteen-nation task force called the International Piracy Ransoms Task Force, which published its recommendations in December 2012. *Piracy Ransoms Task Force publishes recommendations*, GOV.UK (Dec. 11, 2012), <https://www.gov.uk/government/news/piracy-ransoms-task-force-publishes-recommendations>.

matter, this topic was among the first to be discussed in fora such as Working Group 2 of the CPGCS.<sup>548</sup> Nonetheless, since the deployment of privately contracted, armed security personnel raises a host of difficult legal issues – for example, the use of force and rules of engagement –<sup>549</sup> the discussions over the topic did not proceed rapidly.

While awaiting the results of the work on the topic by the IMO, the CPGCS, and other bodies,<sup>550</sup> and possibly due to the complexity of the matter, the UNSC chose not to express its position or otherwise advance the matter. Thus, it was not until Resolution 2020 of November 2011 that the UNSC made its first reference to private guards. This reference was restrained, however, and simply recognized the work of IMO and the CPGCS.<sup>551</sup>

In the meantime, however, the shipping industry had pushed towards legalizing the use of private guards,<sup>552</sup> and states have gradually adopted more favorable positions on the issue.<sup>553</sup> No

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<sup>548</sup> The CPGCS created five working groups to address various aspects of the counter-piracy initiatives. Working Group 2 was the “Legal Forum of the CGPCS” – see <http://oceansbeyondpiracy.org/matrix/contact-group-piracy-coast-somalia-cgpcs>. The author attended several meeting of Working Group 2 (WG2), where the question of private armed guards was raised for discussion by States attending that meeting. On the discussions by WG2 on the legal aspects associated with the deployment of private security guards see e.g. *Outcome of CGPCS Working Group Meetings*, BIMCO, Bulletin 2013, Volume 108, at 96-97.

<sup>549</sup> For further discussion of the various legal issues arising with regard to the deployment of private guards on board ships, see Symmons, *supra* note 293 and James Brown, *Pirates and Privateers: Managing the Indian Ocean’s Private Security Boom*, LOWY INST. INT’L POL’Y (Sept. 2012).

<sup>550</sup> Among the other bodies that explored the various aspects of private guards on board vessels is the International Organization for Standardization (IOS), whose work was recognized by the UNSC in Resolution 2077. See S.C. Res. 2077, *supra* note 248 (“[IOS] has developed industry standards of training and certification for Private Maritime Security Companies when providing privately contracted armed security personnel on board ships in high-risk areas.”).

<sup>551</sup> See S.C. Res. 2020, *supra* note 317.

<sup>552</sup> For example, in an interview, the French Prime Minister referred to lobbying by the shipping industry while explaining the decision of the French Government to allow the use of armed guards. AFP, *France to allow armed guards on ships to ward off pirates*, INT’L NEWS (Dec. 3, 2013), <http://www.thenews.com.pk/article-128801-France-to-allow-armed-guards-on-ships-to-ward-off-pirates-PM> (“We will allow the use of private teams who can



less important, it has become evident that the deployment of private armed guards has contributed to the decrease in piracy attacks.<sup>554</sup>

The UNSC finally pronounced a clear and positive approach to the deployment of private security guards in Resolution 2077 of November 2012, by “commending the efforts of flag States for taking appropriate measures to permit vessels sailing under their flag transiting the High Risk Area to embark vessel protection detachments and privately contracted armed security personnel, and encouraging States to regulate such activities in accordance with applicable

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complement missions being accomplished by the national navy. . . . Shipping companies have strongly urged this and we have heard them.”).

<sup>553</sup> See, e.g., Emma Ross-Thomas, *Spain to Allow Private Armed Guards on Ships to Deter Pirates*, BLOOMBERG NEWS (Oct. 23, 2009, 9:49AM), [http://www.bloomberg.com/apps/news?pid=newsarchive&sid=alPWlhKgE\\_NQ;Ships can carry armed guards against pirates](http://www.bloomberg.com/apps/news?pid=newsarchive&sid=alPWlhKgE_NQ;Ships%20can%20carry%20armed%20guards%20against%20pirates), JAPAN TIMES (Nov. 13, 2013), <http://www.japantimes.co.jp/news/2013/11/13/national/ships-can-carry-armed-guards-against-pirates/#.UsRHGdJDsu0>; *Taiwan fishermen to use armed guards against pirates in Indian Ocean*, KYODO NEWS INT’L (Mar. 18, 2014), <http://www.globalpost.com/dispatch/news/kyodo-news-international/140318/taiwan-fishermen-use-armed-guards-against-pirates-indi>.

<sup>554</sup> In a November 2012 interview, Rear Admiral Duncan Potts, Operation Commander of the European Union Naval Force (EUNAVFOR) in the Somali region, stated that “[t]he deployment of armed private security guards on board ships . . . have been 100% successful in deterring or defeating attacks.” Frank Gardner, *Somali Piracy: A Broken Business Model?*, BBC NEWS (Nov. 29, 2012), <http://www.bbc.co.uk/news/world-africa-20549056>. This was later confirmed by the Secretary General. See U.N. S.C. Rep. of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia, *supra* note 376 (“The adoption of self-protection measures and situational awareness by commercial ships, including the deployment of privately contracted armed security personnel on-board vessels and vessel protection detachments are other factors believed to have contributed to the decrease in piracy attacks.”). For an example of a specific incident where private guards prevented a potentially successful piracy attack see the ‘Nave Atropos’ case, *supra* note 96 (describing the involvement of the private security guard on board the ‘Nave Atropos’ in frustrating the attack; the testimony given by the private guards also enabled the Court to convict the pirates). For more on this issue, see Steven Perlberg, *Somali Piracy Is Down 90% From Last Year*, BUS. INSIDER (Dec. 12, 2013), [http://www.businessinsider.com/somali-piracy-is-down-this-year-2013-12?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+businessinsider+%28Business+Insider%29](http://www.businessinsider.com/somali-piracy-is-down-this-year-2013-12?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+businessinsider+%28Business+Insider%29).



international law and permit charters to favour arrangements that make use of such measures.”<sup>555</sup>

A year later the UNSC reiterated this position in Resolution 2125.

