

Paying Danegeld to Pirates – Humanitarian Necessity or Financing Jihadists*

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I. Introduction

“If I know aught of life at sea, War, trade and piracy are one, An indivisible trinity”¹ is how *Goethe* described, through his character Mephistopheles, the close ties between piracy and trade. And indeed, piracy has been a constant companion of international shipping throughout the times. Accordingly, the way to fend off this threat and, in this context, the payment of monies has been a constant topic of debate. The history of tribute and ransom payments and the term danegeld can be traced back to King Æthelred II of England, under whose reign 10,000 pounds were paid to the Danes for the first time in 991 seeking relief from Viking attacks.²

In modern times, pirate groups that operate off the coast of Somalia have been heavily financed by escalating ransom payments. In most cases, these payments have ensured that crews, cargo and ships have been released by the pirates without cost of human lives. However, they have also contributed to the work of criminal gangs and enabled them to gather better supplies and indeed set up almost professional logistical structures, which furthered the flourishing of the “business model” piracy.³ As such, ransom payments have facilitated instability and cemented the rule of criminals in wide parts of Somalia.

Looking back, the history of the Barbary States – Morocco, Algiers, Tunis and Tripoli – is of interest when discussing ransom and tribute payments. The corsairs were a challenge to all trade powers from the

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¹ J.W. von Goethe, *Faust*, Part II, Act V, Verse 11187 et seq. [Penguin trans.], originally: “Ich müßte keine Schifffahrt kennen. Krieg, Handel und Piraterie, Dreieinig sind sie, nicht zu trennen.”

² Cf. E. Gibson, *Chronicon saxonicum*, 1692, A.D. 978-979, 991.

³ The term “business model” has become an often used description of Somali piracy, J.A. Roach, “Countering Piracy off Somalia: International Law and International Institutions”, *AJIL* 104 (2010), 397 et seq. (407); R. Meade, “An adaptable and lucrative business”, *Lloyds List* of 6 May 2011.

16th century on. Europe adopted a more or less collective strategy of non-resistance and annual tribute payments to deal with this threat. In 1622, the *Casse der Stücke von Achten* was founded in Hamburg in which seafarers paid premiums in return for an early kind of kidnap and ransom insurance.⁴ Churches collected money for seafarers taken as slaves by the Barbary corsairs,⁵ while article 22 (9) of Hamburg's *Falliten-Ordnung* of 1753 obligated insolvent shipowners to pay ransoms under certain conditions, in order to free the slaves from their captors.⁶

Around the same time, the payment of ransom was also allowed and practiced in the United Kingdom.⁷ While Europe's states pursued their policy of cooperation,⁸ paid annual tributes and allowed ransom payments by private actors, the United States appeared on the scene. One year after the Peace of Paris, in which the British Empire acknowledged the sovereignty of the newly founded nation, the American merchant vessel *Betsy* was hijacked in 1784 and brought to Morocco.⁹ The United States paid US\$ 80,000 in tribute for the release of the prisoners, a great number of which had died due to the circumstances of the imprisonment.¹⁰ This led to an increase of attacks on the American fleet, which was largely unprotected at the time. Subsequently, a peace treaty was signed in 1796 between the Bashaw of the Barbary pirates and the United States,¹¹ which lost effect when the Bashaw declared war in 1801. This set the stage for the third president of the United States,

⁴ P. Koch, "Der hamburgische Beitrag zur Entwicklung des Versicherungswesens in Deutschland", in: P. Koch, *Beiträge zur Geschichte des deutschen Versicherungswesens*, Teil II, 2005, 7 et seq. (7).

⁵ E. Wiese, "Hamburg und die Sklavenkasse", *Hamburger Abendblatt* of 15 December 2009.

⁶ T. Hasche, *Hamburgisches Privatrecht: Erläuterung der Hamburgischen Falliten-Ordnung*, Vol. 2, 1802, 129 et seq.

⁷ J. Chuah, "Pirate's Ransom – to pay or not to pay", *Student Law Review* 56 (2009), 46 et seq.; see below under IV.

⁸ For a detailed account refer to S. Lane-Poole, *The Story of Barbary Corsairs*, 1890, 256 et seq.

⁹ R.F. Turner, "State Responsibility and the War on Terror: The Legacy of Thomas Jefferson and the Barbary Pirates", *Chi. J. Int'l L.* 4 (2003), 121 et seq. (122).

¹⁰ *Ibid.*

¹¹ For a collection of the treaties between the United States and the Barbary States, refer to the Avalon Project, *Documents in Law, History and Diplomacy, The Barbary Treaties 1786-1836*, available at <<http://avalon.law.yale.edu>>.

Thomas Jefferson, who had promoted a war on the Barbary pirates since 1786 and was strongly opposed to paying tribute.¹²

Convinced of the fact that “an insult unpunished becomes the parent of many others”,¹³ *Jefferson* waged a war against the Barbary States from 1801 to 1805, which ended with a peace treaty, including an exchange of prisoners.¹⁴ The struggle against the Barbary pirates was – after continued hijackings of American vessels by the pirates – brought to an end by *Madison*, who, as the fourth president of the United States, again deployed ships against Algiers.¹⁵ This operation resulted in a treaty that guaranteed the United States full shipping rights and ended tribute payment. *Madison* found the following words to describe the US-American view at the time: “It is a settled policy of America, that as peace is better than war, war is better than tribute. The United States, while they wish for war with no nation, will buy peace with none.”¹⁶ However, even the United States, though stout in their stance against Barbary piracy, did not outlaw the payment of ransom by private actors.

Today, the re-emergence of piracy in Somalia falls in a time where the financing of criminal acts, even involuntarily through ransom payments by private actors, may very well be regarded differently than it has been historically, especially with a view to combating international terrorism. This contribution focuses on such possible differences.

First, the newest developments concerning the factual background will be outlined and some thoughts will be given to the differences of

¹² Turner, see note 9, 125.

¹³ Letter from Thomas Jefferson to John Jay of 23 August 1785, reprinted in: J.P. Boyd/ M.R. Bryan/ E.L. Hutter (eds), *The Papers of Thomas Jefferson*, 1953, Vol. 8, 426 et seq. (427).

¹⁴ As the number of prisoners made by Tripoli exceeded that of the US Navy, it was agreed that the United States would make a payment for the release of the remaining prisoners. For a detailed account see Lane-Poole, see note 8, Chapter XX; Turner, see note 9, 136. The war on the corsairs is still reflected in today’s hymn of the US Marine Corps: “From the Halls of Montezuma to the Shores of Tripoli.”

¹⁵ Lane-Poole, see note 8, 293.

¹⁶ Quoted in C. Hitchens, “Jefferson Versus the Muslim Pirates”, *City Journal* 17 (2007), available at <www.city-journal.org>; *Madison*’s position in favour of a strong navy and an even stronger union to guard the United States from “the rapacious demands of pirates and barbarians” was documented in Federalist No. 41, “General View of the Powers Conferred by The Constitution”, *Independent Journal* of 19 January 1788.

the legal regimes fighting terrorism and piracy. Afterwards, the payment of ransoms will be analysed on the basis of the International Convention for the Suppression of the Financing of Terrorism¹⁷ (hereinafter also “the Convention”) and applicable Security Council resolutions. Finally, some comments will be made on national legislation with regard to ransom payments and terrorist financing.

II. Paying Ransom and/or Funding Terrorists? A Joining of Forces and Legal Consequences

With the rise of piracy, ransom payments have again become a topic of political debate for the naval powers. Concerning Somali piracy, the average sum of ransom payments has seen an unprecedented increase in recent years. In 2010, the average ransom paid reached US\$ 5.4 million and topped the average ransom sum of 2009 by US\$ 2 million.¹⁸ With such amounts, the interest of other groups in Somalia has seemingly awakened, and a joining of forces between pirate and terrorist groups now seems to be no more a mere rumour but a tangible scenario.

1. Factual Background

To examine the ties between piracy and terrorism, a short overview of the current situation in Somalia is in order. The unprecedented rise in piratical acts in the last years has been made possible by the collapse of an effective governmental rule, a development that goes back to the overthrow of dictator *Siad Barre* in 1991.¹⁹ Legally speaking, the con-

¹⁷ International Convention for the Suppression of the Financing of Terrorism of 9 December 1999, UNTS Vol. 2178, 197 et seq., *ILM* 39 (2000), 270 et seq. (entered into force 10 April 2002).

¹⁸ A. Bowden, “The Economic Cost of Maritime Piracy”, *One Earth Future Working Paper*, December 2010, 10, available at <<http://oneearthfuture.org>>; Jack Lang even suggests a doubling of the amount in the *Report of the Adviser to the Secretary-General on Legal Issues related to Piracy off the Coast of Somalia*, in: *Letter dated 24 January 2011 from the Secretary-General to the President of the Security Council*, Doc. S/2011/30 of 25 January 2011, Annex, para. 96.

¹⁹ See e.g. A. Nord, “Somalia und der internationale Terrorismus – wie stark sind islamische Fundamentalisten am Horn von Afrika”, *Nord-Süd aktuell*, 2002, 96 et seq. For a study of the historical developments leading up to the

flict between the internationally recognized Transitional Federal Government (TFG) and the heavily armed insurgents of the *al-Shabaab* (The Youth) and *Hizbul Islam* (Islamic Party) is to be qualified as a non-international armed conflict.²⁰ The two insurgent groups used to cooperate only in few instances, while ideological differences prevented a further joining of their forces.²¹ In December 2010, however, the two groups declared that they would merge and sort out their ideological differences at the internal level.²² After this merger, the *al-Shabaab*, consisting of separate cells, remains the largest insurgent group, which has effectively consumed the less extremist, but also less powerful *Hizbul Islam*.²³ The organization does not limit itself to a nationalist agenda, but aims at establishing a global Islamic caliphate and represents a strict *Wahhabi* understanding of the Islam, outlawing music, radio and cinema events and taking away women's rights, e.g. the freedom of movement.²⁴ The radical islamist *al-Shabaab* already exercises control over most of South and Central Somalia and even before merging with *Hizbul Islam* was regarded as the strongest military faction of the country.²⁵ To reach its ultimate goal of a global caliphate state, *al-Shabaab* declared to join forces with *al-Qaida* in February 2010 and is known to support the global *Jihad*, a pledge that has been renewed after the killing of *Usama bin Laden* on 2 May 2011.²⁶ In July 2010, *al-Shabaab* executed suicide bombings in Uganda killing a minimum of 74 soccer fans during the final game of the World Soccer Championship

failure of the state, see I.M. Lewis, *A modern history of the Somali*, 2002; in respect of the UN involvement cf., C.E. Philipp, "Somalia – A Very Special Case", *Max Planck UNYB* 9 (2005), 517 et seq.

- ²⁰ T. Neumann/ T.R. Salomon, "Kein Krieg vor Somalia", *HuV-I* 3/2011, forthcoming. This statement is true for most parts of Somalia, however not for the semi-autonomous region Somaliland, which remains comparatively untroubled.
- ²¹ K. Petretto, "Somalia und Piraterie: keine Lösung in Sicht, weder zu Wasser noch zu Land", *Hamburger Informationen zur Friedensforschung und Sicherheitspolitik* 49/2010, 4.
- ²² M.M. Muhumed, "Merger of Somali militants could mean more attacks", *The Associated Press* of 20 December 2010.
- ²³ Ibid.
- ²⁴ Petretto, see note 21, 4; the *Wahhabi* direction contradicts the *Sufi* representation of Islam otherwise predominantly found in Somalia.
- ²⁵ Ibid., 3 et seq.
- ²⁶ BBC Monitoring Africa, "Somalia's Al-Shabab says death of Bin-Ladin not to hamper 'jihad' against West", 3 May 2011.

and proving by that its ability and willingness to operate beyond Somali borders.²⁷ The TFG on the other hand cannot match the military strength of *al-Shabaab*. On the contrary, the TFG's area of geographic influence is as of July 2011 limited to mainly the capital of Somalia, Mogadishu. Militarily, the TFG exercises effective control over just a small number of districts within Mogadishu and only with the assistance of the protection force of the African Union Mission in Somalia (AMISOM).²⁸

The role of the pirates in this conflict has remained unclear so far leading to a diverse set of speculations. The case has been made that pirates wilfully contribute and finance actions in the Somali civil war and that the parties of the civil war intend to make use of piracy to finance their actions.²⁹ On the other hand, it has been argued that the pirates really conduct their operations independently of the conflict, suggesting that they are not insurgents themselves.³⁰ Moreover, the connection between Somali pirates and insurgents has been challenged on the basis of a lack of obvious links between the two.³¹ Although the insurgents are not participating directly in the attacks on shipping and the pirates are usually not insurgents, it seems hardly deniable that parts of the ransom money may end up in the hands of groups that are somehow involved in the armed conflict. Eventually parts of these funds may contribute to and finance terrorist activities.³²

²⁷ X. Rice, "At least 74 killed in two attacks in Ugandan capital: Somali Islamist militants claim responsibility", *The Guardian* of 13 July 2010, 15.

²⁸ Petretto, see note 21, 3. Cf. also International Crisis Group, *Somalia: The Transitional Government on Life Support*, Crisis Group Africa Report 170 of 21 February 2011, Appendix B, available at <www.crisisgroup.org>.

²⁹ M. Stehr, "Piraten steigern sich weiter", *MarineForum* 2011, Issue 1/2, 14 et seq. (16), who goes so far to state that this makes pirates insurgents and combatants, a point which contradicts international humanitarian law; for a critique of this position see Neumann/ Salomon, see note 20, 2; D. König/ T.R. Salomon/ T. Neumann/ A.S. Kolb, *Piraterie und maritimer Terrorismus als Herausforderungen für die Seesicherheit: Rechtliche Analysen*, Pirat Working Paper, B.V., available at <<http://www.maritimesecurity.eu/>>.

³⁰ D. Guilfoyle, "The Laws of War and the Fight against Somali Piracy: Combatants or Criminals?", *Melbourne Journal of International Law* 11 (2010), 141 et seq.; Neumann/ Salomon, see note 20, 2.

³¹ Guilfoyle, *ibid.*, 141.

³² Petretto, see note 21, 11 deliberates on the existence of ad-hoc agreements. See also Alan Cole, piracy programme coordinator of UNODC, who echoes pirates' reports that "some level of cooperation with the al Shabaab is

Indeed, this presumption, which used to be more an educated guess than a fact, has been proven in part by recent developments. In February 2011, the *al-Shabaab* reportedly detained pirates that refused to pay the fifth part of the ransom money attained through the abduction of the *MV York*.³³ This hostile action may in part be attributed to the fact that the *Qur'an* outlaws piracy.³⁴ Yet the authors would refrain from attaching too much practical impact to this religious dictate, as the piratical attacks could be considered an act of the *Jihad* and thus be regarded as justified by the *al-Shabaab*. In the times of the Barbary Wars, when the United States inquired as to the legal or moral basis of the pirates' actions, the pirates indeed answered that "it was written in the Koran, that all Nations who should not have acknowledged their authority were sinners, that it was their right and duty to make war upon whoever they could find and to make Slaves of all they could take as prisoners, and that every Mussulman who should be slain in battle was sure to go to Paradise."³⁵

Thus while at first sight, the hostile action of the *al-Shabaab* towards the pirates indicates the lack of an institutional connection between pirates and insurgents, it is quickly revealed that there is and probably has been an ongoing practice of the insurgents to somehow benefit from piracy and that agreements exist between the two groups, making the pirates' refusal to pay an act which the *al-Shabaab* regarded as worthy of retaliation and punishment. Along those lines, *Jack Lang*, Special Adviser of the Secretary-General on Legal Issues related to Piracy off the Coast of Somalia, assumes that agreements between the *al-Shabaab* and pirate groups are indeed an ongoing practice and that they

necessary to run a criminal enterprise", cited in: "Piracy ransom cash ends up with Somali militants", *Reuters* of 6 July 2011. This holds true especially for *al-Shabaab* strongholds such as Haradheere and Kismayo, *ibid*.

³³ "Somali rebels detain several pirate gang leaders", *Reuters* of 17 February 2010.

