

Between the Devil and the Deep Blue Sea: The Plight of Civilian Victims of Anti-Piracy Operations

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Abstract

Incidents of maritime piracy have increased substantially over the past year, due in part to the economic devastation caused by the COVID-19 pandemic. As piracy increases, so does the need for anti-piracy law enforcement or military interventions, many of which are multinational in nature. These interventions sometimes interact unfortunately with civilians, causing unintended casualties or other harms. The civilian victims of these operations struggle to secure redress for their injuries, as both piracy-specific international law and more general principles of conflict do not provide a mode of redress. The Tribunal for the Law of the Sea currently manages a trust fund, originally designed to defray litigation costs, which could be extended in reach to compensate civilian victims of multi-national anti-piracy operations. Extending the trust fund in this manner would serve the purposes of the Tribunal for the Law of the Sea, as described in the United Nations Convention for the Law of the Sea, and would further the goals of restorative justice and begin to provide adequate compensation for victims.

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I. INTRODUCTION

Over the last year, maritime piracy has made a resurgence around the world. Globally, there were 195 attacks in 2020, up from 162 piracy-related incidents in 2019.¹ Some scholars have hypothesized that the increase in global piracy over the past several months can be linked to the economic devastation that has resulted from the COVID-19 pandemic.² The economic downturn deprived already suffering populations of their limited resources, pushing them to increasingly drastic or desperate measures to survive.³

This uptick in piracy places civilians at risk. On occasion, pirates have been willing to hold high-value targets as hostages for months or even years.⁴ This behavior endangers civilians in two ways: an increased likelihood of violence at the hands of their captors and accidental harm resulting from international anti-piracy operations. The actors involved in anti-piracy policing efforts often operate in a legal grey area that makes it exceedingly difficult for civilian victims to secure compensation when they are harmed. This Comment seeks to address an appropriate method for providing redress or compensation for the civilian casualties of multi-national anti-piracy operations.

Section II of this Comment will address the international legal framework for piracy-related incidents with a specific focus on the inadequacies of piracy-specific treaties to provide a route for compensating civilian casualties.

Section III of this Comment will discuss the failings of the current system to provide redress for those harmed by multinational anti-piracy operations, discussing both domestic and international courts.

The final Section of this Comment will discuss a possible solution to the challenges facing those harmed by anti-piracy policing operations—an expanded purpose for the International Tribunal for the Law of the Sea Trust Fund (ITLOSTF). This Section will argue that compensating victims through the Trust Fund not only comports with the principles of international law and restorative justice, but naturally flows from the delegation of jurisdiction and purposes of the International Tribunal for the Law of the Sea (ITLOS).

¹ ICC-IMB *Annual Report: 2020 World-Wide Incidents of Piracy and Armed Robbery Against Ships*, MARITIME CYPRUS, (Jan. 17, 2021), <https://perma.cc/44RR-5S5G>. These numbers parallel statistics from the last great peak in maritime piracy, between 2009 and 2012. Brandon Prins, *How COVID-19 Could Make Maritime Piracy Worse*, THE MARITIME EXECUTIVE (July 5, 2020), <https://perma.cc/BI72-G3CP>.

² See Kevin Drew, *Amid a Pandemic, the Jolly Roger Flies High*, U.S. NEWS (July 30, 2020), <https://perma.cc/344R-3F4G>.

³ See *id.*

⁴ See Forrest Booth, *Marine Insurance, Jurisdiction and Piracy: Threats Foreign and Domestic*, 25 U.S.F. MAR. L.J. 37, 71 (2012).

II. INTERNATIONAL LEGAL FRAMEWORK

An investigation of options available to victims of anti-piracy operations must begin with a survey of the law of piracy: what qualifies as piracy, when intervention is permitted, and how civilians are treated under the law.⁵ Piracy is the oldest crime to which universal jurisdiction applies.⁶ This means that any state can prosecute and punish accused pirates, regardless of the state's active involvement or interests in a particular incident.⁷

The first modern international provision that discusses the crime of piracy is the 1958 Geneva Convention on the High Seas.⁸ The definition of piracy contained in this Convention can be found in Article 15.⁹ Piracy is defined as

any illegal acts of violence, detention or any acts of depredation, committed for private ends by the crew or the passengers of a private ship . . . , and directed: a) on the high seas, against another ship . . . or against persons or property on board such ship . . . ; b) against a ship . . . outside the jurisdiction of any state.¹⁰

There are two primary modern treaties which currently govern the policing of piracy: The United Nations Convention on the Law of the Sea (UNCLOS)¹¹ and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA).¹² The treaties share one important trait: neither provides a process for compensating the victims of multi-national anti-piracy operations.