Thus, in this matter, rather than taking the lead by encouraging or instructing States to permit the deployment of armed guards, the UNSC chose to act cautiously, allowing other organizations to take the helm.<sup>556</sup> It waited for the outcome of studies on the legal aspects of the matter and the positive reports on the use of private guards in deterring pirates before openly supporting the use of private security guards.

#### **4.9. ENGAGING THE PRIVATE SECTOR**

The important role of private industry in supporting the counter-piracy undertakings off the coast of Somalia was recognized at a relatively early stage. For instance, the CGPCS created Working Group 3, the role of which is to strengthen shipping self-awareness and other capabilities. The Group, chaired by the United States, has worked closely with the commercial shipping industry to enhance awareness and improve capabilities.<sup>557</sup> Representatives from the shipping industry have also participated in the counter-piracy discussions of other fora.<sup>558</sup>

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<sup>555</sup> S.C. Res. 2077, *supra* note 248.

<sup>556</sup> Specifically, the UNSC recognized “IMO’s role concerning privately contracted armed security personnel on board ships in high-risk areas.” S.C. Res. 2020, *supra* note 317.

<sup>557</sup> See *International Response: Contact Group*, U.S. DEP’T OF STATE, <http://www.state.gov/t/pm/ppa/piracy/contactgroup/>.

<sup>558</sup> For example, Intertanko reported on its participation in a meeting of the European Commission’s Stakeholders Advisory Group on Maritime Security, which took place on December 10, 2013, and in the 30th session of the shared hazards and deconfliction (SHADE) anti-piracy meeting in Bahrain on December 3, 2013. *See generally* INTERTANKO, <http://www.intertanko.com/>.

While UNSC Resolutions are typically addressed at States, on a number of occasions the UNSC has sought cooperation from civil society.<sup>559</sup> In the context of piracy, the UNSC addressed the private sector in three main ways: (1) urging the shipping industry and insurance companies to issue and implement guidelines on counter-piracy prevention and protection measures; (2) encouraging the private sector to financially contribute to the dedicated Trust Funds; and (3) encouraging the private sector to share information relevant to law enforcement efforts.

Through the Resolutions, the manner in which the UNSC addressed the private industry has gradually evolved. The first two resolutions, Resolutions 1816 and 1838, did not mention the private sector and the call by the UNSC to issue guidance to ships on the application of precautionary measures was made upon States only.<sup>560</sup> The following Resolutions made a reference to the private sector through the more traditional manner of addressing States. Thus, in Resolution 1846, the first to mention the shipping and insurance industries, the UNSC called upon “States, *in cooperation with the shipping industry, the insurance industry* and the IMO, to issue to ships entitled to fly their flag appropriate advice and guidance on avoidance, evasion, and defensive techniques and measures to take if under the threat of attack or attack when sailing in the waters off the coast of Somalia.”<sup>561</sup> The UNSC also called upon States and regional organizations to coordinate “their efforts to deter acts of piracy and armed robbery at sea off the

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<sup>559</sup> For example, with regard to the situation in Sierra Leone, the UNSC “asked the diamond industry to collaborate with the official government.” Simma, *supra* note 383, at 802; *see also* S.C. Res. 1306, *supra* note 399, ¶ 26. With regard to the situation in Liberia, the UNSC “called upon civil society to contribute to peace in the region.” Simma, *supra* note 383, at 802; *see also* S.C. Res. 1408, ¶ 7–8, U.N. Doc. S/RES/1408 (May 6, 2002).

<sup>560</sup> S.C. Res. 1838, *supra* note 320 (urging “[s]tates . . . to issue to ships entitled to fly their flag, as necessary, advice and guidance on appropriate precautionary measures to protect themselves from attack or actions to take if under attack or the threat of attack when sailing in waters off the coast of Somalia.”).

<sup>561</sup> S.C. Res. 1846, *supra* note 296 (emphasis added).

coast of Somalia in cooperation with . . . *the international shipping community* . . . <sup>562</sup> The UNSC reiterated its calls to develop and apply preventative measures in later Resolutions related to piracy off the coast of Somalia<sup>563</sup> and made similar calls with regard to the situation in the Gulf of Guinea.<sup>564</sup>

The UNSC changed its approach in Resolution 1950, where, for the first time in the context of combating maritime piracy, the UNSC addressed the private sector *directly*. The UNSC commended the establishment of two Trust Funds and urged “both state and *non-state* actors affected by piracy, most notably the *international shipping community*, to contribute to them.”<sup>565</sup> In the following Resolution (Resolution 1976), the UNSC also commended “the efforts of the shipping industry, in cooperation with the CGPCS and IMO, in developing and disseminating the updated version of the Best Management Practices to Deter Piracy off the Coast of Somalia and in the Arabian Sea Area (BMP) and emphasizes the critical importance *for the shipping industry* of applying the best practices recommended in the BMP.”<sup>566</sup> In Resolution 2020, the UNSC again underlined “the importance of implementing such recommendations and guidance by *all* stakeholders, *including* the shipping industry.”<sup>567</sup> Similarly, in Resolution 2077,

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<sup>562</sup> *Id.* at ¶ 22 (emphasis added).