³⁴ "If anyone kills a person – unless it be for murder or for spreading mischief in the land – it would be as if he killed all people. And if anyone saves a life, it would be as if he saved the life of all people" (Qur'an 5:32). "Spreading mischief in the land" (*Fasad fil-ardh*) has been famously interpreted to include piracy. On this basis the *al-Shabaab* has executed counter-piracy operations in the past, J. Gettleman/ M. Ibrahim, "Insurgents' Seizure of a Pirate Base in Somalia Raises Questions About Its Future", *New York Times* of 3 May 2010, A4.

³⁵ American Peace Commissioners to John Jay, 28 March 1786, reprinted in: Boyd/ Bryan/ Hutter, see note 13, Vol. 9, 354.

sometimes entail that pirate groups hand over up to 30 per cent of the ransom payment to the terrorist group.³⁶ In some geographical areas in which it has a strong presence, especially in southern and central Somalia, the *al-Shabaab* imposes taxes on ransom payments for vessels.³⁷

It can only be guessed in how many cases pirates agreed to pay a part of the ransom to *al-Shabaab*, but the recent “relocation of the pirates to the south of Somalia in areas controlled by Al-Shabaab”³⁸ suggests that such agreements have been made on a reliable basis and that ransom payments will continue to finance *al-Shabaab*’s actions inside and outside Somalia.

Treading a little further on this path, ransom payments reportedly reached record sums of up to US\$ 9 million.³⁹ Although one should exercise care when basing an argument on record sums, as both media as well as pirates may have an interest in exaggerating the sum, those figures do not seem to be too far-fetched. To put this into a terrorist-threat-perspective, a fifth of one major ransom payment – US\$ 1.8 million – is more than three times the estimated costs of the 9/11 attacks organized by *al-Qaida*,⁴⁰ the terrorist organization that *al-Shabaab* is aligned with. On the lower end of financial expenditure lie the October 2000 attack on the *USS Cole* and the Madrid attacks in March 2004, which are believed to have cost about US\$ 10,000 each.⁴¹ One can only imagine the actual present and future terrorist threat for the international community being caused by shipowners’ payments of ransom to Somali pirates, when the annual sum of ransom payments is considered, which was somewhere around US\$ 82 million in 2009, putting the possible terrorists’ share, provided they frequently benefited from those

³⁶ Lang, see note 18, para. 24.

³⁷ A Reuters investigation even lists specific payments made by pirate groups to *al-Shabaab*’s “marine office”, see “Piracy ransom cash ends up with Somali militants”, see note 32.

³⁸ Lang, see note 18, para. 24.

³⁹ *Ibid.*, para. 96; ECOSOC, Commission on Crime Prevention and Criminal Justice, *Report of the Executive Director*, Doc. E/CN.15/2011/18 of 10 February 2011, para. 9.

⁴⁰ P. Williams, “Warning Indicators and Terrorist Finances”, in: J.K. Giraldo/H.A. Trinkunas (eds), *Terrorism Financing and State Responses*, 2007, 72 et seq.

⁴¹ *Ibid.*, 78.

payments, somewhere between US\$ 16 million to US\$ 27 million.⁴² Certainly those developments may undermine the recent hopes that the death of *Usama bin Laden* will financially weaken *al-Shabaab*.⁴³

Apart from these obvious and pressing issues of international security, the payment of ransoms also has a detrimental effect on the situation in Somalia itself. While in most cases the money does not contribute to better the situation of the Somalis themselves, it has even further destabilized Somalia. Moreover, it may prove to empower fundamentalist forces to such a degree that they may actually wield the power to loosen the already weak grip which the TFG has over Mogadishu.

2. Legal Issues beyond Ransom Payments

The developments that have just been delineated have legal consequences. Besides legal problems entailed by the payment of ransom to pirates, which in turn may finance terrorists, other difficulties may arise when the cooperation between pirates and terrorists develops further. One of the paramount problems seems to be very basic, i.e. whether the acts of the Somali pirates in fact remain piratical acts in a legal sense or whether they turn into terrorism, making applicable a whole other legal regime. Such a change in the legal regime would have significant consequences. Leaving the legality of ransom payments for a while, which will be addressed *in extenso* in the course of this contribution, there are remarkable differences in the legal regimes of combating terrorism and combating piracy. The interdiction of a vessel for instance is legal without flag state consent only in cases of piracy (article 107 United Nations Convention on the Law of the Sea – UNCLOS⁴⁴). In the case of a ship hijacked by terrorists, the flag state must generally permit a boarding of the vessel, e.g. by military or coast guard personnel of another state.⁴⁵

⁴² Monitoring Group on Somalia established pursuant to S/RES/1853 (2008) of 19 December 2008, cited in: Lang, see note 18, fn. 44.

⁴³ BBC Monitoring Africa, “Bin Ladin’s death weakens Somali’s terrorist group – Ethiopian minister”, 4 May 2011.

⁴⁴ UNTS Vol. 1833, 397 et seq.

⁴⁵ For an account regarding interdiction rights of states T.M. Brown, “For the ‘Round and Top of Sovereignty’: Boarding Foreign Vessels at Sea on Terror-Related Intelligence Tips”, *Journal of International Maritime Law* 16 (2010), 45 et seq.; D. König, “Der Einsatz von Seestreitkräften zur Verhinderung von Terrorismus und Verbreitung von Massenvernichtungswaffen sowie zur Bekämpfung der Piraterie: Mandat und Eingriffsmöglichkeiten”,

The principle of universal jurisdiction, which means that any state can prosecute an act regardless of any sufficient connection or genuine link between the act and the state, is only applicable in cases of piracy and not – at least not without an international treaty prescribing this⁴⁶ – in cases of terrorism.⁴⁷

in: A. Zimmermann et al. (eds), *Moderne Konfliktformen – Humanitäres Völkerrecht und privatrechtliche Folgen*, 2010, 203 et seq. (206-224); D. Guilfoyle, *Shipping Interdiction and the Law of the Sea*, 2009; A. von Arnould, “Die moderne Piraterie und das Völkerrecht”, *AVR* 47 (2009), 454 et seq. (455 et seq.); R. Wolfrum, “Fighting Terrorism at Sea: Options and Limitations under International Law”, in: M.H. Nordquist et al. (eds), *Legal Challenges in Maritime Security*, 2008, 1 et seq.; W. Heintschel von Heinegg, “The United Nations Convention on the Law of the Sea and Maritime Security Operations”, *GYIL* 48 (2005), 151 et seq.; id., “Current Legal Issues in Maritime Operations: Maritime Interception Operations in the Global War on Terrorism, Exclusion Zones, Hospital Ships and Maritime Neutrality”, *Isr. Y. B. Hum. Rts* 34 (2004), 151 et seq.; M.A. Becker, “The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea”, *Harv. Int’l L. J.* 46 (2005), 131 et seq.

⁴⁶ M.H. Morris, “Universal Jurisdiction in a Divided World: Conference Remarks”, *New England Law Review* 35 (2000-2001), 337 et seq. (348 et seq.) argues against the proposition that the applicability of universal jurisdiction can be prescribed by an international treaty.

⁴⁷ For the applicability of the universality principle regarding piracy H. Grotius, *De jure belli ac pacis*, Liber 2, Ch. 20, No. 40; PCIJ, *The Case of the S.S. “Lotus”*, PCIJ Series A, No. 10, Judge Moore, Dissenting Opinion, 65 et seq. (70); ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, ICJ Reports 2002, 3 et seq., Judges Higgins/Kooijmans/ Buergenthal, Joint Separate Opinion, 64 et seq. (81); I. Brownlie, *Principles of Public International Law*, 7th edition 2008, 307; E. Kontorovich, “The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation”, *Harv. Int’l L. J.* 45 (2004), 183 et seq. (188-194); J.M. Goodwin, “Universal Jurisdiction and the Pirate: Time for an Old Couple to Part”, *Vand. J. Transnat’l L.* 39 (2006), 973 et seq., argues *de lege ferenda* against the applicability on the basis of conflicts with internationally recognized standards of fair trial; for these reasons, G.D. Gabel suggests draft guidelines for dealing with pirates in: “Smoother Seas Ahead: The Draft Guidelines as an International Solution to Modern-Day Piracy”, *Tulane Law Review* 81 (2007), 1433 et seq. For a historical account of the development of the universality principle for piracy see A.P. Rubin, “Law of Piracy”, *Den. J. Int’l L. & Pol’y* 15 (1986-1987), 173 et seq. (224 et seq.). Different theories exist, however, on the applicability of the principle of universality for terrorism. K. Ambos, “Vorbemerkungen zu den §§ 3-7”, in: W. Joecks/ K. Mießbach (eds), *Münchener Kommentar zum StGB*, 2003,

Qualifying a perpetrator as a terrorist would then mean that prosecution in a third state, e.g. Kenya, was a breach of international law, unless a genuine link could be established. This may in turn render all diplomatic efforts to establish a cooperation agreement with other third states, which then undertake to prosecute suspects, fruitless. As such, it may prove to be of significant practical importance how acts of maritime violence are qualified legally.

In article 101 UNCLOS, piracy is defined as,

“(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

- (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

para. 55, not only supports its applicability, but suggests that this question is beyond dispute; see however G. Werle/ F. Jeßberger, in: H.W. Laufhütte/ R. Rissing-van-Saan/ K. Tiedemann (eds.), *Strafgesetzbuch Leipziger Kommentar*, 12th edition 2007, vor § 3, para. 241; G. Werle, *Völkerstrafrecht*, 2nd edition 2007, fn. 368 argues against its applicability in the absence of specific treaty law. Indeed, based on the numerous international treaties regarding terrorism, some aspects of terrorism fall under the universality principle. To state that terrorism as such is covered by the principle would, however, mean to drag a quickly evolving phenomenon under a legal regime which was not made for it. Practical challenges are evident since there is no internationally binding definition of terrorism, which in turn would mean that the principle of universality could potentially apply to an unmanageable number of acts, granting every state discretion whether to apply the principle or not. See also A.D. Buzawa, “Cruising with Terrorism: Jurisdictional Challenges to the Control of Terrorism in the Cruising Industry”, *Tulane Maritime Law Journal* 32 (2007-2008), 181 et seq. (186 et seq.); A.J. Colangelo, “The New Universal Jurisdiction: In Absentia Signaling over Clearly Defined Crimes”, *Georgetown Journal of International Law* 36 (2005), 537 et seq. (594). For the lack of an internationally accepted definition of terrorism see B. Saul, *Defining Terrorism in International Law*, 2006; A.P. Schmid/ A. J. Jongman et al. published the analysis *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature*, 1988, in which 109 officially used different definitions are analysed, *ibid.*, 5-6. Perry analyses and compares 22 different definitions in official use at the level of US-American federal legislation alone, N.J. Perry, “The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails”, *Journal of Legislation* 30 (2003-2004), 249 et seq.

- (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)."

As such, the core concept of piracy – the act on the sea itself pursuant to subparagraph (a) – is characterized by three components: first, the area in which it is committed, meaning the high seas or the exclusive economic zone of a state (article 58 (2) UNCLOS) (*locus delicti*);⁴⁸ second, that the act is directed from one ship to another ship (two-ship requirement); and third, that it is committed for “private ends”.⁴⁹

This leaves us with a very narrow definition.⁵⁰ If pirates and terrorists formally joined forces and continued to operate against trade vessels, the first two requirements may regularly be satisfied. However, the third may not. One of the reasons for which the private-ends-requirement was included in the piracy regime of UNCLOS’s predecessor

⁴⁸ Article 101 (a) UNCLOS only lists the high seas and places outside the jurisdiction of any state as a possible *locus delicti*, however article 58 (2) UNCLOS extends the piracy regime to acts in the exclusive economic zone.

⁴⁹ A suggestion to delete the phrase “for private ends” did not succeed on the occasion of the Third UN-Conference on the Law of the Sea, S.N. Nandan/ S. Rosenne/ N.R. Grandy (eds), *United Nations Convention on the Law of the Sea 1982, A Commentary*, Vol. III, 1995/2002, 198 et seq. As such, according to today’s predominant understanding of the piracy regime, politically motivated acts do not constitute piracy. They are, however, included in the International Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention) of 1988 and the SUA Protocol of 2005.

⁵⁰ For *de lege ferenda* criticism of this narrow construction see e.g. J.L. Jesus, “Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects”, *International Journal of Marine and Coastal Law* 18 (2003), 363 et seq. (380 et seq.); Zou K., “Seeking Effectiveness for the Crackdown of Piracy at Sea”, *J. Int’l Aff.* 59 (2005), 117 et seq. (118 et seq., 131); D. Guilfoyle, “Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts”, *ICLQ* 57 (2008), 690 et seq. (694); R. Collins/ D. Hassan, “Applications and Shortcomings of the Law of the Sea in Combating Piracy: A South East Asian Perspective”, *Journal of Maritime Law & Commerce* 40 (2009), 89 et seq. (95 et seq.).

sor, the Convention on the High Seas of 1958,⁵¹ is that states were eager to avoid the applicability of the universality principle for their own actions, in order to circumvent conflicts between nations.⁵² After the Soviet Union accused China and its Nationalist Chinese naval forces of conducting and the United States of abetting piratical acts in the China Sea, states felt the need to exclude their own conduct from the reach of the universality principle, which would otherwise have allowed every other state to adjudicate on their actions.⁵³ As a result, the private-ends-requirement was included in the Convention on the High Seas and later it was incorporated into UNCLOS as well.

Today the requirement is widely interpreted to include motivations such as enrichment, vandalism and revenge,⁵⁴ while excluding not only state actions, but all actions committed for political motives of any kind, rendering article 101 UNCLOS inapplicable to virtually all terrorist acts. When assessing the legal consequences of a joining of forces of pirates and terrorists, the key question thus becomes: are the acts committed for private ends, even though they may finance acts undertaken for political ends, terrorist acts? As such the question can be boiled down to the significance of long-term-objectives. Thus we are left with two secure positions and a question:

⁵¹ Convention on the High Seas, UNTS Vol. 450, 11 et seq., article 15.

⁵² Morris, see note 46, 339 et seq.; C. Crockett, "Toward a Revision of the International Law of Piracy", *DePaul Law Review* 26 (1976), 78 et seq. (88); L. Reydams, *Universal Jurisdiction*, 2003, 58. It has to be noted, however, that this was only one motive for including the private ends requirement. It was well established before the Convention on the High Seas that piracy includes mainly acts committed for a personal motive, such as "personal greed or [...] personal vengeance", while the "man who acts with a public object [...] is not only not the enemy of the human race but he is the enemy solely of a particular state", W.E. Hall, *A Treatise on International Law*, 1917, Part II, Ch. 6.

⁵³ Morris, see note 46, 339 et seq.; for an interesting account of this conflict see D.H.N. Johnson, "Piracy in Modern International Law", *Transactions of the Grotius Society* 43 (1957), 63 et seq. (64): "It was alleged by the Soviet Union and its supporters that the activities in the China Sea of the Nationalist Chinese naval forces, aided and abetted by those of the United States, were 'piratical' – a point of view which was of course vigorously denied by the spokesmen of the countries concerned."

⁵⁴ Jesus, see note 50, 378; M. Halberstam, "Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety", *AJIL* 82 (1988), 269 et seq. (274 et seq.).

-First, the hijacking of a ship solely for the enrichment of the abductors may qualify as piracy.

-Second, the hijacking of a ship in order to move states to release political prisoners or terrorists is no piracy.

The question remains: what if a ship is abducted for ransom and as such for enrichment, but the ransom is ultimately fully or in part used to finance terrorist acts?

To address the general differences between the legal regimes governing piracy and terrorism, some commentators suggest a wider interpretation of the term “private ends”.⁵⁵ Although state practice to date does not seem to back this suggestion, it could be a viable solution to pressing issues in the legal categorization of hybrid phenomena and to the struggle against maritime terrorism in general. If the private-ends-requirement was taken to mean what it originally was supposed to mean, then only state actions would be excluded from such a wider notion of piracy. In the meantime, terrorist actions, such as the bombing of the *USS Cole* and acts similar to the hijacking of the *Achille Lauro*, taking place on the high seas or in an exclusive economic zone, would fall under the definition.⁵⁶ They are undertaken for political motives, but as they do not qualify as state actions, they are included in a wider understanding of piracy. As already mentioned, this suggestion seems to go far beyond the currently predominant understanding of the concept “piracy” and as such is *de lege ferenda*, but it could solve some of the difficulties connected to the fight against maritime terrorism and possibly upcoming problems in dealing with hybrid forms.

To come back to today’s situation in Somalia, even judging from the narrow interpretation of the private-ends-requirement, it seems sensible to still regard the acts committed by the Somali perpetrators as piracy by the law of nations, even though ties between piracy and terrorism may exist. It may be a consequence of these acts that terrorist activities are funded, but it is certainly so far not the motivation of the pirates to finance terrorism. Somali pirates more or less pay a part of the ransom money as “protection money”, as “danegeld” themselves, but still commit the acts solely for their own enrichment. However, this development will have to be observed closely. As soon as terrorist organiza-

⁵⁵ Guilfoyle, see note 45, 32 et seq.; T. Garmon, “International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th”, *Tulane Maritime Law Journal* 27 (2002), 257 et seq. (265).

⁵⁶ For detailed background information on the *Achille Lauro* hijacking see M.K. Bohn, *The Achille Lauro Hijacking*, 2004.

tions abduct ships to finance their agenda, the legal categorization of such an act may have to be re-evaluated, as then the main motive of the abduction of ships may be considered a predominantly political one. Even in that case, however, it would be possible to still regard those acts as piracy, as they are first and foremost committed for personal enrichment and then subsequently, on a second level, the organization that committed the act chooses to finance terrorism with the ransom money. Yet one may also argue that more importance needs to be attributed to long-term objectives of the perpetrators, rendering the regime of piracy inapplicable to such an act.

III. Ransom Payments to Pirates and the International Law for the Suppression of Terrorist Financing

To date, no instrument of international law specifically addresses the problem of ransoms paid to pirates.⁵⁷ Yet different legal regimes have

⁵⁷ Although just by the letter of UNCLOS, paying ransom to pirates could even be regarded as piracy itself. Article 101 UNCLOS not only addresses piracy in the sense of acts committed upon the high sea, but also includes “any act of inciting or of intentionally facilitating [such] an act” (article 101 (c) UNCLOS). While including ransom payments as piracy by way of article 101 (c) UNCLOS was quite surely not within the intent of the drafters, the mere wording opens up this possibility of interpretation. Objectively, the payment of ransom has proven to facilitate piracy in Somalia. One may argue that the paying of ransom does not entail a voluntary or intentional facilitation, as usually shipowners only intend to free the crew, cargo and ship. Nevertheless, they will at least regularly know about the aggravating effect of ransom payments on piracy so that the subjective – *mens rea* – prerequisite may be taken to be fulfilled. Regardless of the detailed requirements of the subjective element “intentionally”, the logical conclusion that shipowners paying ransoms are pirates according to international law, while in seeming conformity with the wording of article 101 UNCLOS appears counterintuitive. To solve this legal problem, it may help to introduce the German criminal law concept of “necessary participation” (*notwendige Teilnahme*) in this discussion, which excludes from the crime itself the participation of the victim – as the object of legal protection – that is necessary to commit the specific offence. By way of example, the victim of usury does not commit the offence, although the act could not have been committed without the victim’s consent and may even have been initiated by the victim, see C. Roxin, *Strafrecht Allgemeiner Teil*, Vol. 2, 2003, 141 et seq.

been created over the course of the long last decade to tackle more generally terrorist financing, including the International Convention for the Suppression of the Financing of Terrorism and several resolutions by the UN Security Council. From the lawyer's point of view, the issue comes down to whether these documents provide for any regulation concerning ransom payments to pirates. A first crucial question to be answered for each of them is whether their approach to "terrorism" is broad enough in scope to cover forms of piracy such as can contemporarily be observed, for instance, around the Horn of Africa. In addition, it needs to be assessed whether the Convention or the relevant Security Council resolutions propose any binding guidelines on how to resolve the conflict between interests – with the prevention of future crimes on the one side and the protection of hostages on the other – which is created when ships are hijacked and crews taken as hostage to extort ransoms.

1. International Convention for the Suppression of the Financing of Terrorism

The International Convention for the Suppression of the Financing of Terrorism is one of the more recent in a series of counterterrorism treaties that have been adopted since the issue of international terrorism resurfaced in the late 1950s.⁵⁸ As part of the overall international strategy

⁵⁸ See in particular the treaties listed in the Annex to the Terrorist Financing Convention: Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970, UNTS Vol. 860, 105 et seq., *ILM* 10 (1971), 133 et seq. (entered into force 14 October 1971); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971, UNTS Vol. 974, 177 et seq., *ILM* 10 (1971), 1151 et seq. (entered into force 26 January 1973); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 24 February 1988, UNTS Vol. 1589, 474 et seq., *ILM* 27 (1988), 627 et seq. (entered into force 6 August 1989); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 14 December 1973, UNTS Vol. 1035, 167 et seq., *ILM* 13 (1974), 41 et seq. (entered into force 20 February 1977); International Convention against the Taking of Hostages of 17 December 1979, UNTS Vol. 1316, 205 et seq., *ILM* 18 (1979), 1456 et seq. (entered into force 3 June 1983); Convention on the Physical Protection of Nuclear Material of 3 March 1980, UNTS Vol. 1456, 124 et seq., *ILM* 18

to combat terrorism, the suppression of terrorist financing has come to play an increasingly central role.⁵⁹ In late 1998, France initiated the elaboration within the United Nations of a multilateral convention to tackle the financing of terrorism.⁶⁰ Over the course of the following year, negotiations were conducted in the Ad Hoc Committee that had been established pursuant to General Assembly Resolution 51/210 “to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism”⁶¹ as well as in the

(1979), 1419 et seq. (entered into force 8 February 1987); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 10 March 1988, UNTS Vol. 1678, 221 et seq., *ILM* 27 (1988), 668 et seq. (entered into force 1 March 1992); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf of 10 March 1988, UNTS Vol. 1678, 304 et seq., *ILM* 27 (1988), 685 et seq. (entered into force 1 March 1992); International Convention for the Suppression of Terrorist Bombings of 15 December 1997, UNTS Vol. 2149, 256 et seq., *ILM* 37 (1998), 249 et seq. (entered into force 23 May 2001). See also International Convention for the Suppression of Acts of Nuclear Terrorism of 13 April 2005, UNTS Vol. 2445, 89 et seq., *ILM* 44 (2005), 815 et seq. (entered into force 7 July 2007). For a brief sketch of the history of international counterterrorism efforts, see I. Bantekas, “The International Law of Terrorist Financing”, *AJIL* 97 (2003), 315 et seq. (315-316).

⁵⁹ Following the attacks of 9/11, the Security Council became the principal forum for the adoption of multilateral counterterrorism measures, and it increasingly emphasized the need to tackle terrorist financing, see Bantekas, see note 58, 315. With a view to action by the Security Council on this issue, see below under III. 2.

⁶⁰ See the statement made by the French Minister for Foreign Affairs during the 1998 general debate of the General Assembly, Doc. A/53/PV.11 of 23 September 1998, 15 et seq. (18); see also the *Letter dated 3 November 1998 from the Permanent Representative of France to the United Nations addressed to the Secretary-General*, Doc. A/C.6/53/9 (including, as an Annex, a first draft for an international convention for the suppression of terrorist financing) of 4 November 1998. For a brief sketch of the origins of this initiative, including discussions within the context of the EU and the G8, see A. Aust, “Counter-Terrorism – A New Approach: The International Convention for the Suppression of the Financing of Terrorism”, *Max Planck UNYB* 5 (2001), 285 et seq. (286).

⁶¹ A/RES/51/210 of 17 December 1996, para. 9; while the primary focus of the committee was to be on the elaboration of conventions for the suppression of terrorist bombings and, subsequently, of acts of nuclear terrorism (*ibid.*), the General Assembly specifically tasked the Ad Hoc Committee

Sixth Committee of the General Assembly.⁶² On 9 December 1999, the General Assembly adopted without a vote the International Convention for the Suppression of the Financing of Terrorism and requested that it be opened for signature.⁶³ The Convention entered into force on 10 April 2002 and has, as of July 2011, 174 parties.⁶⁴

The Convention complements existing counterterrorism conventions and responds to the understanding that the number and seriousness of terrorist acts is contingent on the amount of available funds. Acknowledging that previous treaties had failed to specifically address this issue, it undertakes to fill the gap by promoting international cooperation among states in preventing the financing of terrorism and in suppressing it through prosecution and punishment of the perpetrators.⁶⁵ The core of the Convention is the definition of terrorist financing and its establishment as an offence, along with the ancillary offences of attempt, co-perpetration and complicity, in article 2.⁶⁶ State parties commit themselves to criminalize these offences and to make them punishable by appropriate penalties.⁶⁷ This obligation is complemented, *inter alia*, by incorporation of the principle “*aut dedere aut judicare*”,

with drafting a convention for the suppression of terrorist financing in A/RES/53/108 of 8 December 1998, paras 11-12.

⁶² For an overview of the preparatory works see especially *Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996*, Third Session (15 to 26 March 1999), Doc. A/54/37 of 5 May 1999; General Assembly, Working Group of the Sixth Committee, *Measures to Eliminate International Terrorism, Report of the Working Group*, Doc. A/C.6/54/L.2 of 26 October 1999; General Assembly, Sixth Committee, *Measures to Eliminate International Terrorism: Report of the Sixth Committee*, Doc. A/54/615 of 30 November 1999.

⁶³ A/RES/54/109 of 9 December 1999; see also Doc. A/54/PV.76 of 9 December 1999, 8.

⁶⁴ See United Nations Treaty Service, available at <<http://treaties.un.org>>.

⁶⁵ International Convention for the Suppression of the Financing of Terrorism, preamble, paras 10-12; cf. also *Report of the Ad Hoc Committee*, see note 62, para. 27.

⁶⁶ See already the *travaux préparatoires, Report of the Working Group*, see note 62, Annex III, para. 6.

⁶⁷ Article 4 International Convention for the Suppression of the Financing of Terrorism.

demanding extradition or prosecution of an alleged offender, as well as by a sanctions regime that includes the freezing and seizure of funds.⁶⁸

Whether the Convention extends to the payment of ransoms to pirates and obligates state parties, at least in principle, to criminalize and suppress such transactions and to punish the persons involved depends on two factors: firstly, the concept of “terrorism” as considered by the Convention must include the phenomenon of piracy; and, secondly, the payment of ransoms must qualify as “financing” in the meaning circumscribed by the Convention. Whether such is the case is to be determined by analysing the Convention according to the rules of treaty interpretation codified in articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).⁶⁹ Pursuant to article 31 (1) VCLT, the terms of the Convention’s provisions must primarily be construed in accordance with their ordinary meaning in their context and in the light of the object and purpose of the Convention.

⁶⁸ See in particular article 8 (1) International Convention for the Suppression of the Financing of Terrorism; cf. already *Report of the Ad Hoc Committee*, see note 62, paras 31-32; for a general overview of the structure, approach and substance of the Convention, see C.M. Johnson, “Introductory Note to the International Convention for the Suppression of the Financing of Terrorism”, *ILM* 39 (2000), 268 et seq. (268-269).

⁶⁹ Vienna Convention on the Law of Treaties (VCLT) of 23 May 1969, UNTS Vol. 1155, 331 et seq., *ILM* 8 (1969), 679 et seq. (entered into force 27 January 1980); itself a treaty, the VCLT applies directly to written agreements (article 2 (1)(a) VCLT) concluded between two or more of its state parties following its entry into force (article 4 VCLT). As the ICJ has repeatedly affirmed, the rules contained in arts 31 and 32 VCLT are also a well-recognized part of customary international law, see e.g. *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, 13 July 2009, Judgment, available at <<http://www.icj-cij.org/docket/files/133/15321.pdf>>, para. 47; and *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, ICJ Reports 2007, 43 et seq. (109 et seq., para. 160). As such, they also apply to treaties concluded with or between third states. For a more differentiated view on the customary status of arts 31 and 32 cf., however, M.E. Villiger, *Commentary on the 1969 Convention on the Law of Treaties*, 2009, article 31 para. 37, article 32 para. 13 (with further references to judicial and scholarly opinions).

a. Application of the International Convention for the Suppression of the Financing of Terrorism to the Funding of Piratical Acts?

Although the line between the two phenomena is blurred in practice, terrorism and piracy are in principle two different concepts, distinguished by the political or private nature of the purpose for which they are committed respectively.⁷⁰ There is thus good reason to question whether the International Convention for the Suppression of the Financing of Terrorism covers funding of piratical activities at all. So far, the issue has rarely been touched upon in international legal scholarship, and commentaries on the Convention or on international counterpiracy law suggest support for either answer to the question. On the one hand, it has been submitted that the Convention is different from prior counterterrorism treaties in that it may only apply to offences that are committed for terrorist purposes.⁷¹ On the other hand, the Convention has occasionally been mentioned in the discussion of international legal instruments to combat piracy.⁷² The current state of literature is thus inconclusive.

The key to answering the question of whether the funding of piratical activities falls within the ambit of the Convention is the definition of the offence in article 2 (1),

“Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

- (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or
- (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hos-

⁷⁰ See above under II. 2.

⁷¹ See, though without specific consideration of piratical activities, R. Laval, “The International Convention for the Suppression of the Financing of Terrorism”, *ZaöRV/ HJIL* 60 (2000), 491 et seq. (505).

⁷² R. Geiß/ A. Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden*, 2011, 12 et seq.; Roach, see note 3, 408; id., “Documents on countering piracy off the coast of Somalia”, in: *Piracy and Legal Issues: Reconciling Public and Private Interests*, Annex II, 48 of 1 October 2009, available at <http://www.chathamhouse.org.uk/files/15221_011009piracy_law.pdf>.

tilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”

The Convention thus takes a two-pronged approach in defining the “financing of terrorism”. Common to both limbs of the tandem is the objective element of an unlawful provision or collection of funds, coupled with a corresponding subjective criterion (“wilfully”), excluding a merely accidental or negligent commission of the offence.⁷³ A duality has then been chosen by the Convention’s drafters to delineate the acts for which the funds, according to the intention or knowledge of the offender, are to be used: subparagraph (a) incorporates all those offences defined under any one of the conventions listed in the Annex,⁷⁴ while subparagraph (b) creates a “mini-definition”⁷⁵ of terrorism for the purposes of the Convention.

The application of the Convention to persons initiating or facilitating the payment of ransoms to pirates thus hinges on whether the activities to be funded by these means come within the ambit of the two subparagraphs.⁷⁶ If they are, in turn, piratical in nature, aimed at gener-

⁷³ Given the further specification of the required intention or knowledge, it has been doubted that this explicit stipulation of wilful action was indeed necessary, see Aust, see note 60, 295; cf. also M. Pieth, “Criminalizing the Financing of Terrorism”, *Journal of International Criminal Justice* 4 (2006), 1074 et seq. (1081-1082). For a detailed discussion of the structure and elements of article 2 (1) of the International Convention for the Suppression of the Financing of Terrorism, *ibid.*, 1079-1082.

⁷⁴ For a state ratifying the International Convention for the Suppression of the Financing of Terrorism that is not party to a treaty listed in the Annex, or ceases to be so, article 2 (2) of the Convention allows for the deposit of a Declaration excluding that treaty from the application of the Convention to that party. Further treaties may be added to the Annex pursuant to the procedure set forth in article 23 of the Convention.

⁷⁵ Aust, see note 60, 291; J.M. Koh, *Suppressing Terrorist Financing and Money Laundering*, 2006, 63.

⁷⁶ Without relevance at this stage is, however, the fact that the process of financing itself is due to an act of piracy. As a matter of fact, terrorist organizations avail themselves of both lawful and unlawful ways to obtain the necessary funds for their terrorist activities, see e.g. Bantekas, see note 58, 316; K. Wolny, *Die völkerrechtliche Kriminalisierung von modernen Akten des internationalen Terrorismus: Unter besonderer Berücksichtigung des Statuts des Internationalen Strafgerichtshofs*, 2008, 109-110. As Waszak explains, the key difference between terrorist financing and money launder-

ating economic benefits for private ends, they fail the requirements of the independent definition of terrorist acts in subparagraph (b), at the core of which is the political purpose of intimidating a population or coercing a government or an international organization into action or inaction.