<sup>563</sup> *Cf.* S.C. Res. 1851, *supra* note 189 (“[Urging] States, in collaboration with the shipping and insurance industries, and the IMO to continue to develop avoidance, evasion, and defensive best practices and advisories to take when under attack or when sailing in the waters off the coast of Somalia.”).

<sup>564</sup> See S.C. Res. 2018, *supra* note 249 (calling upon “States, in cooperation with the shipping industry, the insurance industry and the International Maritime Organization (IMO) to issue to ships entitled to fly their flag, appropriate advice and guidance within context of the Gulf of Guinea, on avoidance, evasion and defensive techniques and measures to take, if under the threat of attack, or attack when sailing in the waters of the Gulf of Guinea”).

<sup>565</sup> S.C. Res. 1950, *supra* note 321 (emphasis added). The UNSC reiterated this call in later Resolutions. *See, e.g.*, S.C. Res. 2020, *supra* note 317.

<sup>566</sup> S.C. Res. 1976, *supra* note 167 (emphasis added).

<sup>567</sup> S.C. Res. 2020, *supra* note 317 (emphasis added).

the UNSC highlighted the importance of such implementation “particularly [by] the shipping industry.”<sup>568</sup>

An additional step was taken in a Presidential Statement pronounced in August 2013, in which the UNSC urged “States and international organizations, *as well as the private sector* to share evidence, information and intelligence, as appropriate, for law enforcement purposes related to piracy and armed robbery at sea, including for ensuring effective prosecution of suspected, and imprisonment of convicted, perpetrators and facilitators, and encourages existing and future initiatives in this regard.”<sup>569</sup> This call probably stems from the realization that the shipping and insurance industries are in possession of important information for the investigation of piracy incidents. Such information may include, for example, names and phone numbers of piracy negotiators, obtained through the direct negotiations between the private sector and the pirates over ransom payments.<sup>570</sup> A more implicit call for the private sector to share information was later made in Resolution 2125, where the UNSC recognized “the need for States, international and regional organizations, and *other appropriate partners* to exchange evidence and information for anti-piracy law enforcement purposes.”<sup>571</sup>

The role of the private sector as an important partner in the counter-piracy undertakings has therefore been acknowledged and promoted by the UNSC. The important role of the private sector was further demonstrated when the UNSC noted that “the joint counter-piracy efforts of the international community and private sector have resulted in a sharp decline in pirate attacks

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<sup>568</sup> S.C. Res. 2077, *supra* note 248.

<sup>569</sup> U.N.S.C. Presidential Statement, *supra* note 516 (emphasis added).

<sup>570</sup> For further discussion on the importance of information sharing by the private sector and the challenges posed in that regard see St. Hilaire, *supra* note 317, 6 n.4.

<sup>571</sup> S.C. Res. 2125, *supra* note 353 (emphasis added).

as well as hijackings since 2011.”<sup>572</sup> Moreover, the UNSC took the uncommon (albeit not unprecedented) step of addressing the private sector directly, while keeping its line of refraining from imposing obligations on civil society actors.<sup>573</sup>

#### **4.10. THE AUTHORIZATION TO ENTER SOMALIA’S TERRITORIAL WATERS AND TERRITORY**

In Resolution 1816 – the first Resolution focusing entirely on piracy off the coast of Somalia – the UNSC took an unusual step by authorizing States to enter Somali territorial waters. Acting under Chapter VII of the UN Charter, the UNSC decided that:

“For a period of six months from the date of this resolution, States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General, may:

a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and

(b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery.”<sup>574</sup>

The original six-month authorization was periodically extended by later piracy

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<sup>572</sup> S.C. Res. 2077, *supra* note 248.

<sup>573</sup> See Simma, *supra* note 383, at 802 (“importantly, the Resolutions do not impose obligations on the civil society, but only ‘encourage’ or ‘invite’ them to take steps”).

<sup>574</sup> S.C. Res. 1816, *supra* note 125.

Resolutions.<sup>575</sup> Resolution 1851 further expanded the authorization to include operations on Somali land. In Operative Paragraph 6 of Resolution 1851, the UNSC decided that “States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia for which advance notification has been provided by the TFG to the Secretary-General may undertake all necessary measures that are appropriate *in Somalia*, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG, provided, however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law.”<sup>576</sup> As explained by Tullio Treves, “[T]he expression ‘in Somalia’, while not explained in the preambular paragraphs, clearly alludes to action undertaken on the mainland.”<sup>577</sup>

Thus, actions such as boarding a suspected vessel or seizing it (Articles 110 and 105) may be carried out by “cooperating states” in Somalia’s territorial waters in the same way they would have been conducted on the high seas. This authorization has generated much attention and commentary. For example, Resolution 1816 was described as a “unique in the history of United Nations Security Council resolutions.”<sup>578</sup> Stefan Talmon, who, in the past, has characterized the UNSC as the “world legislature,”<sup>579</sup> contended that Resolutions 1816, 1846, and 1851 are another example of the UNSC adapting treaties. Through these resolutions, Talmon argued, the UNSC adapted Article 105 of UNCLOS by authorizing member states to suppress piracy in

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<sup>575</sup> UNSC Resolution 1846 extended the authorization for additional 12 months. S.C. Res. 1846, *supra* note 296. This extension was renewed annually by the UNSC through Resolutions 1897, 1950, 2020, 2077, 2125, 2184, and 2246.

<sup>576</sup> S.C. Res. 1851, *supra* note 189 (emphasis added).

<sup>577</sup> Treves, *Developments*, *supra* note 147, at 405.

<sup>578</sup> Dalton et al., *supra* note 357, at 130.

<sup>579</sup> Talmon, *supra* note 405, at 175.

territorial waters and on land.<sup>580</sup>

Though the UNSC authorization to enter Somalia's waters and territory is indeed uncommon, a closer look at its terms leads to the conclusion that it is much less radical than it was originally portrayed. First and foremost, the authorization was based on the fact that Somalia's Transitional Federal Government (TFG) provided its prior consent.<sup>581</sup> This consent was conveyed via a formal letter sent to the appropriate UN organs<sup>582</sup> and the UNSC has been careful to ensure that the consent has been formally renewed prior to each extension of the authorization.<sup>583</sup> The authorization is also limited to "cooperating States," namely "States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General."<sup>584</sup> This ensures that the TFG retains full control over which States may act in its

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<sup>580</sup> Chesterman et al., *supra* note 504, at 251. Talmon mentions, however, that the resolutions expressly stressed that the authorization provided applies only with regard to the situation in Somalia. *Id.*

<sup>581</sup> See S.C. Res. 1816, *supra* note 125; S.C. Res. 1851, *supra* note 189.

<sup>582</sup> The letter of consent on which the authorization granted by Resolution 1816 was based was sent on February 27, 2008, by the Permanent Representative of the Federal Republic of Somalia to the United Nations to the President of the Security Council. S.C. Res. 1816, *supra* note 125. The authorization granted by Resolution 1851 followed a letter dated December 9, 2008 and sent by the President of the Federal Republic of Somalia. UN. S.C. Res. 1851, *supra* note 189. Reference was made in that Resolution also to a letter dated September 1, 2008 and sent by the President of the Federal Republic of Somalia to the Secretary-General of the UN. *Id.*

<sup>583</sup> The additional 12-month extension granted by Resolution 1897 was based on two November 2009 letters from the Permanent Representative of the Federal Republic of Somalia to the United Nations. S.C. Res. 1897, *supra* note 320. Resolution 1950 followed a letter dated October 20, 2010 (OP of the Resolution). S.C. Res. 1950, *supra* note 321. Resolution 2020 followed a letter dated November 10, 2011 (OP of the Resolution). S.C. Res. 2020, *supra* note 317. Resolution 2077 followed a letter dated November 5, 2012 (OP 13 of the Resolution). S.C. Res. 2077, *supra* note 248. Resolution 2125 followed a letter dated November 12, 2013 (OP 13 of the Resolution). S.C. Res. 2125, *supra* note 353.

<sup>584</sup> S.C. Res. 1816, *supra* note 35325. Resolution 1851 (OP 6) broadened the authorization to include also regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia. S.C. Res. 1851, *supra* note 35389. This followed the letter dated September 1, 2008, from the President of the Federal

territorial waters.

As noted by Treves, the reference to the authorization of the coastal State (Somalia) “takes away all, or much of, the revolutionary content of the resolutions.”<sup>585</sup> Any State may limit its sovereign rights over its territory by authorizing other States to act therein. A precedent for a similar authorization under international law exists,<sup>586</sup> as does a precedent for limiting the authorization to States cooperating with the State in question.<sup>587</sup> Moreover, in the context of Somalia, the TFG consented to foreign forces conducting a counter-piracy action within Somalia before the adoption of Resolutions 1816 and 1851. In April 2008, French helicopters and commandos seized the pirates who had ransomed the crewmembers of the yacht *Le Ponant* as they returned ashore. The pirates were reportedly Somali fishermen and were removed to face trial in Paris with the TFG’s permission.<sup>588</sup> It therefore appears that, at the most, the added value of the UNSC’s authorization was, first, the removal of any legal doubt which could have

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Republic of Somalia to the Secretary-General of the UN, which expressed the TFG’s willingness to consider working with other States and regional organizations to combat piracy and armed robbery off the coast of Somalia. *Id.*

<sup>585</sup> Treves, *Developments*, *supra* note 147, at 406.

<sup>586</sup> This precedent is illustrated by the exchange of notes between Albania and Italy in Treves, *Developments*, *supra* note 147, at 406; see also the discussion of the CARICOM Maritime and Airspace Security Cooperation Agreement, *infra* Part 5.3.2.

<sup>587</sup> In Resolution 678, the UNSC authorized Member States cooperating with the Government of the State of Kuwait to use all necessary means (unless Iraq complied with the UNSC’s demands) to uphold and implement the previous relevant resolutions and to restore international peace and security in the area. See Dino Kritsiotis, *The Contingencies of Piracy*, 41 CAL. W. INT’L L.J. 305, 332–33.

<sup>588</sup> Guilfoyle, *UN Security Council Resolution 1816*, *supra* note 4264, at 692; *French Troops Seize Somali Pirates After Hostages Are Freed*, INT’L HERALD TRIBUNE, (Apr. 11, 2008), <http://www.iht.com/articles/2008/04/11/africa/yacht.php>; *France Charges Somali Pirates*, BBC NEWS (April 18, 2008), <http://news.bbc.co.uk/1/hi/world/europe/7355598.stm>.



potentially arisen in light of the TFG's questionable authority to give consent,<sup>589</sup> and, second, enabling the execution of regular and swift operations without the need to seek prior, ad hoc consent, as was required in the *Le Ponant* case.