Yet at least two different ways are perceivable in which the Convention may be brought into effect by ransoms paid to pirates: to begin with, and to the extent that the monies generated as ransoms are channelled into the funds of terrorist groups, such as the *al-Shabaab* in Somalia, they may well be, in full or in part, an indirect form of financing terrorist acts in the sense of subparagraph (b). Difficulties in these constellations will pertain primarily to the *mens rea* of article 2 (1) of the Convention, as the use of the money must have been covered by the intent of the persons involved in the ransom payment.⁷⁷ Another trigger for the Convention's application would be a broader rather than narrower interpretation of article 2 (1) and namely subparagraph (a) as criminalizing also the financing of acts that serve purely private purposes and are thus without any ambiguity piratical and not terrorist.

The wording of article 2 (1)(a) of the Convention plainly refers to the treaties listed in the Annex and the offences defined therein without

ing, two phenomena which otherwise share central features, is that "money laundering cleans dirty money" while "terrorist financing dirties clean money", see J.D.G. Waszak, "The Obstacles to Suppressing Radical Islamic Terrorist Financing", *Case W. Res. J. Int'l L.* 36 (2004), 673 et seq. (674-676). The International Convention for the Suppression of the Financing of Terrorism consequently disregards the source from which the funds concerned are obtained, see article 1 (1) ("assets of every kind, [...] however acquired"); cf. already on the draft convention prepared by France, *Report of the Ad Hoc Committee*, see note 62, para. 28. For a different reason, namely with a view to the element of extortion inherent in ransom transfers, the piratical context of the acquisition and provision of the payment will, however, be of relevance when it comes to establishing the *actus reus* of article 2 (1) of the Convention requiring "unlawful" financing, see below under III. 1. b.

⁷⁷ On difficulties in identifying the required intention or knowledge of the terrorist use to which the funds are to be put, cf. also more generally Lavallo, see note 71, 501-504 (arguing that, in most cases, it will not be possible to prove a direct link between the collection or provision of certain funds and a specific offence as covered by article 2 (1) of the Convention, and submitting that, therefore, it should suffice that the collector or provider knows that the recipients are terrorists and will probably use them for terrorist activities falling within either subparagraph (a) or (b)).

indicating any further limitation, such as with a view to the purpose for which these are committed. Yet the 1979 International Convention Against the Taking of Hostages (Hostages Convention)⁷⁸ as well as the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention)⁷⁹ equally apply to crimes committed for private ends just as to those committed for political purposes, and may therefore be relevant in the context of piracy.⁸⁰ Then again, the general rule of interpretation codified in article 31 (1) VCLT demands that account be taken of the context in which the terms of a treaty are used.

The relevant context comprises the entire text of the treaty, including its preamble.⁸¹ While the notion “terrorism” is featured in none of the operative provisions of the International Convention for the Suppression of the Financing of Terrorism, it dominates the entire agreement due to its prominent mention in the title⁸² and the virtually exclusive preoccupation with this concept that can be observed in the preamble.⁸³ Moreover, subparagraph 1 (b) of article 2 defines a category of acts that share amongst themselves, and with the broadly accepted understanding of terrorism, a political purpose.⁸⁴ These observations could suggest a narrower interpretation also of subparagraph 1 (a), establishing the financing of the relevant acts under the listed treaties as an offence only where they are committed with a terrorist intention according to the contributor’s intent.⁸⁵

⁷⁸ International Convention against the Taking of Hostages, see note 58.

⁷⁹ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, see note 58.

⁸⁰ Cf. article 3 (1) SUA Convention, *ibid.*; article 1 (1) International Convention against the Taking of Hostages, see note 58; see also Roach, see note 3, 407; Geiß/ Petrig, see note 72, 13.

⁸¹ See article 31 (2) VCLT.

⁸² It may be noted that even amongst the treaties listed in the Annex to the Convention there is only one, the International Convention for the Suppression of Terrorist Bombings, which equally refers to the notion of terrorism in its title.

⁸³ Except for the very first, which reaffirms the fundamental purposes and principles of the United Nations, every preambular paragraph mentions terrorism directly or indirectly by reference to previous paragraphs or to resolutions of the UN General Assembly.

⁸⁴ Cf. already above, text following note 76 and under II. 2.

⁸⁵ Such a construction would seem to correspond to Lavalle’s contention that contrary to the other “counterterrorism treaties” mentioned in the Annex,

Construing subparagraph 1 (a) in this sense would, however, contradict the overall structure of article 2 and finds no support in either the purpose or the drafting history of the Convention. Pursuant to the architecture of the norm, the purpose of intimidation of a population or coercion of a government or international organization qualifies only “[a]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict” as mentioned in subparagraph (b), but not the offences defined in the specified conventions according to subparagraph (a) in conjunction with the Annex.⁸⁶

The objective of the International Convention for the Suppression of the Financing of Terrorism, which is the final element to be considered under the general rule of treaty interpretation according to article 31 (1) VCLT, provides no grounds for rebutting this systematic argument. In light of the preamble and the drafting history of the Convention, its objective, for present purposes, may be described broadly as the prevention of terrorist acts, to be promoted specifically by preventing and suppressing the financing of international terrorism.⁸⁷ In default of a recognized definition of terrorism, this aim had previously been pursued by the “piecemeal approach”⁸⁸ of adopting the very conventions listed in the Annex, which criminalize specific categories of acts

the International Convention for the Suppression of the Financing of Terrorism applies to terrorism-related offences only, cf. Lavalle, see note 71, 505.

⁸⁶ To apply to the acts incorporated in the definition by subparagraph (a), the qualifier as regards the perpetrators’ purpose would have had to be stated in a final clause rather than within subparagraph (b):

“[...] in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict,

when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”

⁸⁷ Cf. International Convention for the Suppression of the Financing of Terrorism, preamble, paras 9-12; cf. also *Report of the Working Group*, see note 62, Annex III, para. 6; further specifications of this purpose are possible but unnecessary at this point and will be left for discussion in the relevant context, see below, text accompanying notes 107-108.

⁸⁸ Aust, see note 60, 291.

that are typically committed by terrorists but may also be part of other criminal endeavours.⁸⁹

There is no evidence that this approach of combating terrorism by broadly targeting activities that are often related but may potentially be unrelated to terrorist goals was given up in the International Convention for the Suppression of the Financing of Terrorism. In particular, the definition of another category of acts in light of the perpetrators' terrorist motivation in subparagraph 1 (b) of article 2 served to complement the previous "piecemeal" by criminalizing also the funding of terrorist killings that are committed through none of the means and in none of the contexts covered by the specialized conventions.⁹⁰ Thus, even if the ultimate purpose of the Convention is to prevent "terrorism", this is no reason to construe the reference to other counterterrorism conventions in article 2 (1)(a) more narrowly than those treaties themselves. This position finds additional support in the preparatory works, which may be resorted to as a supplementary means of interpretation confirming the meaning suggested by an interpretation of the terms of a treaty in light of their context and its purpose, or to resolve persisting ambiguities.⁹¹

During the first reading of the French draft convention in the Ad Hoc Committee, an amendment to draft article 2 (1)(a) had been proposed by Guatemala, which would explicitly have limited the relevant offences under the existing treaties to those "of a terrorist nature".⁹² As

⁸⁹ Cf. Lavalle, see note 71, 505; see generally on the common basic structure of the different counterterrorism treaties *ibid.*, 493-494; Johnson, see note 68, 268.

⁹⁰ Cf. also Lavalle, see note 71, 497; Aust, see note 60, 291-292. This "twofold aim" of the definition in article 2 (1) of the Convention, embracing both the financing of acts falling within the ambit of existing counterterrorism treaties binding upon state parties to the Convention and the financing of murder not covered by existing treaties, was noted as one of the shared understandings that emerged during the general debate on the French draft convention in the Ad Hoc Committee, see *Report of the Ad Hoc Committee*, see note 62, para. 29.

⁹¹ Cf. article 32 VCLT.

⁹² See *Proposal submitted by Guatemala*, Doc. A/AC.252/1999/WP.16, reprinted in: *Report of the Ad Hoc Committee*, see note 62, Annex III, No. 16, according to which article 2 (1)(a) would have read: "An offence of a terrorist nature within the scope of one of the Conventions listed in the Annex hereto, provided that at the material time the State Party concerned

the Rapporteur noted in his informal summary of the discussions in the Working Group, “[o]pposing views regarding the need to further specify the crimes in the annex to the draft convention were presented” also during the second reading of draft article 2.⁹³ Although the phrasing of draft article 2 (1)(a) underwent further changes in the working paper and draft convention prepared subsequently in the Ad Hoc Committee and the Working Group of the Sixth Committee, no qualifier as proposed by Guatemala was included at either stage of the Convention’s evolution, including evidently and most importantly the final version.⁹⁴ The report of the Ad Hoc Committee and the Rapporteur’s informal summary fail to state the reasons for which the proposed amendments were rejected. Given the ambiguities surrounding the notion of terrorism, the insertion of a reference to the “terrorist nature” of the acts covered would in fact have been far from further clarifying the offence. According to the Rapporteur’s summary, such clarification was, however, the aim of the Guatemalan proposal.⁹⁵ Yet, quite to the contrary, it could have further complicated the assessment of the scope of the Convention.⁹⁶ Against this backdrop, and in the absence of compelling evidence from other sources of interpretation that a concept of “terrorism” should limit the relevant offences under the conventions listed in the

was a party to that Convention”; see also *Report of the Ad Hoc Committee*, see note 62, Annex IV, para. 20.

⁹³ *Report of the Ad Hoc Committee*, see note 62, Annex IV, para. 91.

⁹⁴ Cf. also Working Paper prepared by France on arts 1 and 2, reprinted in: *Report of the Ad Hoc Committee*, see note 62, Annex I.B; Revised text prepared by the Friends of the Chairman, reprinted in: *Report of the Working Group*, see note 62, Annex I.

⁹⁵ *Report of the Ad Hoc Committee*, see note 62, Annex IV, para. 20.

⁹⁶ Cf. Higgins, who found in 1997 that “[t]errorism’ is a term without legal significance” but “merely a convenient way of alluding to activities, whether of States or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both”, R. Higgins, “The general international law of terrorism”, in: R. Higgins/ M. Flory (eds), *Terrorism and International Law*, 1997, 13 et seq. (28). She continued to observe that no “umbrella concept of ‘terrorism’, over and above the specific topics of hostages, aircraft, protected persons etc.” had been necessary thus far for international law to prohibit and establish jurisdiction over relevant types of events, *ibid.* Cf. also Sorel, for whom “terrorism” is a “delicate political conception [that], without any clear and accepted definition, can be interpreted in various ways”, J.M. Sorel, “Some Questions About the Definition of Terrorism and the Fight Against Its Financing”, *EJIL* 14 (2003), 365 et seq. (372).

Annex, no additional qualifier like the one that had been formally proposed yet not adopted should be read into subparagraph (a).

In sum, the International Convention for the Suppression of the Financing of Terrorism applies broadly to the funding of activities that may or may not fall within a narrower definition of terrorism covering crimes committed for political purposes only, as long as these acts are offences as specified by the Conventions listed in the Annex. The financing of piratical activities may thus well constitute an offence as defined by article 2 (1)(a), namely in conjunction with the SUA and the Hostages Convention.

b. Ransom Payments as Terrorist Financing?

If the financing of piracy may come within the ambit of the International Convention for the Suppression of the Financing of Terrorism, the crucial issue then is whether the payment of ransoms is to be considered as an offence as defined by article 2. It has been suggested 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 offence of financing terrorism in article 2 (1) in conjunction with the annex, and of complicity in article 2 (5)].”⁹⁷ Indeed, the payment of ransoms, parachuted on board the hijacked vessel, easily constitutes a direct or indirect provision of funds as required by the *chapeau* of article 2 of the Convention.⁹⁸ Whether the necessary *mens rea* can be found is, obviously, ultimately a matter to be assessed individually for each person in any given case. Yet, since it is an established fact that pirates, especially off the Somali coast, operate as part of what

⁹⁷ Roach, see note 3, 408.

⁹⁸ The formulation for which the drafters of the Convention opted is very broad both with regard to the form of support that may constitute financing and the way by which it is provided. Thus, article 1 (1) defines funds broadly as “assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, money orders, shares, securities, bonds, drafts, letters of credit”. Moreover, the qualifier “by any means, directly or indirectly” in article 2 (1) clarifies that any supplier of funds, be it the originator or an intermediary, commits the offence of financing terrorism, irrespective of the process used to reach the receiver, as long as the other requirements of the provisions, including in particular the necessary *mens rea*, are satisfied, see Aust, see note 60, 294.

has become a flourishing and well-organized “business”,⁹⁹ ship operators paying ransoms will regularly know that at least part of the money transferred will flow into further piratical or terrorist acts. In these circumstances, the payment of ransoms to pirates could thus far qualify as an offence under article 2 of the International Convention for the Suppression of the Financing of Terrorism which the parties undertake, in principle, to prosecute and punish, notwithstanding the fact that humanitarian concerns for the hostages may strongly demand that the pirates’ bidding is done. Such an uncompromising stance of international law on ransom payments known to facilitate further terrorist or piratical activities would, in practice, encourage authorities advocating a similarly tough stance on the domestic level.¹⁰⁰

Within the International Convention for the Suppression of the Financing of Terrorism, however, the conflict between the aim of preventing future acts of terrorism and the rescue of victims from current emergency situations is to be considered in light of the remaining component of the definition in article 2 (1), requiring funds to be “unlawfully” provided. The meaning and warrant of this qualifying adverb has aroused some controversies, both during the drafting process of the Convention and in scholarly commentary thereon.¹⁰¹ *Prima facie*, it may appear at best tautological to circumscribe the scope of terrorist financing that is to be criminalized by reference to its unlawfulness.¹⁰² It

⁹⁹ Cf. Roach, see note 3, 407.

¹⁰⁰ Cf. e.g. Rutkowski, Paulsen and Stoian, who express concern that Security Council Resolution 1844 on Somalia could be used by the US Department of State in an initiative to make the payment of ransoms to pirates illegal under domestic law, L. Rutkowski/ B.G. Paulsen/ J.D. Stoian “Mugged Twice?: Payment of Ransom on the High Seas”, *American University Law Review* 59 (2010), 1425 et seq. (1435).

¹⁰¹ See e.g. Lavalley, see note 71, 500-501; Pieth, see note 73, 1080-1081; see also Aust, see note 60, 294-295.

¹⁰² It was on the basis of this perception that some delegations proposed the deletion of the term from the draft article 2 (1) of the Convention during the discussion both in the Ad Hoc Committee and the Working Group of the Sixth Committee, see e.g. *Proposal submitted by Germany*, Doc. A/AC.252/1999/WP.26, reprinted in: *Report of the Ad Hoc Committee*, see note 62, Annex III, No. 27; no reference to an unlawfulness of the provision of funds can also be found in the *Proposal submitted by the United Kingdom of Great Britain and Northern Ireland concerning articles 1 and 2*, Doc. A/AC.252/1999/WP.20 and Rev.1, reprinted in: *Report of the Ad Hoc Committee*, see note 62, Annex III, Nos. 20, 21; see generally *Report of the Ad Hoc Committee*, see note 62, Annex IV, paras 17 (first reading)

is not surprising then that the term “unlawfully” was not contained in article 2 (1) of the original draft Convention proposed by France,¹⁰³ and that it was initially placed in square brackets indicating persisting need for consultations in a subsequent revised draft prepared on the basis of the ensuing negotiations.¹⁰⁴

As has repeatedly been observed in doctrine, a similar structure was built into the International Convention for the Suppression of Terrorist Bombings.¹⁰⁵ In this case, including “unlawfulness” as an element of the offence has been said to be warranted as, in particular albeit exceptional circumstances, certain persons or authorities may justifiably have to cause an explosion.¹⁰⁶ Similar considerations may, however, be in place as regards the provision of funds to terrorists or pirates, notably against

and 88 (second reading); *Report of the Working Group*, see note 62, Annex III, para. 67; cf. also Aust, see note 60, 294; for Laval, a literal understanding of the term would even produce highly absurd results, see note 71, 500.