In addition, the UNSC was cautious in defining the authorization.<sup>590</sup> The authorization was limited *ratione temporis* (a limited period of time, regularly assessed) and *ratione loci* (it only applied to the situation in Somalia and Somali's territorial waters and land).<sup>591</sup> Further, while the cooperating State may use "all necessary means"<sup>592</sup> or "all necessary measures,"<sup>593</sup> the measures used have to be in accordance with the applicable international legal framework. Thus, for example, the seizure of a pirate ship in Somali waters must be carried out "only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect."<sup>594</sup> The UNSC also affirmed in the various Resolutions that the authorization provided "shall not affect the rights or obligations or responsibilities of member states under international law, including any rights or obligations under the [Law of the Sea] Convention, with respect to any other situation, and underscores in particular that it shall not be considered as establishing customary international law."<sup>595</sup> The Resolutions do not affect Somalia's right to continue and exercise the jurisdictional powers over territorial waters conferred upon coastal States. For example, Somalia retained the ability to conduct a "hot pursuit" of a piracy ship that left its territorial waters. Nor do the Resolutions

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<sup>589</sup> Kritsiotis, *supra* note 587, at 332–33

<sup>590</sup> Treves, *Developments*, *supra* note 147, at 404.

<sup>591</sup> *Id.* at 404–05; Kritsiotis, *supra* note 587, at 332–33.

<sup>592</sup> S.C. Res. 1816, *supra* note 125.

<sup>593</sup> S.C. Res. 1851, *supra* note 189.

<sup>594</sup> UNCLOS, art. 107.

<sup>595</sup> S.C. Res. 1816, *supra* note 125.

deny or impair the right of innocent passage through Somalia's waters to the ships of any third State.<sup>596</sup>

It was noted that, in light of the various restrictions and reservations accompanying the authorization, "it is not surprising that the authority given by these resolutions has gone largely if not entirely unutilized."<sup>597</sup> It appears, however, that the relatively low number of cases where the authorization was applied has primarily been a product of the modality of Somali piracy and the standard operating procedures put in place by navies in response. The vast majority of piracy incidents took place on the high seas, frequently very far from shore.<sup>598</sup> Once a ship has been hijacked, the navies usually refrained from engaging in any action that might threaten the hostages, such as pursuing the hijacked vessel into Somali waters (where the hijacked ship was typically headed) or attempting to board the ship to rescue the hostages and arrest the pirates. It is therefore the operational environment, rather than the various legal limitations on the authorization, that led to a reduced number of naval activities in Somali waters or land.

Be that as it may, the assessment of the authorization's success should not be based on the number of times it was invoked. Rather, it is the message that the authorization conveyed that is of importance. Specifically, by allowing in principle cooperating States to enter Somali waters

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<sup>596</sup> *Id.* at 3; Treves, *Developments*, *supra* note 147, at 405.

<sup>597</sup> Eugene Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, AM. SOC'Y OF INT'L LAW (Feb. 6, 2009), available at <http://www.asil.org/insights/volume/13/issue/2/international-legal-responses-piracy-coast-somalia>.

<sup>598</sup> In its geospatial analysis of maritime piracy between 1995 and 2013, UNITAR indicated that with regard to attacks in the Western Indian Ocean, "the median distance from where an attack is reported to the nearest coast has dropped from close to 400 km in 2010 to under 50 km in 2013." UNITAR, *supra* note 433, at 1. The analysis also mentions that between 2009 and 2011, 50 percent of all attacks happened at more than 350 km from the shores, *Id.* at 23. The UNSC also expressed its concern over the fact that Somali pirates "have expanded in their geographic scope, notably evidenced by the hijacking of the M/V Sirius Star 500 nautical miles off the coast of Kenya and subsequent unsuccessful attempts well east of Tanzania." S.C. Res. 1851, *supra* note 189.

and even operate on Somali land, the UNSC sent a strong signal to Somali pirates that they will not enjoy a safe haven. This signal was also translated into action in at least one notable operation, which took place in May 2012, when EU naval forces conducted a successful raid on pirate bases on the Somali mainland.<sup>599</sup> This operation followed an amendment to the EU Joint Action governing operation Atalanta, which authorized the EU naval forces to operate in Somali territory in accordance with the authorization granted by Resolution 1851 and extended in Resolution 2020.<sup>600</sup> As indicated by the pirates themselves, this operation was a significant blow to their piratical undertakings.<sup>601</sup>

#### **4.11. THE APPLICABLE LEGAL PARADIGM IN COMBATING PIRACY – INTERNATIONAL HUMANITARIAN LAW OR LAW ENFORCEMENT?**

One of the misperceptions surrounding the counter-piracy initiatives concerns the applicable legal paradigm. Specifically, confusion arose regarding whether counter-piracy initiatives are governed by international humanitarian law or, conversely, by a law-enforcement paradigm.

The confusion was particularly dominant in the early stages of the operations off the coast of Somalia due to a number of factors. First, the historical view of pirates as enemies of mankind (*hosti humani generis*) may have given the impression that they should be treated differently than

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<sup>599</sup> See *Somali Piracy: EU Forces in First Mainland Raid*, BBC NEWS (May 15, 2012), <http://www.bbc.com/news/world-africa-18069685>.

<sup>600</sup> After noting that “it is necessary to extend the area of operations of Atalanta to include Somali internal waters and Somali land territory,” the European Union Council Decision amended the area of operations previously authorized by the Joint Action. Council Decision 2012/174/CFSP, *supra* note 453 (“The area of operations of the forces deployed to that end shall consist of the Somali coastal territory and internal waters, and the maritime areas off the coasts of Somalia and neighbouring countries within the region of the Indian Ocean.”).

<sup>601</sup> A pirate commander acknowledged as much in an interview after the attack. *Somali Piracy: EU Forces in First Mainland Raid*, *supra* note 599 (“They destroyed our equipment to ashes. It was a key supplies centre for us.”).

ordinary criminals.<sup>602</sup> The flawed link between Somali pirates and terrorism, echoed early on,<sup>603</sup> may have also contributed to this view through, *inter alia*, influencing the terminology used (“war on piracy”<sup>604</sup> similar to the “war on terrorism”). Additionally, navies were quickly dispatched off the coast of Somalia and have continued to lead the counter-piracy activities at sea. Unlike the operations of coast guards, which are law-enforcement activities carried out at sea, the deployment of naval forces is associated with a military paradigm (either before or during armed conflicts) rather than a law-enforcement paradigm.

These factors, which wrongly pointed toward the applicability of a military paradigm, appear to have been indirectly supported by the first interventions of the UNSC. In addition to invoking Chapter VII powers, which are often (though not exclusively) linked to the prevention of armed conflicts as part of the classic view of the UNSC’s role in ensuring “peace and security,” the piracy Resolutions sanctioned the use of *all necessary means (or measures)* to repress acts of piracy and armed robbery. Such phrasing is typically understood as allowing the use of force<sup>605</sup> which, again, is generally associated with a military paradigm. The confusion was further compounded when the UNSC, in Resolution 1851, underscored that counter-piracy measures must be “consistent with applicable *international humanitarian* and human rights

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<sup>602</sup> See Friman & Lindborg, *supra* note 48, at 173 (“[E]nemies would normally be treated differently from criminals and vice versa.”).

<sup>603</sup> See *supra* Part 4.6.

<sup>604</sup> See, e.g., Katerine Kerr, *UN and IMO Renew Call for Action in War on Piracy*, MARITIME SECURITY.ASIA (Nov. 25, 2011), available at [http://maritimesecurity.asia/free-2/piracy-2/un-and-imo-renew-call-for-action-in-war-on-piracy/](http://maritimesecurity.asia/free-2/piracy-2/un-and-imo-renew-call-for-action-in-war-on-piracy/http://maritimesecurity.asia/free-2/piracy-2/un-and-imo-renew-call-for-action-in-war-on-piracy/).

<sup>605</sup> Guilfoyle, *UN Security Council Resolution 1816*, *supra* note 74, at 695 (“[T]he words ‘all necessary means’ [are] commonly associated with a general authorization to use military force.”); Heinze, *supra* note 147426, at 55 (“Such language, of course, is widely understood to entail a general authorization to use military force.”).

law.”<sup>606</sup>

Despite these perplexing elements, it is clear that the law enforcement paradigm should govern counter-piracy initiatives. As discussed above, piracy is a crime of ordinary-law characteristics and should be treated as such. Pirate attacks are not “acts of war,”<sup>607</sup> and the mere fact that Chapter VII powers were invoked does not necessitate the existence of an armed conflict or authorize the use of arms under a military-based paradigm. In fact, warships authorized to seize pirate ships are notionally acting as “police or law enforcement forces” when combating piracy.<sup>608</sup> Consequently, guidelines for policing – rather than for military operations – are applicable, particularly with regard to the principles governing the use of force.<sup>609</sup> State practice in carrying out counter-piracy operations off the coast of Somalia also indicates that such operations resemble police action.<sup>610</sup>

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<sup>606</sup> S.C. Res. 1851, *supra* note 189.

<sup>607</sup> See Symmons, *supra* note 293, at 31. See also Treves, *Developments*, *supra* note 147, at 412 (“There is no armed conflict, international or internal. Pirates are not at war with the states whose flotillas protect merchant vessels in the waters off the coast of Somalia.”); Kritsiotis, *supra* note 587, at 127 (“[t]he Security Council in no way viewed the piratical violence from Somalia and the various responses to it as instigating or forming part of any overarching ‘armed conflict’-whether in terms of an international armed conflict or of a non-international armed conflict that, for want of a better phrase, had migrated offshore.”).

<sup>608</sup> Symmons, *supra* note 293, at 31. See also Keyuan, *supra* note 465, at 250 (“Maritime law enforcement of UNSC Resolutions, although involving military personnel (in particular when police powers are exercised by military authorities), is basically a policing activity at sea.”).

<sup>609</sup> Zou, *supra* note 295, at 250 (highlighting the importance of the right to life and referencing instruments governing police work such as the Code of Conduct for Law Enforcement Officials and the U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials). See also Heinze, *supra* note 147, at 63 (noting that the rules of engagement used in the counter-piracy operations are “consistent with applicable standards on the use of force that flow from UNCLOS, related case law pertaining to the apprehension of pirates, as well as international norms pertaining to the use of use of firearms in the context of police powers”).

<sup>610</sup> See Heinze, *supra* note 147, at 62–63.