¹⁰³ See *Letter dated 3 November 1998 from the Permanent Representative of France to the United Nations addressed to the Secretary-General*, see note 60, Annex I, article 2 (1): “Any person commits an offence within the meaning of this Convention if that person intentionally organizes or proceeds with the financing of a person who, to his or her knowledge: [commits, or proposes to commit, acts listed in article 2(1)(a) and (b)].”

¹⁰⁴ See *Proposal submitted by France: Revised texts of articles 2, 5, 8, and 12 and additional provisions*, Doc. A/AC.252/1999/WP.45, reprinted in: *Report of the Ad Hoc Committee*, see note 62, Annex III, No. 46, article 2 (1): “Any person commits an offence within the meaning of this Convention if that person [unlawfully and intentionally] provides financing with the knowledge or intent that such financing will be used, in full or in part, to commit [or prepare the commission of]: [...]”; still after the criterion of “unlawfulness” had become a set element of article 2 in the *Working paper prepared by France on articles 1 and 2* following the two readings and informal consultations by the Ad Hoc Committee, see *Report of the Ad Hoc Committee*, *ibid.*, Annex I.B., discussions continued in the Working Group of the Sixth Committee, see *Report of the Working Group*, see note 62, Annex III, para. 67.

¹⁰⁵ International Convention for the Suppression of Terrorist Bombings, see note 58, article 2: “Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device [...]”.

¹⁰⁶ Aust mentions the possibility that, in exceptional situations, law enforcement authorities may have to detonate explosives in a public place, see note 60, 294; Laval points to the use of explosives, for instance, in civil engineering work, see note 71, 500.

the backdrop of situations of kidnapping and extortion as discussed in the present article.

Indeed the purpose of the International Convention for the Suppression of the Financing of Terrorism, as revealed by the preparatory works, can be delineated more finely than has been done so far.¹⁰⁷ Rather than sweepingly aiming at the prevention of terrorism by criminalizing, preventing and prosecuting its financing, the drafters were aware of and concerned with the distinction between legitimate and illegitimate forms of conduct that may ultimately facilitate terrorist acts, and targeted only the latter. A clear distinction was thus drawn, for instance, between the “criminal acts” of the sponsors of terrorism and “the legitimate activities of humanitarian organizations.”¹⁰⁸ In light of this more precisely defined purpose of the Convention, the term “unlawfully” in article 2 (1) obtains meaning as a gateway opening avenues for exceptions to the criminalization in principle of terrorist financing.¹⁰⁹ Further evidence for this construction can be found in the subsequent conduct by state parties to the Convention, which is to be taken into account pursuant to article 31 (3) VCLT. Thus, for instance, the Swiss legislator relied on the term “unlawfully” to find, in adapting the relevant federal laws to the requirements of the Convention, that humanitarian activities as well as the payment of ransoms can be justified even if they contribute to the funding of terrorism.¹¹⁰ Moreover, and particularly worthy of note, the Assembly of the African Union requested the UN General Assembly in its “Decision to combat the

¹⁰⁷ See above, text accompanying note 87.

¹⁰⁸ See *Report of the Working Group*, see note 62, Annex III, para. 9: “It was also noted that the purpose of the draft convention was to target the sponsors of terrorism in order to deter as well as to prosecute and punish their criminal acts without penalizing the legitimate activities of humanitarian organizations or those who contribute funds in good faith.”

¹⁰⁹ Pieth, see note 73, 1080; see also in the *travaux préparatoires Report of the Working Group*, see note 62, Annex III, para. 67: “[...] the view was also expressed that it would be useful to retain the reference to ‘unlawful’, since it added an element of flexibility by, for example, excluding from the ambit of application of the draft convention legitimate activities, such as those of humanitarian organizations and ransom payments.”

¹¹⁰ Swiss Federal Council, *Botschaft betreffend die Internationalen Übereinkommen zur Bekämpfung der Finanzierung des Terrorismus und zur Bekämpfung terroristischer Bombenanschläge sowie die Änderung des Strafgesetzbuches und die Anpassung weiterer Bundesgesetze*, 26 June 2002, BBl. 2002, 5390 et seq. (5404-5405); see also Pieth, see note 73, 1080, fn. 33.

payment of ransom to terrorist groups” of 3 July 2009 “to initiate negotiations with a view to elaborating a supplementary protocol to the International Convention for the Suppression of the Financing of Terrorism or to the International Convention against the Taking of Hostages which prohibits the payment of ransom to terrorist groups.”¹¹¹ This Decision most clearly illustrates that for the African Union’s members, most of whom are parties to the International Convention for the Suppression of the Financing of Terrorism, no such prohibition of ransom payments was imposed by the said Convention.

Finally, the *travaux préparatoires* to the Convention equally confirm that the opening of avenues to exempt certain forms of terrorist funding was precisely the reason for which the “unlawfulness” element was retained despite criticism by some delegations. A pivotal concern was that, by broadly criminalizing the provision of assets that would, at least in part, benefit terrorists, the work of humanitarian agencies would be hindered, namely under conditions where entire populations are in dire need of assistance and terrorists hide amongst them and may thus equally obtain supplies. Knowledge of unavoidable abuse should, however, not prevent the continued delivery of humanitarian aid.¹¹² While the payment of ransoms is a case apart from the aforementioned, concern for the life and bodily integrity of the hostages may justify similar considerations. Accordingly, ransoms were named during the elaboration of the Convention as another form of funding that could be exempted from the scope of the offence of financing terrorism.¹¹³ In conclusion, an interpretation in light of the purpose and with regard to the preparatory works of the treaty clearly results in the finding that no

¹¹¹ African Union, Assembly of the Union, *Decision to Combat the Payment of Ransom to Terrorist Groups*, AU Doc. Assembly/AU/Dec. 256(XIII) of 3 July 2009, para. 10.

¹¹² *Statement made on 19 March 1999 by the Observer for the International Committee of the Red Cross*, Doc. A/AC.252/1999/INF./2, Annex; *Comments by the United Nations High Commissioner for Refugees on the Draft International Convention for the Suppression of the Financing of Terrorism*, Doc. A/C.6/54/WG.1/INF/1 (calling upon the delegations to use the term “unlawfully” so as “to ensure that the humanitarian community is not unduly penalized”, para. 7); see also *Report of the Working Group*, see note 62, Annex III, para. 67.

¹¹³ *Report of the Working Group*, see note 62, Annex III, para. 67; see also Pieth, see note 73, 1080; Aust, see note 60, 294; Lavallo, see note 71, 501, fn. 31.

offence under article 2 (1) of the Convention is committed by persons compelled to pay ransoms for the release of hostages.

c. Conclusion on the Lawfulness of Ransom Payments to Pirates under the International Convention for the Suppression of the Financing of Terrorism

To sum up, the International Convention for the Suppression of the Financing of Terrorism contains no obligation for state parties to criminalize the payment of ransoms. Generally, the definition of the offence in article 2 (1) justifies the application of the Convention regardless of whether the acts for which the funds are to be used qualify as terrorist or piratical, as long as they fall at least within the ambit of the offences defined in the treaties in the Annex to the Convention. At the same time, however, the payment of ransoms is not an unlawful provision of funds which state parties would be obligated to criminalize and suppress. In the event that a protocol to the Convention such as called for by the African Union Assembly was adopted, however, and in the absence of any provision to the contrary, the scope of the offence of terrorism financing would be extended also to ransoms paid to pirates.

2. Conformity of Ransom Payments with Security Council Resolutions

Having established 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. This section will evaluate Security Council Resolution 1373,¹¹⁴ which broadly addresses the issue of terrorist financing, and the sanctions regime originating from Resolution 1267,¹¹⁵ which specifically targets *al-Qaida* and the *Taliban*. In addition, to complement the legal assessment of ransoms paid to Somali pi-

¹¹⁴ S/RES/1373 (2001) of 28 September 2001.

¹¹⁵ S/RES/1267 (1999) of 15 October 1999. On the competence of the Security Council to establish targeted sanctions regimes under Chapter VII of the UN Charter, cf. e.g. S. Majlessi, "The Use of Economic Sanctions under International Law: A Contemporary Assessment", *CYIL* 39 (2001), 253 et seq. (283-330); E. López-Jacoiste, "The UN Collective Security System and its Relationship with Economic Sanctions and Human Rights", *Max Planck UNYB* 14 (2010), 273 et seq. (279-297).

rates, the targeted sanctions regime under Resolution 1844,¹¹⁶ adopted in the context of the continuing civil war in the country, will be addressed.

a. Conformity of Ransom Payments with Security Council Resolution 1373

Pirate activities could fall within the scope of Security Council Resolution 1373, which was adopted shortly after the terrorist attacks of 11 September 2001 in the United States.¹¹⁷ The resolution's primary focus was to prevent future acts of terrorism by suppressing their financing. In order to ensure that financing of terrorism was outlawed internationally irrespective of the International Convention for the Suppression of the Financing of Terrorism, which was not yet in force in 2001,¹¹⁸ the Security Council adopted operative paragraphs in Resolution 1373 bearing similarity to the core provisions of the aforementioned Convention.¹¹⁹ As operative paragraph 1 spells out, after a general call to "[p]revent and suppress financing of terrorist acts" (subparagraph (a)), the states are requested to criminalize the financing of terrorist acts (subparagraph (b)) and to freeze any funds of persons suspected to participate in terrorist acts (subparagraph (c)) as well as to generally prohibit the financing of terrorist acts (subparagraph (d)).¹²⁰

All states are called upon to implement these imperatives in their domestic laws.¹²¹ The provisions have remained basically unaltered by

¹¹⁶ S/RES/1844 (2008) of 20 November 2008.

¹¹⁷ S/RES/1373, see note 114; see also Geiß/ Petrig, see note 72, 13.

¹¹⁸ See note 63 and accompanying text.

¹¹⁹ Therefore, the Security Council has been termed a "world legislator" namely by S. Talmon, "The Security Council as World Legislature", *AJIL* 99 (2005), 175 et seq. (175). For a general discussion of the Security Council's practice of prescribing treaty provisions via resolution, see S. Talmon, "Security Council Treaty Action", *Revue Hellénique de Droit International* 62 (2009), 65 et seq. (96 et seq.).

¹²⁰ S/RES/1373 (2001), see note 114, op. para. 1; quoted in full text below.

¹²¹ The implementation is monitored by the Counter-Terrorism Committee, which has been established by para. 6 of Resolution 1373; moreover, this paragraph obliges all states to report on the implementation of Resolution 1373. Nanda emphasizes that 100 states reported their progress within 90 days, V. Nanda, "The Role of International Law in Combating Terrorism", *Michigan State University Detroit College of Law Journal of International Law* 10 (2001), 603 et seq. (605). The committee adopted guidelines for the

further Security Council resolutions, in contrast to the comparable UN-administered system to freeze funds of individuals established by Resolution 1267, which has been subject to changes.¹²² The only explicit amendment to the obligations under Resolution 1373 was introduced by Resolution 1452,¹²³ which urged all states to consider the exceptions to the freezing of funds under Resolution 1267¹²⁴ – for example to exempt ordinary living expenses, legal fees and costs for administration of funds¹²⁵ – when implementing Resolution 1373 in domestic legislation.¹²⁶ Otherwise, the resolution has remained unchanged and in effect.

Since, at first glance, the wording of the relevant prohibitions seems to be inclusive, and taking into consideration recent collaboration of pirates in Somalia with *al-Shabaab*,¹²⁷ a case could be made that Resolution 1373 covers ransom payments to pirates. Therefore, it should be determined whether pirate activities are terrorist acts within the meaning of Resolution 1373 and whether the payment of ransom for hi-

implementation of Resolution 1373 without explicitly mentioning ransom payments, see Counter-Terrorism Committee, *Technical Guide to the Implementation of Security Council Resolution 1373 (2001)*, 2009, available at <www.un.org/en/sc/ctc>. The latest report on the progress made according to the reports by states was published by the Committee in 2009, see Counter-Terrorism Committee, *Survey on the Implementation of Security Council Resolution 1373 (2001) by Member States*, Doc. S/2009/620 of 3 December 2009, available at <www.un.org/en/sc/ctc>. Cf. generally on the committee's work E. Rosand, "Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism", *AJIL* 97 (2003), 333 et seq.

¹²² For a detailed description of the sanctions regime introduced by Resolution 1267, see below under III. 2. b.

¹²³ S/RES/1452 (2002) of 20 December 2002.

¹²⁴ S/RES/1267 (1999) of 15 October 1999.

¹²⁵ S/RES/1452 (2002), see note 123, op. para. 1 (a) reads: "necessary for basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges, or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or service charges for routine holding or maintenance of frozen funds or other financial assets or economic resources".

¹²⁶ S/RES/1452 (2002), see note 123, op. para. 5: "Urges Member States to take full account of the considerations set out above in their implementation of resolution 1373 (2001)."

¹²⁷ Cf. above under II.

jacked ships and crews falls within the scope of this instrument. In the first operative paragraph, the Security Council

“[d]ecides that all States shall:

- (a) Prevent and suppress the financing of terrorist acts;
- (b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
- (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;
- (d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons.”¹²⁸

Comparing the structure of all four subparagraphs, every provision can be found to contain two elements. All clauses prohibit or criminalize an action, which is described e.g. as “financing” (subparagraph (a)) or “wilful provision [...] of funds” (subparagraph (b)). All those activities may be summarized as different methods of financing. Furthermore, the financing is qualified by a connection to “terrorist acts”. Therefore, to regard piratical activities as sanctioned under the resolution, two conditions need to be fulfilled: the pirates receiving ransom have to commit “terrorist acts” and payment of ransom has to be financing pursuant to subparagraphs (a) – (d).

¹²⁸ S/RES/1373 (2001), see note 114, op. para. 1.

aa. Piracy as “Terrorist Act” within the Meaning of Resolution 1373

As such, the legality of paying ransom to pirates in order to free ships and crew depends on whether Resolution 1373 was intended to cover piratical activities as “terrorist acts”. In order to construe Resolution 1373, the applicable rules for interpretation of Security Council resolutions have to be identified. Articles 31-33 VCLT, which concern only the interpretation of treaties, are not directly applicable. Still, the basic means of interpretation which the VCLT provides may be applied by analogy.¹²⁹ Yet when interpreting Security Council resolutions, the special conditions in which these are drafted and adopted have to be taken into account.¹³⁰ In particular, the mainly political nature of all Security Council decisions must be considered.¹³¹

The wording and context seem inconclusive as to the scope of the term “terrorist acts”. Neither does Resolution 1373 contain a definition, nor does it limit the term to attacks like those of 9/11.¹³² Rather, the preambular para. 3 generally states that “any act of international terrorism [constitutes] a threat to international peace and security.”¹³³

By analogy to article 31 (3) VCLT, other sources of law may influence the interpretation of the term “terrorist act” with regard to pirate activities in this case.¹³⁴ Since the resolution was intended to put into force the core provisions of the International Convention for the Suppression of the Financing of Terrorism, the definition of terrorism in ar-

¹²⁹ M. Wood, “The Interpretation of Security Council Resolutions”, *Max Planck UNYB* 2 (1998), 73 et seq. (85 et seq.); M. Herdegen, “Interpretation in International Law”, *Max Planck Encyclopedia of Public International Law*, 2010, online edition, paras 50-51. This may be confirmed by Talmon, see note 119, 179, calling resolutions “secondary treaty (or Charter) law”; however, as a matter of interpretation, Wood, recalls the political nature of resolutions to distinguish them from the UN Charter as a treaty, *ibid.*, 79.

¹³⁰ Wood, see note 129, 85 et seq.

¹³¹ Cf. *ibid.*, 78.

¹³² Cf. Sorel, see note 96, 369 et seq., who holds that the Security Council actually discussed the necessity of including a definition at all, while highlighting the detriments.

¹³³ Cf. S/RES/1373 (2001), see note 114. The African Union subscribes to this proposition in Decision 256 of 2009, see note 111.

¹³⁴ Wood further elaborates on respective adjustments of article 31 (3) VCLT with regard to Security Council resolutions, see note 129, 91-94; see also Herdegen, see note 129, paras 50-51.

ticle 2 (1)(b) provides a starting point for the interpretation.¹³⁵ As stated above, this norm requires a special *mens rea* element, which presupposes that “the purpose of such act, by its nature or context, is to intimidate a population or to compel a government [...] to do or abstain from doing any act.” Moreover, even though no universally accepted definition of terrorism exists, several definitions share this requirement.¹³⁶ Against this backdrop, for Resolution 1373 to be applicable, piracy would need to come within this definition. The term piracy is defined in article 101 UNCLOS, codifying customary international law.¹³⁷ As analysed above, only acts undertaken for private ends may

¹³⁵ Cf. Talmon, see note 119, 177. Moreover, he indicates that the lack of a definition of a terrorist act in the resolution “allows each member state to define terrorist acts under its domestic legislation”, *ibid.*, 189. Yet, in concluding that some states purportedly had enacted laws to fulfil their obligations under Resolution 1373 without actually succeeding (*ibid.*, 190), he acknowledges that a certain prevailing definition of the term “terrorist act” underlies the resolution. Mention should further be made of the approach by Lavallo, who discusses yet finally rejects the idea of resorting to the terrorism definition in *op. para. 3* of Security Council Resolution 1566 of 8 October 2004, R. Lavallo, “A Politicized and Poorly Conceived Notion Crying Out for Clarification: The Alleged Need for a Universally Agreed Definition of Terrorism”, *ZaöRV/ HJIL* 67 (2007), 89 et seq. (103).

¹³⁶ Cf. the Council of Europe Convention on the Prevention of Terrorism, Council of Europe Treaty Series (CETS) No. 196, concluded in Warsaw on 16 May 2005 and entered into force 1 June 2007, whose article 1 (1) *inter alia* incorporates the definition from the International Convention for the Suppression of the Financing of Terrorism; the same would be true for the European Convention on the Suppression of Terrorism, CETS No. 090, concluded on 27 January 1977 as amended by the Protocol amending the European Convention for the Suppression of Terrorism, CETS No. 190 concluded in Strasbourg on 15 May 2003, which never entered into force, but was replaced by the aforementioned convention. Furthermore, Subedi elaborates on the drafting process of the comprehensive Convention of International Terrorism, which, however, was not adopted eventually, S. Subedi, “The UN Response to International Terrorism in the Aftermath of the Terrorist Attacks in America and the Problem of the Definition of Terrorism in International Law”, *International Law FORUM du Droit International* 4 (2002), 159 et seq. (162).

¹³⁷ Cf. T. Treves, “Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia”, *EJIL* 20 (2009), 399 et seq. (401); for further references see König, see note 45, 224; Ö. Direk/ M. Hamilton/ K. Openshaw/ P. Terry, “Somalia and the Problem of Piracy in International Law”,

constitute piracy.¹³⁸ Such activities, if aimed solely at extorting ransom payments, do not satisfy the mini-definition of terrorism included in article 2 (1)(b) International Convention for the Suppression of the Financing of Terrorism.¹³⁹ This suggests that “terrorist acts” in Resolution 1373 would equally exclude piratical activities.

This analysis, even though informed by the desire to align the interpretation of Resolution 1373 with that of the Convention, would, however, result in asserting a different scope for each of these instruments.¹⁴⁰ One might therefore consider incorporating the idea of article 2 (1)(a) International Convention for the Suppression of the Financing of Terrorism with its reference to offences specified under the treaties listed in the Annex. Yet by employing the means of cross-referencing other conventions, the International Convention for the Suppression of the Financing of Terrorism specifically sought to work around the legal minefield of universally defining terrorism.¹⁴¹ As such, it is doubtful whether the Security Council intended to adopt this unique two-pronged approach as a whole. Rather, since the resolution was drafted in the immediate aftermath of the clearest possible example of international terrorism, the attacks of 9/11, it is well perceivable that no attention was paid to the exact circumscription of “terrorism” and its demarcation with regard to other crimes. As a consequence, when dealing with phenomena lying at the periphery of terrorism properly, the applicability of the regime established under Resolution 1373 cannot currently be ascertained – the legal situation remains uncertain.

bb. Ransom Payments as Financing under Resolution 1373

Whether the modalities of financing in operative paragraph (1) cover the payment of ransoms is doubtful. The International Convention for

Uluslararası Stratejik Araştırmalar Kurumu (USAK) Yearbook of International Politics and Law 4 (2011), 223 et seq. (238).

¹³⁸ Cf. above under II. 2. for a discussion of possible interpretations, see also von Arnald, see note 45, 462 et seq.; L. Azubuike, “International Law Regime Against Piracy”, *Annual Survey of International & Comparative Law* (2009), 43 et seq. (52-53); Rutkowski/ Paulsen/ Stoian, see note 100, 1431; Direk et al., see note 137, 231 et seq.

¹³⁹ Cf. above under III. 1. b.

¹⁴⁰ Cf. under III. 1. a.

¹⁴¹ Cf. above under III. 1. a. with regard to the definition of terrorism under the International Convention for the Suppression of the Financing of Terrorism.

the Suppression of the Financing of Terrorism, which is considered the model for Resolution 1373, excludes ransoms from its scope of application.¹⁴²

The general provision in operative paragraph (1)(a) requests all states to “prevent and suppress the financing of terrorist acts.” The original meaning of financing is support with financial means.¹⁴³ Hence, where monies obtained as ransoms serve terrorist agendas, the application of paragraph (1)(a) is triggered, without a specific element of *mens rea* being required.

Subparagraph (b) obligates states to criminalize the “wilful provision [...] of funds”, provided that they are transferred “with the intention that [they] should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.”¹⁴⁴ As the *actus reus* is broadly phrased to encompass any provision of funds, the conduct to be penalized by states includes payment of ransoms. The actual challenge will be to prove the required subjective elements in a given case.¹⁴⁵

As regards subparagraph (c) concerning the freezing of funds, by contrast, it is already doubtful whether shipowners paying ransom for the release of their ship, cargo or crew fulfil the *actus reus* requirement. Potentially, they could be taken to act “at the direction” of persons committing or attempting to commit terrorist acts, when complying with ransom demands. However, a contextual construction taking into account the other modalities of subparagraph (c) points to a narrow reading of this term: both the entities whose funds are to be frozen and the property from which benefits are generated have to be “owned and controlled” either directly or indirectly by terrorists or associated persons. This indicates the requirement of a close and somewhat institutionalized connection between the terrorists and the sources from which the funds are generated. While “acting [...] at the direction” does not require an organizational structure amounting to that of a corporation, a comparison with the standard of ownership and control suggests that for the freezing of funds the resolution presupposes a connection

¹⁴² Cf. above the conclusion under III. 1. c.

¹⁴³ Cf. B.A. Garner (ed.), *Black's Law Dictionary*, 9th edition, 2009: “financing”: “[t]he act or process of raising or providing funds” or “[f]unds that are raised or provided”.

¹⁴⁴ S/RES/1373 (2001), see note 114, op. para. 1 (b).

¹⁴⁵ Cf. for the analysis of the *mens rea* element under the International Convention for the Suppression of the Financing of Terrorism, see note 77 and accompanying text.

going beyond a singular and random encounter such as that between the hijacker and the owner of the hijacked ship. Prior to payment of the ransom, the latter does not act at the direction of the hijacker, and the non-recurring payment of ransom does not imply that his remaining assets will also be provided to terrorist networks. Consequently, subparagraph (c) will regularly not apply to the payment of ransom.

Subparagraph (d), which requests the prohibition, though not necessarily by laws imposing penal sanctions, of “making any funds, financial assets or economic resources or financial or other related services available” for the benefit of terrorists and specified associated persons or entities, is again phrased widely enough to cover any incidents of ransom payments. Since no additional requirement is set out, a textual interpretation would suggest that ransoms are included in the scope of subparagraph (d).

In conclusion, the wording of subparagraphs (a), (b) and (d) seems to indicate that states would be required to prohibit and criminalize the payment of ransom to terrorists and possibly to pirates, at least when these further terrorist acts by supplying funds.

Notwithstanding these considerations, the political context in which Resolution 1373 was adopted may call for a different understanding. In contrast to the interpretation of the International Convention for the Suppression of the Financing of Terrorism advocated above, the resolution would go significantly further and require states to prohibit ransom payments, even though it was intended to incorporate the core aspects of that convention.¹⁴⁶ Thus, it may be warranted to interpret the resolution in accordance with the Convention. This could be achieved by a construction in light of the object and purpose of the resolution or by implication. The drafting process of a Security Council resolution could make it necessary to imply certain terms complementing the actual wording.¹⁴⁷ The International Convention for the Suppression of

¹⁴⁶ Talmon, see note 119, 102, emphasizes this action as an example where the Security Council “prescribe[s] the provisions of an existing multilateral treaty not just for one particular State, but for all” and therefore considers Resolution 1373 “a treaty-promoting instrument.”

¹⁴⁷ Wood states that Security Council resolutions “tend not to be particularly detailed, and it may be necessary to imply certain terms”, see note 129, 89 (with an extensive description of the drafting process of a resolution, *ibid.*, 80-82), and that “[if] it appears that the Council was intending to base itself on existing legal rules or an existing legal situation, then its decisions ought certainly to be interpreted taking those rules into account”, *ibid.*, 92. How-

the Financing of Terrorism differentiates between lawful and unlawful ends,¹⁴⁸ making it conceivable that the additional requirement of unlawfulness is to be implied also in Resolution 1373, thereby excluding ransom as a form of financing that can be acquiesced in, namely for humanitarian considerations.

To identify the purpose of a legal instrument, resort may again be had to the different tools of interpretation mentioned in articles 31 and 32 VCLT.¹⁴⁹ Classic sources for this determination are especially the preamble and the historical background of the document.¹⁵⁰ The context in which Resolution 1373 was adopted may support a restrictive interpretation: the resolution is dated 28 September 2001 and was drafted still under the impression of the 9/11 attacks on the United States. The first two phrases of the preamble reaffirm S/RES/1368 (2001) of 12 September 2001 and express the “unequivocal condemnation of the terrorist attacks which took place in New York.”¹⁵¹ Given this context, it appears unlikely that payment of ransom would have been contemplated during the drafting process.¹⁵² Moreover, though not yet in force at the time, the International Convention for the Suppression of the Financing of Terrorism, which excludes the payment of ransoms from its scope, served as an orientation in drafting the paragraphs on the sup-

ever, in this case, the International Convention for the Suppression of the Financing of Terrorism only entered into force on 10 April 2002, the “thirtieth day following the date of the deposit of the twenty-second instrument of ratification”, cf. article 26 of the Convention. Therefore, it is unable to qualify as “relevant rule of international law” in the sense of article 31 (3)(c) VCLT. Nevertheless, the interpretation of Resolution 1373 in light of its historical context allows for this reference, given the model character of the International Convention for the Suppression of the Financing of Terrorism, see Talmon, see note 119, 177.

¹⁴⁸ Cf. above for a detailed discussion of the consequences under III. 1. b.

¹⁴⁹ Cf. Villiger, see note 69, article 31, para. 13.

¹⁵⁰ Cf. J. Klabbbers, “Some Problems Regarding the Object and Purpose of Treaties”, *Finnish Yearbook of International Law* 8 (1997), 138 et seq. (156), pointing to the ICJ’s use of preambular provisions and preceding discussions in the General Assembly in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* case.

¹⁵¹ S/RES/1373 (2001), see note 114, preamble, paras 1-2.

¹⁵² Cf. Talmon, see note 119, 187, commenting on the short time in which Resolution 1373 was adopted. For a general overview on the drafting of Security Council resolutions, cf. Wood, note 129, 80-82 (explaining the process of unofficial drafting, and emphasizing the diplomatic, not always legal reasons for amending a draft resolution).

pression of terrorist financing. Therefore, the historical background may be taken to support a narrow understanding, excluding ransom payments.

Yet the preamble could be taken to support a wide understanding of terrorist financing.¹⁵³ In the third preambular paragraph, it is stated that “such acts, like any acts of international terrorism, constitute a threat to international peace and security”, whereas the fifth clause continues with “reaffirming the need to combat *by all means* [...] threats to international peace and security.”¹⁵⁴ Furthermore, the resolution reaffirms Resolution 1269, which “[u]nequivocally condemns all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations.”¹⁵⁵ The wide wording of those preambular paragraphs might indicate a purpose demanding that terrorist financing be combated as effectively as possible.¹⁵⁶ In that case, any exception to the operative paragraphs would re-

¹⁵³ Wood, see note 129, 89; see generally on article 31 (1) VCLT Villiger, see note 69, article 31, para. 10 for the inclusion of the preamble as relevant context.

¹⁵⁴ S/RES/1373 (2001), see note 114, preamble, paras 3 and 5. Emphasis added by the authors.

¹⁵⁵ S/RES/1269 (1999) of 19 October 1999, op. para. 1.

¹⁵⁶ As a general rule of treaty construction, Herdegen highlights that an interpretation “is generally inspired by the purpose of the agreement and its effective implementation”, see note 129, paras 30-31. Subedi emphasizes the broad scope of Resolution 1373, cf. Subedi, see note 136, 160. Equally, Talmon refers to the “*general and abstract character* of the obligation”, see note 119, 176 [emphasis in the original]. Bantekas suggests that the United States, as sponsor of Resolution 1373, might have taken the opportunity to adopt a resolution that otherwise would have found no majority in the Security Council, see note 58, 326. Laborde and DeFeo state that “[t]he criminal law obligations imposed by Resolution 1373 and successor Resolutions are not limited to offences in the anti-terrorism conventions and protocols”, J.P. Laborde/ M. DeFeo, “Problems and Prospects of Implementing UN Action against Terrorism”, *Journal of International Criminal Justice* 4 (2006), 1087 et seq. (1092). In the same vein, Szasz appears to suggest that the purpose of Resolution 1373 cannot be reduced to the mere and simple implementation of the Convention, observing firstly that Resolution 1373 “lacks any explicit or implicit time limitation, [and thus] a significant portion of the resolution can be said to establish new binding rules of international law”, P. Szasz, “The Security Council Starts Legislating”, *AJIL* 96 (2002), 901 et seq. (902), and secondly draws a clear line between the resolution and the International Convention for the Suppression of the

quire justification, as it may jeopardize the effectiveness of measures against the financing of terrorism.

Since different interpretations of the resolution's purpose are conceivable, subsequent action concerning the resolution might provide further guidance. In analogy with article 31 (3)(a) and (b) VCLT, any "subsequent agreement [...] regarding the application" and the "subsequent practice in the application" are suitable means of interpretation. As stated above, Resolution 1373 underwent only one explicit amendment, by operative paragraph 5 of Resolution 1452, which urges states to make exemptions from the freezing of funds identical to those envisaged for the UN-administered system of sanctions.¹⁵⁷ Unfortunately, no unequivocal message can be derived from this provision: the Security Council either intended to make a single correction to an otherwise strict regime of Resolution 1373 and thereby clarified that no other exceptions should apply, or emphasized in a purely declaratory fashion that implicit exceptions may exist. Consequently, the subsequent practice of the Security Council appears ambiguous regarding the inclusion

Financing of Terrorism when he finds that the Security Council consciously incorporated only certain provisions of the Convention even though "it could have done so [adopt the whole Convention], either by making participation in the convention obligatory rather than optional, or by providing that all the provisions of the Convention [...] are binding on all states", *ibid.*, 903. A similar stance was later taken by the African Union in Decision 256 of 2009, declaring its commitment "to strive to curb all sources of financing this phenomenon [terrorism]", see note 111, para. 5, whereas it recognizes "that the payment of ransom constitutes one of the main methods of financing international terrorism", see note 111, para. 2. Furthermore, the African Union drafted a "Model Law on the Prevention and Combating of Terrorism" that ought to prohibit the payment of ransom, cf. African Union, Assembly of the Union, *Decision on the Report of the Peace and Security Council on Its Activities and the State of Peace and Security in Africa*, AU Doc. Assembly/AU/Dec.338 (XVI) of 31 January 2011.

¹⁵⁷ Resolution 1452 establishes exemptions, e.g. in op. para. 1 (a) for funds "necessary for basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges, or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or service charges for routine holding or maintenance of frozen funds or other financial assets or economic resources." For a brief outline of the UN administered regime under Resolution 1267 cf. below under III. 2. b.

of ransom in the scope of financing in operative paragraph 1 of Resolution 1373.