The evolution of the piracy Resolutions further supports these conclusions. The reference to “applicable international humanitarian law” was not repeated after Resolution 1851. It was also correctly noted that “[T]he Resolution refers to “applicable humanitarian law” (i.e. law that would otherwise apply). Unless pirates are also civil-war insurgents, it is hard to see that there would commonly be any humanitarian law applicable to actions against common criminals.”<sup>611</sup>

Moreover, in Resolution 1846, the UNSC called upon all States “to cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somali.”<sup>612</sup> Resolution 1851 continued the shift toward a law-enforcement paradigm.<sup>613</sup> A reference was made to the applicability of UNTOC, with a view toward encouraging greater cooperation in combating piracy as an organized crime phenomenon (rather than insurgency or other form of armed conflict activity).<sup>614</sup> Emphasis was also placed on facilitating the investigation and prosecution of suspects. For instance, the UNSC supported the conclusions of inter-State agreements that will facilitate the presence of law enforcement officials of States willing to take custody of pirates on the navy ships of other States operating off the coast of Somalia (a concept known as “shipriders”).<sup>615</sup> The UNSC further urged States “to make their citizens and vessels available for forensic investigation as appropriate at the first port of call immediately following an act or attempted act of piracy or armed robbery at sea

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<sup>611</sup> Guilfoyle, *UN Security Council Resolution 1816*, *supra* note 74.

<sup>612</sup> S.C. Res. 1846, *supra* note 296. The Resolution also called upon States to “render assistance by, among other actions, providing disposition and logistics assistance with respect to persons under their jurisdiction and control, such victims and witnesses and persons detained as a result of operations conducted under this Resolution.” *Id.*

<sup>613</sup> *Id.*

<sup>614</sup> See *supra* Part 4.2.

<sup>615</sup> S.C. Res. 1851, *supra* note 189.

or release from captivity.”<sup>616</sup>

Later Resolutions continued in the direction of bolstering the law-enforcement approach. Resolution 1918 (the only Somali piracy Resolution not adopted under Chapter VII) underlined the concern over the release of suspects without bringing them to justice and called on States “to criminalize piracy under their domestic law and favorably consider the prosecution of suspected, and imprisonment of convicted, pirates.”<sup>617</sup> The Resolution further asked the UN Secretary General to present the UNSC with a report on possible options to further the goal of prosecuting and imprisoning of pirates. This request led to the Lang Report, which focused on the various options for prosecuting pirates. In Resolution 1950, the most comprehensive Resolution at the time, the UNSC underlined “the importance of continuing to enhance the collection, preservation and transmission to competent authorities of evidence of acts of piracy and armed robbery at sea off the coast of Somalia.”<sup>618</sup> The Resolution called upon States to cooperate in determining jurisdiction<sup>619</sup> and urged all States “to take appropriate actions under their existing domestic law to prevent the illicit financing of acts of piracy and the laundering of its proceeds.”<sup>620</sup> The Resolution also made the first reference to the role of law enforcement organizations such as INTERPOL and Europol and urged States, in cooperation with those organizations, “to further investigate international criminal networks involved in piracy off the coast of Somalia, including those responsible for illicit financing and facilitation.”<sup>621</sup>

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<sup>616</sup> *Id.*

<sup>617</sup> S.C. Res. 1918, *supra* note 6.

<sup>618</sup> S.C. Res. 1950, *supra* note 321.

<sup>619</sup> *Id.*

<sup>620</sup> *Id.*

<sup>621</sup> S.C. Res. 1950, *supra* note 321.

The next Resolution (1976), adopted following the presentation of the Lang Report, reiterated the call to criminalize piracy, including conspiracy and attempts to commit acts of piracy, which were not previously mentioned. It also explicitly mentioned – for the first time – the fact that piracy is a crime subject to universal jurisdiction, with a view to further encourage the prosecution of suspects. Resolution 2015 requested that States report on the measures they had taken to criminalize piracy under their domestic law and to prosecute and support the prosecution of individuals suspected of piracy. It also underlined the importance of providing courts with jurisdiction over on-land facilitators and instigators of piracy.<sup>622</sup> Resolution 2020 highlighted the importance of preserving crime scenes following acts of piracy and enabling seafarers to give evidence in criminal proceedings.<sup>623</sup> As already discussed, the UNSC used Resolution 2077 to express its clear view of piracy as a transnational criminal enterprise.<sup>624</sup> If any doubt still existed on the applicable paradigm to counter-piracy, this statement by the UNSC has clearly removed it: to counter piracy, States and organizations must resort to means available and permitted under a law-enforcement paradigm.<sup>625</sup>

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<sup>622</sup> S.C. Res. 2015, *supra* note 353. The UNSC underlined “the importance for such courts to have jurisdiction to be exercised over not only suspects captured at sea, but also 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.”

<sup>623</sup> See S.C. Res. 2020, *supra* note 317.

<sup>624</sup> See *supra* Part 4.2.

<sup>625</sup> For Heinze’s general conclusion on the question of the applicable paradigm, see Heinze, *supra* note 147, at 48 (“[A]nti-piracy efforts are currently, and should remain, an international criminal law enforcement operation.”).



#### **4.12. THE PIRACY RESOLUTIONS: CHAPTER VII RESOLUTIONS THAT DO NOT CONVEY BINDING DECISIONS**

By virtue of the UN Charter, the decisions of the UNSC are vertically binding on all Member States of the UN.<sup>626</sup> Chapter VII powers are therefore usually invoked to pass binding decisions, while recommendations and other non-binding interventions by the UNSC can be conveyed without resorting to those powers.