Further evidence supporting this finding can be adduced from a statement of the African Union in Decision 256 of 3 July 2009.¹⁵⁸ As stated above, this Decision calls upon the Security Council to “adopt a restrictive resolution against the payment of ransom in order to consolidate legal provisions put in place, particularly by Resolutions 1373 and 1267.”¹⁵⁹ Whether or not such a consolidation of legal provisions in place would ultimately imply a mere declaratory compilation¹⁶⁰ or a revision and partial supplementation¹⁶¹ of existing rules, the request made by the African Union Assembly demonstrates the perceived need to clarify the *lex lata* under said Security Council resolutions. Following up on this initiative, the African Union prepared a model law that aims at prohibiting payments of ransom.¹⁶²

In conclusion, Resolution 1373 remains ambiguous as to whether it includes the payment of ransom in its ambit. Assuming an affirmative answer to this issue, the payment of ransom in cases of piracy could be prohibited by Resolution 1373, depending on the interpretation to be given to “terrorist act” in operative paragraph 1. Moreover, Resolution 1373 could then apply at least where parts of the ransoms paid to Somali pirates are passed on to terrorist organizations such as *al-Shabaab*. Since paragraphs 1 (b) and (d) explicitly include the provision of funds “directly or indirectly”, links of this kind, if proven and accompanied by any necessary element of *mens rea* in a given case, may be taken to suffice. Under these conditions, Resolution 1373 may be applicable to the payment of ransom to pirates.

¹⁵⁸ African Union, Assembly of the Union, Decision 256 (XIII), see note 111.

¹⁵⁹ *Ibid.*, para. 9.

¹⁶⁰ Indicated by the ordinary meaning of “consolidate”, cf. in: J.A. Murray et al. (eds), *The Oxford English Dictionary*, 2nd edition, 1989, “consolidate”.

¹⁶¹ Cf. Garner, see note 143, “code”, emphasizing that a consolidation may include the revision of law.

¹⁶² Cf. African Union Decision 338, see note 156. D. Akande/ T. Maluwa, “African Union Consultancy on the Elaboration of an African Comprehensive Anti-Terrorism Model Law: Explanatory Guide to Provisions of the Model Law”, 2011, available at <www.icpat.org>.

cc. Conclusion on the Applicability of Resolution 1373 to Ransom Payments to Pirates

Regarding the legality of ransom payments for the release of pirate-held ships and crews, the result of the interpretation is inconclusive. It remains uncertain whether piratical acts qualify as “terrorist acts” under Resolution 1373. Moreover, different readings can be sustained as to whether ransom payments are to be included in the resolution’s scope. Hence the assessment of the resolution currently allows for no definite conclusions on the matter.

b. Suppression of Ransom Payments under the UN Sanctions Regime Targeting *al-Qaida* and the *Taliban*

Aside from the general regime concerning the suppression of terrorist financing established on the basis of Resolution 1373, the Security Council had targeted certain individuals and entities with specific sanctions, including the freezing of funds, since 1999. Pursuant to Resolutions 1267 (1999), 1333 (2000)¹⁶³ and 1390 (2002),¹⁶⁴ a list was established identifying the persons to be subjected to the sanctions, namely “Usama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them.”¹⁶⁵ This system subsequently underwent alterations in an effort to ensure adherence to basic human rights, a concern the prevalence of which was specifically emphasized by the judgment of the European Court of Justice (ECJ) in *Kadi* and *Yusuf*.¹⁶⁶ Thereafter,

¹⁶³ S/RES/1333 (2000) of 19 December 2000.

¹⁶⁴ S/RES/1390 (2002) of 28 January 2002.

¹⁶⁵ S/RES/1390 (2002), *ibid.*, op. para. 2.

¹⁶⁶ Cf. ECJ, Joined Cases C-402/05 P and C-415/05 P– *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Judgment of 3 September 2008, ECR 2008, I-6351, which overruled the judgments of the Court of First Instance of 21 September 2005 in Case T-315/01 *Kadi v. Council of the European Union and Commission of the European Communities* (2005) ECR II-3649 (“*Kadi*”) and Case T-306/01 *Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (2005) ECR II-3533 (“*Yusuf and Al Barakaat*”). For a general overview of these judgments and their legal consequences within the European Union, cf. recently T. Tridimas, “Economic Sanctions, Procedural Rights and Judicial Scrutiny: Post-*Kadi* Develop-

standing was granted to individuals in a de-listing procedure,¹⁶⁷ which was later replaced by an individual complaints procedure before an ombudsman.¹⁶⁸ Even earlier, several exceptions to the freezing of funds belonging to listed individuals had been introduced.¹⁶⁹ The regime was consolidated in Resolution 1904¹⁷⁰ and has recently been reformed after the death of *Usama bin Laden*¹⁷¹ and in light of the political constellation in Afghanistan. Henceforth, two separate lists will be administered: whereas Resolution 1988 (2011) covers “Taliban, and other individuals, groups, undertakings and entities associated with them,”¹⁷² Resolution 1989 (2011) targets “Al-Qaida and other individuals, groups, undertakings and entities associated with them.”¹⁷³ This measure was taken in order to allow for differentiated treatment, and aimed at facilitating reconciliation efforts with the *Taliban* in Afghanistan.¹⁷⁴ Both resolu-

ments”, *Cambridge Yearbook of European Legal Studies* 12 (2009-2010), 455 et seq. For a detailed analysis of their impact on European Law cf. E. López-Jacoiste, see note 115, 310 et seq., with specific focus on the human rights conformity of various targeted sanctions regimes, and Laborde/ De-Feo, see note 156, addressing various aspects of obligations to criminalize certain acts, mainly concerning Resolution 1373 and the International Convention for the Suppression of the Financing of Terrorism. The ECJ’s approach is further analysed by S. Neudorfer, “Antiterrormaßnahmen der Vereinten Nationen und Grundrechtsschutz in der Union”, *ZaöRV/ HJIL* 69 (2009), 976 et seq., whereas G. Thallinger, “Sense and Sensibility of the Human Rights Obligations of the United Nations Security Council”, *ZaöRV/ HJIL* 67 (2007), 1015 et seq. discusses the responsibility of the Security Council to respect human rights.

¹⁶⁷ S/RES/1730 (2006) of 19 December 2006, op. para. 1 and Annex.

¹⁶⁸ S/RES/1904 (2009) of 17 December 2009, op. paras 20-27.

¹⁶⁹ S/RES/1452 (2002), see note 123, op. paras 1-2.

¹⁷⁰ S/RES/1904 (2009), see note 168. For a general overview of the development of the regime up to this resolution, cf. e.g. A.J. Kirschner, “Security Council Resolution 1904 (2009): A Significant Step in the Evolution of the Al-Qaida and Taliban Sanctions Regime?”, *ZaöRV/ HJIL* 70 (2010), 585 et seq. Furthermore cf. M. Kanetake, “Enhancing Community Accountability of the Security Council through Pluralistic Structure: The Case of the 1267 Committee”, *Max Planck UNYB* 12 (2008), 113 et seq.

¹⁷¹ S/RES/1989 (2011) of 17 June 2011, preamble, para. 4: “[r]ecalling [...] that Usama bin Laden will no longer be able to perpetrate acts of terrorism.”

¹⁷² S/RES/1988 (2011) of 17 June 2011, op. para. 1.

¹⁷³ S/RES/1989 (2011), see note 171, op. para. 1.

¹⁷⁴ S/RES/1988 (2011), see note 172, preamble, paras 6-9. Furthermore, the resolution concerning the *Taliban* allows for participation of the Afghan

tions uphold the provisions of earlier resolutions deciding that states shall

“[f]reeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly for such persons’ benefit, by their nationals or by persons within their territory.”¹⁷⁵

Operative paragraph 1 (a) thus contains an obligation of the states, firstly, to freeze funds of listed persons and their associates and, secondly, to ensure that economic means are not made available to them. As regards the freezing of assets, reference can be made to the considerations addressed in the context of operative paragraph 1 (c) of Resolution 1373.¹⁷⁶ Hence, a ransom payment regularly fails to establish a sufficiently close connection between a listed person and a shipowner that would extend the freezing obligation to the assets of the latter. The second part of operative paragraph 1 (a) bears similarity to operative paragraph 1 (d) of Resolution 1373 in that it broadly addresses the making available of funds. However, whereas the regime of Resolution 1373 is inconclusive as to the inclusion of ransom payments, operative paragraph 5 of Resolution 1904 “[c]onfirms that the requirements in paragraph 1(a) above shall also apply to the payment of ransoms to individuals, groups, undertakings or entities on the Consolidated List.”¹⁷⁷

government in the de-listing process, cf. S/RES/1988 (2011), op. paras 18 et seq. Within a month of its adoption, 15 *Taliban*-associated persons were delisted pursuant to the new procedure, see Security Council Press Releases SC/10306 of 30 June 2011 and SC/10328 of 18 July 2011. The al-Qaida resolution *inter alia* significantly strengthens the position of the Ombudsman, who is now empowered to make recommendations for de-listing which can only be overruled by consensus, S/RES/1989 (2011), see note 171, op. paras 21 et seq.

¹⁷⁵ S/RES/1989 (2011), see note 171, op. para. 1 (a); S/RES/1988 (2011), see note 172, op. para. 1 (a).

¹⁷⁶ Cf. above under III. 2. a. bb.

¹⁷⁷ S/RES/1904 (2009), see note 168 (emphasis in the original). Under the old regime the “Consolidated List” consisted of “Al-Qaida, Usama bin Laden and the Taliban, and other individuals, groups, undertakings and entities associated with them, as referred to in the list created pursuant to resolutions 1267 (1999) and 1333 (2000)”, *ibid.*, op. para. 1.

The Resolutions 1988 and 1989 transposed this declaration verbatim to the new lists.¹⁷⁸

Read in this light, the obligation of states to ensure that no funds are made available would also extend to inhibiting transactions aimed at the release of hostages. Yet the application of Resolutions 1988 and 1989 requires that a person demanding ransom is identified on the respective lists. Despite its ties to *al-Qaida*, the *al-Shabaab* itself had not been listed before the reform of the sanctions regime¹⁷⁹ and as of July 2011 does not appear on the *al-Qaida* list under Resolution 1989. As yet, the impact of measures under the 1988/1989 regime seems therefore limited with regard to Somali pirates.

c. Suppression of Ransom Payments under the UN Sanctions Regime Regarding Somalia

In the particular context of Somali piracy, it is, lastly, appropriate to broaden the focus of the analysis beyond the confines of regimes that have been developed as part of the response to the phenomenon of international terrorism. Due to the civil war that has torn the country apart since the late 1980s, Somalia attracted the attention of the international community long before the recent re-emergence of piracy. With a view to halting the descent of the Somali state into anarchy, the Security Council imposed a general arms embargo with Resolution 733 (1992),¹⁸⁰ which remains in place to the present day. Seeing that the embargo was violated on a constant basis,¹⁸¹ the Security Council adopted Resolution 1844 to give teeth to the regime.¹⁸² Under this resolution, a committee is to designate individuals and entities to be subjected to several forms of targeted sanctions.¹⁸³ Similar to the regime originating from Resolution 1267, Resolution 1844 demands, *inter alia*, the freezing

¹⁷⁸ S/RES/1989 (2011), see note 171, op. para. 8; S/RES/1988 (2011), see note 172, op. para. 7.

¹⁷⁹ Committee 1267, *The Consolidated List established and maintained by the 1267 Committee with Respect to Al-Qaida, Usama bin Laden, the Taliban and other individuals, groups, undertakings and entities associated with them*, updated 4 May 2011, available at <www.un.org>.

¹⁸⁰ S/RES/733 (1992) of 26 August 1992.

¹⁸¹ *Report of the Panel of Experts on Somalia pursuant to Security Council resolution 1474 (2003)*, Doc. S/2003/1035, paras 69-140.

¹⁸² S/RES/1844, see note 116, preamble, para. 8.

¹⁸³ S/RES/1844, *ibid.*, paras 8, 12-17.

of funds as well as action to “ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of [the listed] individuals or entities.”¹⁸⁴ Unlike in the *al-Qaida* and *Taliban* regime, *al-Shabaab* figures amongst the listed persons.¹⁸⁵

On its face, the provision concerning the making available of funds raises the same issue that has already been addressed in detail in the context of Resolution 1373, i.e. whether the payment of ransoms should be exempted from its ambit. Yet Resolution 1844 explicitly addresses the phenomenon of piracy in preambular paragraph 5, “[e]xpressing [...] grave concern over the recent increase in acts of piracy and armed robbery at sea against vessels off the coast of Somalia, and noting the role piracy may play in financing embargo violations by armed groups [...]”. While unlike in Resolutions 1988 and 1989 no explicit reference is made to ransoms, the Security Council was evidently aware of and specifically tackled the phenomenon of piracy off the Somali coast, which regularly involves the hijacking of vessels for ransom. This strongly suggests that Resolution 1844, interpreted in light of the original intent of the Security Council members, was meant to also inhibit ransom payments.¹⁸⁶

Assuming that ransom payments qualify as funding prohibited by Resolution 1844, the second obstacle is again establishing the required link between the money paid and the persons listed according to the resolution. As has been suggested before, the 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*.¹⁸⁷ Yet a distinction may need to be made between different coastal regions from which attacks originate. In geographical areas in which the *al-Shabaab* im-

¹⁸⁴ S/RES/1844, *ibid.*, op. para. 3.

¹⁸⁵ Security Council Committee pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea, *List of individuals and entities subject to the measures imposed by paragraphs 1, 3 and 7 of Security Council Resolution 1844 (2008)*, 24 September 2010, No. 1.

¹⁸⁶ This conclusion is in line with the view expressed by *John Steed*, Principal Military Adviser to the UN Special Envoy to Somalia, according to whom “[t]he payment of ransoms just like any other funding activity, illegal or otherwise, is technically in breach of the Somalia sanctions regime if it makes the security situation in Somalia worse”, quoted in: “Piracy ransom cash ends up with Somali militants”, see note 32.

¹⁸⁷ Cf. above under II. 1.

poses taxes on ransom payments, these may have to be treated as benefiting listed persons.

Based on the text and historical context of Resolution 1844, it could hence be concluded that UN Member States are obligated to prevent the payment of ransoms at least to those pirate groups operating from *al-Shabaab* strongholds. Doubts about this conclusion must arise, however, due to the virtually complete absence of efforts by states to prevent such payments, which will be discussed in more detail below.¹⁸⁸ Public authorities appear not only to have acquiesced in this practice, but reportedly even took an active part in ransom negotiations in some instances. For example, the German *Federal Criminal Police Office (Bundeskriminalamt)* and *Federal Foreign Office (Auswärtiges Amt)* have been known to guide shipowners through this process and even advised the payment of ransoms in specific cases.¹⁸⁹ There is no evidence that such *modi operandi* have been understood as involving a breach of international law by the relevant actors. Overall, this subsequent practice militates against a construction of Security Council Resolution 1844 as imposing an obligation on states to prevent ransom payments to Somali pirates.

In conclusion, although *al-Shabaab* is listed for sanctions according to Resolution 1844 and despite the facts that the generation of revenues from piratical activities is mentioned as a grave concern in the resolution itself and that the situation in Somalia allows for the establishment of links between pirate attacks and *al-Shabaab* at least in certain parts of the country, international state practice calls into question the understanding that Resolution 1844 imposes an obligation to prevent the payment of ransoms to such Somali pirate groups. As such, ambiguities persist concerning the reach of the 1844 regime.

3. Conclusion on the Legal Framework on the Payment of Ransom

As far as the instruments dealing with terrorist financing are concerned, the preceding analysis has been marked by the fact that neither the phenomenon of piracy nor the process of ransom payments were focal points of concern during their drafting and initial application. The

¹⁸⁸ Cf. below under IV.

¹⁸⁹ A. Ulrich, "Terror und Angst", *Der Spiegel* of 6 July 2009, 34 et seq. (35 et seq.).

question to what extent they are nonetheless governed by these regimes has been answered differently for the International Convention for the Suppression of the Financing of Terrorism and the relevant Security Council resolutions, due to slight but significant differences in the wording, structure and historical context of the relevant paragraphs.