One could have therefore expected that the frequent adoption of Resolutions under Chapter VII to address piracy off the coast of Somalia would serve to convey binding decisions on States. Yet, perhaps surprisingly, a closer look at the piracy Resolutions reveals that notwithstanding their significant contribution to the fight against maritime piracy, they carried no binding instructions, neither of positive nature (i.e. requiring States to take certain steps)<sup>627</sup> nor of negative nature (namely requiring States to refrain from acting).<sup>628</sup>

Indeed, the plethora of aspects covered by the Resolutions – varying from protection of victims to financial support to the counter-piracy undertakings, from the collection of evidence to best practices to be implemented by shipping industry – were all addressed through the use of hortatory terminology (the Security Council “urges”, “encourages”, etc.) rather than a binding one. Thus, for example, in comparison to terrorism Resolutions that imposed on States an obligation to criminalize certain acts such as financing of terrorism,<sup>629</sup> in the piracy Resolutions

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<sup>626</sup> Articles 24 and 25 of the UN Charter.

<sup>627</sup> Compare, for example, to UNSC Resolution 1373, where the UNSC, acting under Chapter VII, imposed a number of positive obligations such as that all States shall prevent and suppress the financing of terrorist acts - S.C. Res. 1373, *supra* note 305.

<sup>628</sup> Compare, for example, to the aforementioned S.C. 1373, *supra* note 305 (the UNSC decided that all States shall refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts).

<sup>629</sup> See, for example, S.C. Res. 1373, *supra* note 305 (the UNSC decided that all States shall criminalize “the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the

the UNSC only “called on” States to criminalize piracy under their domestic law,<sup>630</sup> even though the lack of adequate national legislation in many States was clearly a matter of concern for the UNSC.

Typically, the UNSC conveys a binding instruction through a Chapter VII Resolution by using the word “decides”. The only “decision” taken by the UNSC – and the part that drew the most attention (at least with regard to the first piracy Resolutions, starting with Resolution 1816) – concerned the authorization for “cooperating States” to enter Somali territorial waters to combat piracy. As already explained,<sup>631</sup> however, this “decision” did not create any new obligations under international law: It neither obliges states to enter Somali waters to combat piracy nor imposes on Somalia any new obligations since the TFG consented to the measures provided by Resolution 1816 and maintained its powers to decide which state would qualify as a “cooperating state” for the purpose of the Resolution. As also mentioned, the requirement to obtain in advance the authorization of the coastal State (Somalia) render that, legally-speaking, the UNSC intervention on this point was not as critical as it may have originally appeared and did not necessitate Chapter VII powers.

In addition, the decision that the “cooperating States” may undertake “all necessary measures” to combat piracy off the coast of Somalia<sup>632</sup> should be understood in light of the applicable paradigm in combating piracy, namely the law-enforcement paradigm. Consequently, the force that may be used in the counter-piracy operations is that which would normally be applied in a police-like operation or be otherwise sanctioned by UNCLOS (or other applicable

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intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts”).

<sup>630</sup> S.C. Res. 1918, *supra* note 6.

<sup>631</sup> See *supra* Part 4.10.

<sup>632</sup> S.C. Res. 1851, *supra* note 189.

conventions) for example with regard to seizing a pirate ship.<sup>633</sup> In other words, this authorization as well did not necessitate a Chapter VII intervention.

The only binding decision taken in the context of the piracy Resolutions concerns the non-application of the arms embargo imposed on Somalia by resolution 733 (1992) to supplies of weapons and military equipment, or to the provision of assistance, destined for the sole use of States, international, regional and subregional organizations taking measures in line with the authorization given by the Resolutions. Nonetheless, this exception was introduced at a late stage in the fight against piracy off the coast of Somalia,<sup>634</sup> and is not part of the core elements of the piracy Resolutions. Consequently, the UNSC's decision on this point does not change the above conclusion regarding the overall nature of the UNSC's intervention as expressed through the piracy Resolutions, namely an involvement that has refrained from imposing on states binding obligations, typical for Chapter VII Resolutions.

#### **4.13. CONCLUSION**

As maritime piracy became a serious matter of concern for the international community, the UNSC promptly assumed a prominent role in both leading and coordinating counter-piracy initiatives. It addressed a variety of challenges, such as those posed by the flawed international legal framework governing piracy. The UNSC also gradually engaged a significant number of actors, including international organizations, informal mechanisms, and the private sector.

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<sup>633</sup> Article 105, UNCLOS.

<sup>634</sup> That decision was first introduced in Resolution 2125 (2013), and was reiterated in Resolution 2184 (2014) and 2246 (2015).

Despite the international consensus on the importance of combating piracy, the UNSC had to walk on a thin political line throughout its intensive engagement, cautiously navigating between the need to create and support adequate counter-piracy mechanisms, on the one hand, and the need to avoid potential criticism for being overly proactive, on the other. This has caused the UNSC to stop short of explicitly defining piracy as a threat to peace and security (while, as explained, treating it *de facto* as such) as well as refrain from pronouncing a clear position on sensitive issues, such as the criminalization of ransom payments.

Notwithstanding these political and other constraints, the piracy Resolutions have had a noteworthy impact and form an important chapter in the evolution of the UNSC. They may open the way for treating other crimes of ordinary law characteristics as threats to peace and security. No less important, the piracy Resolutions represent a modern form of international governance. This governance paradigm aims to engage not only States and classical organizations, but also other relevant actors (such as the private sector). It recognizes the contribution of traditional, formal international institutions (such as UNODC and IMO) and instruments (such as UNCLOS), while also encouraging the creation of informal networks (e.g. the CGPCS) and the conclusion of informal, ad hoc, inter-State agreements, such as on “shipriders” and the transfer of suspects and prisoners. If maintained, this holistic and flexible approach can certainly facilitate future UNSC work in addressing new emerging threats.