As for the increasingly difficult distinction between piracy and terrorism, the two-pronged approach of article 2 (1) International Convention for the Suppression of the Financing of Terrorism with its reference to the listed treaties in subparagraph (a) allows for the conclusion that piratical activities as such may be a relevant end of financing as contemplated and outlawed by the Convention. The absence of this second limb of the definition of the offence in Security Council Resolution 1373, despite its inner connection with the Convention, leaves ambiguous the treatment of piracy under said resolution. The historical context of its adoption, two and a half weeks after 9/11, suggests that this issue was simply not a matter of consideration at the time. Resolution 1373 may, however, at least be called into effect in the face of hybrid forms of the two phenomena, i.e. once a sufficiently close connection between pirates and terrorists may be established to evidence a link in a given case between piratical activities and the funding of terrorist acts. The application of the UN-administered sanctions system, finally, depends on the identity of the persons and entities specifically targeted. It may thus come to encompass the provision of funds to pirates once these or the *al-Shabaab* are added to the list.

Despite the broad scope of the International Convention for the Suppression of the Financing of Terrorism including piratical activities, its wording, purpose and drafting history as well as the parties' subsequent understandings evidence that the payment of ransoms was not originally, and is not to date, intended to be prohibited. Recent initiatives for a protocol to the Convention may change this situation for those parties ratifying it. In that case, unless the protocol clearly excludes from its scope the financing of piracy, the above conclusions on the Convention's scope would make it applicable also to ransoms paid to pirates, irrespective of the existence or absence of any link to terrorist acts. As for the resolutions adopted by the Security Council, the 1988/1989 regime is applicable in theory, notwithstanding constraints on its effectiveness in practice, while the significance of Resolution 1373 as regards the payment of ransoms remains, again, obscure.

As far as the Somali arms embargo regime is concerned, the text and historical context of Resolution 1844 would suggest the illegality of ransom payments at least to those pirate groups operating from *al-*

Shabaab controlled territory. Taking into account, however, the lack of impact that it has had on national policies regarding ransoms paid to pirates, it appears again questionable whether such a prohibitory effect can be derived from the resolution.

IV. National Solutions to Legality of Ransom Payments

The uncertain legal implications of ransom payments within the realm of international law are in part mirrored by national laws. Although the specific norms concerning ransom payments may differ between states, the gist seems to be of similar nature. While at the beginning of the re-emergence of piracy, payment of ransom did not seem to be at the centre of interest of states, the awareness of this aspect of the fight against piracy is rising. In 2009, the US Ambassador *Rosemary A. DiCarlo* mentioned at a Security Council debate on piracy and Somalia that the United States are “concerned that ransom payments have contributed to the recent increases in piracy and encourage all states to adopt a firm ‘no concessions policy’ when dealing with hostage-takers, including pirates.”¹⁹⁰ In 2010, US President *Obama* issued an Executive Order, which among other measures on its face outlaws all payments - even ransom - to specific individuals and entities with connections to terrorist organizations, but also to some known Somali pirates and the *al-Shabaab*.¹⁹¹ Indeed concerns that ransom payments have been fuelling piracy off the shores of Somalia were well founded then, as ransom payments contributed to the means pirates had available to commit their criminal acts, and contribute to further destabilize the situation in Somalia. Those concerns may, however, prove to be even better founded today, when pirates, however unwillingly, finance terrorist endeavours.

A final and clear legislative answer to the issue of ransom is not to be seen so far, indeed the national legal framework to address payments

¹⁹⁰ Remarks by Ambassador *Rosemary A. DiCarlo*, Alternate U.S. Representative for Special Political Affairs, at a Security Council Debate on Piracy and Somalia, in the Security Council Chamber, 18 November 2009, United States Mission to the United Nations, available at <<http://usun.state.gov>>.

¹⁹¹ Executive Order 13536, *Blocking Property of Certain Persons Contributing to the Conflict in Somalia*, 12 April 2010, Federal Register, Vol. 75, No. 72 (15 April 2010), Presidential Documents, 19869 et seq., section 1 (a)(ii)(D). Commentators have frequently suggested that the clause would also cover ransom payments, Rutkowski/ Paulsen/ Stoian, see note 100, 1436 et seq.

to pirates and/or terrorists seems to be paved with even more uncertainties than the international framework. To briefly glance at British legislation, ransom payments were allowed until the Ransom Act¹⁹² of 1782 made it “unlawful for a British subject to enter into a ransom contract.”¹⁹³ This act was later repealed by the Naval Prize Acts Repeal 1864, whereafter it was legal to pay ransom to pirates.¹⁹⁴ In the recent days, this position has been reinforced by Admiralty Judge *David Steel* in *Masefield v. Amlin*, who took the view that, *inter alia* because such payments are recoverable as sue and labour expenses,¹⁹⁵ they are not against public policy.¹⁹⁶ Indeed, the possibility to recover ransom payments, and as such the legal recognition of ransom payments, goes back to Roman Civil Law.¹⁹⁷ While it hence remains legal to pay ransom to pirates, financing pirates that in turn fund terrorism may be assessed differently. The Terrorism Act 2000¹⁹⁸ mainly concerns the financing of terrorism, but it may also cover ransom payments to pirates, which indirectly fund terrorist acts. Section 15 (3) of the act provides,

¹⁹² Full title: An Act to prohibit the ransoming of Ships or Vessels captured from his Majesty’s Subjects, and of the Merchandize or Goods on Board such Ships or Vessels (Act 22 Geo III c. 25).

¹⁹³ Chuah, see note 7, 46.

¹⁹⁴ Ibid.

¹⁹⁵ *Royal Boskalis Westminster NV v. Mountain* [1999] QB 674.

¹⁹⁶ *Masefield AG v. Amlin Corporate Member Ltd* [2010] EWHC 280 (Comm).

¹⁹⁷ “Si navis a pirates redempta sit, Servius, Ofilius, Labeo, omnes conferre debere aiunt. Quod vero praedones abstulerint, eum perdere cuius fuerint, nec conferendum ei qui suas merces redemerit.”, *Ex Digestis, ex. lib. XIV, tit. II, De lege rhodia de jactu, Fr. 2. Paulus lib. XXXIV ad Edictum*, reprinted in: J.M. Pardessus, *Collection de Lois Maritimes Antérieures au XVIII^e Siècle*, 1828, 106. Translation: “If a ship has been ransomed from pirates, Servius, Ofilius, Labeo, all agree that there should be a contribution. But what the robbers have taken away, he must lose whose property it was; nor shall there be a contribution for him who has ransomed goods of his own”, cited in: G. Gauci, “Piracy and its Legal Problems: With Specific Reference to the English Law of Marine Insurance”, *Journal of Maritime Law and Commerce* 41 (2010), 541 et seq. (556).

¹⁹⁸ 2000 Chapter 11, Full Title: An Act to make provision about terrorism; and to make temporary provision for Northern Ireland about the prosecution and punishment of certain offences, the preservation of peace and the maintenance of order, 20 July 2000.

“a person commits an offence if he (a) provides money or other property, and (b) knows or has reasonable cause to suspect that it will or may be used for purposes of terrorism.”

Terrorism is defined in section 1 of the act as the

“use or threat of action where (b) the use or threat of action [that e.g. involves serious violence against a person or serious damage to property, see s. 1(2) of the act] is designed to influence the government or an international governmental organization or to intimidate the public or a section of the public, and (c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.”

Payment of ransom to terrorists seems to fit section 15 (3), although it remains uncertain whether a ransom payment would really be considered “fund-raising”, which is the title of section 15 of the Terrorism Act. This legal uncertainty may prove to be dangerous for shipowners, considering that a violation of section 15 may result in imprisonment of up to 14 years. A further aspect fueling the ambiguity of the legal situation is to be seen in the fact that so far no enforcement action has been initiated against ransom paying companies under section 15 of the Terrorism Act, although there have been ransom payments by UK shipowners.¹⁹⁹

In Germany, the situation seems similar. Paying ransom to pirates may be viewed as a violation of § 129 Criminal Code (StGB) – Forming Criminal Organizations – although to the authors’ knowledge, again no charge has ever been brought on the basis of a ransom payment to pirates. Paying ransom to pirates, which in turn may fund terrorism may, in addition, qualify as a breach of § 129a (5) StGB – Forming Terrorist

¹⁹⁹ BBC, “Somali pirates free UK-flagged tanker after ransom paid”, of 14 May 2010. The lack of such enforcement action can be attributed to the fact that the competent law enforcement agencies so far do not consider the linkage between pirates and terrorists sufficient to initiate prosecution proceedings. In the event of a change of circumstances concerning this aspect, the importance of exceptions laid down in section 21 of the Terrorism Act 2000 has been stressed by the European Union Committee of the UK Parliament, rendering a payment legal as long as e.g. a “Suspicious Activity Report” was filed beforehand, see European Union Committee, *Money laundering and the financing of terrorism*, Minutes of Evidence of 11 March 2009, Supplementary memorandum (3) by HM Treasury and the Home Office, Annex A, available at <<http://www.publications.parliament.uk>>.

Organizations – and § 89a (2)(4) StGB – Preparation of a Serious Violent Offence Endangering the State. However, an approach similar to that taken in *Masefield v. Amlin* may be warranted, because the costs for ransom payments are – in part – recoverable according to § 706 (6) of the German Commercial Code under the General Average rules. This norm accords some degree of legal recognition to payments effectuated for the release of crew, cargo and ship. Regardless of such a reductive interpretation of the elements of crimes previously mentioned, in the end, those payments will regularly be justified by § 34 StGB, which provides for a justification of acts by necessity, if someone,

“faced with an imminent danger to life, limb, freedom, honor, property or another legal interest which cannot otherwise be averted, commits an act to avert the danger from himself or another, does not act unlawfully, if, upon weighing the conflicting interests, in particular the affected legal interests and the degree of danger threatening them, the protected interest substantially outweighs the one interfered with.”²⁰⁰

Thus, when the lives of hostages are on the line, § 34 StGB will most certainly justify ransom payments. Conversely, these may not be seen as a proportionate means to avert the danger when paid to free a vessel only, since the financing of criminal groups is itself a weighty concern within the weighing process of § 34 StGB.

In the United States, the payment of ransom monies has been held to be a “necessary means of deliverance from a peril insured against, and acting directly upon the property.”²⁰¹ However, the terrorism legislation seems to turn away from this statement. In the aforementioned Executive Order of 12 April 2010, US President *Obama* allowed for measures against ransom paying companies. He also authorized the Secretary of the Treasury, in consultation with the Secretary of State, to designate for blocking any person determined to have “materially assisted, sponsored, or provided financial, material, logistical, or technical support [...] for any person whose property and interests in property are blocked pursuant to this order.”²⁰² As such, the United States seems to be the only state that indeed prohibits ransom payments to certain Somali pirates to such an extent that tangible sanctions – the freezing of

²⁰⁰ Translation by M. Bohlander, available at <<http://www.gesetze-im-internet.de>>.

²⁰¹ United States Supreme Court, *Peters v. The Warren Insurance Company*, US 39 (1840), 99 et seq. (110).

²⁰² Executive Order 13536, see note 191, section 1.

the payer's funds – loom. However, *Adam Szubin* of the US Treasury Department, which plays a significant role in the execution of the order, stated shortly after its declaration that only “individuals and entities that freely choose to support acts of piracy or armed robbery at sea off the coast of Somalia” are meant to be targeted, indicating that persons merely trying to free hostages by ransom payments do not fall within the scope of enforcement measures under the Executive Order, despite its inclusive phrasing and its intent to counter the “deterioration of the security situation and the persistence of violence in Somalia”²⁰³.²⁰⁴ Alongside the legal regime of the Executive Order, the financing of terrorism itself is prohibited under the extensive national legal regime against international terrorism in the United States.²⁰⁵

V. Conclusion

It has been shown that the payment of ransom to pirates, although frequently resorted to, may entail numerous practical and legal consequences when the current practice of cooperation between pirates and terrorists solidifies. In this regard, it is desirable to explain or clarify the existing legislation on the international and the national plane. It hardly seems a tolerable situation that shipowners are confronted with an uncertain set of legal norms, most of which are associated with severe punishment, and cannot assess beyond any doubt whether they are acting in a manner consistent with the law or not. As such, clear statements by states and the United Nations as to the applicability of norms to ransom payments to pirates are needed.

As a matter of policy, states should be encouraged to tread different paths. The payment of ransom is the most promising and least risk-laden way to free hostages and as such, if legally allowed, the only way to act in case of a successful piratical attack for a sensible shipowner.

²⁰³ Executive Order 13536, see note 191, preamble.

²⁰⁴ The statement of the Treasury Department is printed in J. Straziuso, “Are pirate ransoms legal? Confusion over US order”, *The Associated Press* of 20 April 2010.

²⁰⁵ For an analysis of the different federal law norms refer to Rutkowski/Paulsen/Stoian, see note 100, 1438 et seq. It appears, however, that these do not sanction ransom payments to pirates generally. Rather the US Treasury's Office of Foreign Assets Control (OFAC) conducts reviews of potential payments before they are carried out to determine their legality, see “Piracy ransom cash ends up with Somali militants”, see note 32.

However, it has often been regarded as the most comfortable solution to piracy, and it has been forgotten or deliberately ignored that it is indeed no solution at all. It has long been known that ransom payments are an easy way to deal with outward threats. European countries were a great agent for this policy during the times of the Barbary States. Yet *Rudyard Kipling's* words prove to be true with regard to the Barbary corsairs as well as regarding Somali piracy,

“It is always a temptation for a rich and lazy nation,
To puff and look important and to say: –
‘Though we know we should defeat you, we have not the time to
meet you. We will therefore pay you cash to go away.’

And that is called paying the Dane-geld;
But we’ve proved it again and again,
That if once you have paid him the Dane-geld
You never get rid of the Dane.”²⁰⁶

Besides the obvious observation that ransom payments are no solution, it has to be underlined that the benefits of paying ransom to pirates have diminished recently. The average duration of ransom negotiations has more than doubled in the last year, due to escalating ransom demands.²⁰⁷

Thus, ransom payment is no longer a way to quickly liberate hostages. While it is true that paying ransoms is a comfortable solution for shipowners, who may recover the sums paid, it is equally true that the ransom payments have empowered and continue to empower criminal gangs to the detriment of the Somali government and its stability and there is a good chance that terrorist groups get a considerable share of the money. As such, while everyone seems to agree that a solution to piracy can only be found on the land, paying ransoms undermines such solutions, while empowering those forces in Somalia that guarantee a worsening of the situation and disadvantaging severely those forces that seek to enforce structures and stability in what seems to be a chaotic situation.²⁰⁸

²⁰⁶ R. Kipling, *Rudyard Kipling's Verse: Inclusive Edition 1885-1918*, 1919, 747.

²⁰⁷ Bowden, see note 18, 9.

²⁰⁸ ECOSOC, see note 39, para. 10. The recent famine at the Horn of Africa caused by the worst drought in 60 years has shown the cold-blooded role

In conclusion, the goal has to be to reduce successful pirate attacks on ships and as such decrease the ransom money that flows into the funding of criminal and, indeed, terrorist activities. This may be achieved when shipowners closely follow the Best Management Practices²⁰⁹, while states continue to cooperate and find ways to follow the money trail to the backers of piracy and seek solutions to prosecute pirate suspects. The payment of ransom can only be a last resort and the institutionalization of this *ultima ratio* solution that has been witnessed regarding Somali piracy may very well render the search for a solution to piracy more difficult than it already is.

that the *al-Shabaab* plays and its gruesome influence on the region. With the number of starvations spiking in Somalia, the militia has insisted that there is no famine, while at the same time accusing the United Nations of simply seeking to spy on Somalia and upholding their ban on humanitarian agencies seeking to provide relief to the 11 million people in dire need of food, “Al-Shabaab: No famine in Somalia”, *UPI* of 23 July 2011; “Somalia MP - Al Shabaab Blocking Aid From Needy Starving People”, *Africa News* of 26 July 2011.

²⁰⁹ Reprinted in: IMO, *Piracy and Armed Robbery Against Ships in Waters off the Coast of Somalia*, IMO Doc. MSC.1/Circ.1337 of 4 August 2010, Annex 2.