A. U.N. Convention on the Law of the Sea

UNCLOS largely reiterates the definition of piracy contained in the earlier Geneva Convention on the High Seas. The difference is UNCLOS's definition includes "any illegal acts of violence or detention, or any act of depredation,

⁵ One important element of this discussion is the law of the prosecution of piracy, as some sources of international law require a conviction in order to provide compensation to victims in the form of reparations.

⁶ See Yvonne M. Dutton, *Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court*, 11 CHI. J. INT'L L. 197, 203 (2010).

⁷ See Alexandra Schwartz, *Corsairs in the Crosshairs: A Strategic Plan to Eliminate Modern Day Piracy*, 5 N.Y.U. J.L. & LIBERTY 500, 506 (2010).

⁸ Convention on the High Seas art. 15, Apr. 29, 1958, 13 U.S.T. 2313, T.I.A.S. No. 5200, 450 U.N.T.S. 82; Dean C. Alexander, *Maritime Terrorism and Legal Responses*, 19 TRANSP. L.J. 453, 462 (1991).

⁹ Convention on the High Seas, *supra* note 8, art. 15.

¹⁰ *Id.*

¹¹ U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

¹² Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, S. Treaty Doc. No. 101-1 (entered into force Mar. 1, 1992) (entered into force for the U.S. on Mar. 6, 1995) [hereinafter SUA]; Dutton, *supra* note 6, at 204–05.

committed for private ends.”¹³ Like the Geneva Convention on the High Seas, UNCLOS requires that all signatory states participate in the suppression of piracy and prosecution of accused pirates.¹⁴

The provisions of UNCLOS are limited in jurisdiction to the high seas and Exclusive Economic Zones (EEZ) of signatory countries.¹⁵ This jurisdictional limitation has proven to be a challenge in recent years, as the majority of attacks in certain regions occur in either territorial or coastal waters, excluding civilian victims from the protections of international law.¹⁶

Perhaps the most notable failing of UNCLOS is the complete lack of a procedure of redress for civilian casualties of anti-piracy conflict or other victims of anti-piracy operations conducted under the umbrella of the Convention. There is no mention in the Convention of redress, jurisdiction, or the status of these casualties.¹⁷

B. The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation

The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) was enacted to ensure that politically motivated attacks on ships could be prosecuted by the international community under the designation of piracy.¹⁸ Unlike UNCLOS, SUA provisions apply within the territorial waters of Member States, as long as the ship that was the target of an attack is scheduled for international navigation at some point.¹⁹ In order for an attack to constitute piracy under SUA, the conflict must be “likely to endanger the safe navigation of the ship.”²⁰

¹³ UNCLOS, *supra* note 11, art. 101(a); Eugene Kontorovich, “A *Guantánamo on the Sea*”: *The Difficulty of Prosecuting Pirates and Terrorists*, 98 CAL. L. REV. 243, 252 (2010).

¹⁴ See Kontorovich, *supra* note 13, at 252.

¹⁵ See Booth, *supra* note 4, at 85.

¹⁶ See *id.* at 85–86.

¹⁷ UNCLOS does not contain a mechanism for enforcing the duty that Member States cooperate in policing piracy. Dutton, *supra* note 6, at 206. This inadequacy allows many countries to avoid participating in anti-piracy operations and in prosecuting pirates unless they have a substantive interest in doing so, which has created a culture of “catch and release” piracy policing. Booth, *supra* note 4, at 77. This trend not only serves to increase the likelihood that pirate attacks will occur in the future, perpetuating the need for risky anti-piracy operations, but also ensures that victims are left without redress from a criminal system.

¹⁸ See Dutton, *supra* note 6, at 208.

¹⁹ See *id.*

²⁰ SUA, *supra* note 12, art. 3.

The most important shared trait between UNCLOS and SUA, for the purposes of this discussion, is that neither treaty contains any provisions explaining the redress available to those harmed by operations conducted under the purview of the convention.

C. Security Council Resolutions

Aside from the two treaties discussed above, there are a number of U.N. Security Council Resolutions that apply to the issue of piracy.

Resolution 1816 encourages Member States to cooperate to address the multinational threat of Somali piracy.²¹ This Resolution permits warships to enter Somali territorial waters to combat piracy.²² This Resolution explicitly allows for international operations to occur in territorial waters—making it unclear whether the jurisdiction over operations conducted pursuant to the Resolution would reside with the domestic courts or with some international body.

Resolution 1838 calls on Member States to deploy naval vessels and military airplanes to actively fight piracy on the high seas off the coast of Somalia.²³ This Resolution requires that all operations conducted by Member States comply with the provisions of UNCLOS and incorporate the cooperation of the Somali government.²⁴ This has a significant impact for civilian victims, as UNCLOS provides no method of redress or route to compensation.²⁵

D. The Law of Armed Conflict as Applied to International Piracy.

The Law of Armed Conflict encompasses a number of foundational principles, including, most centrally, the importance of protecting civilians.²⁶ The international community first prohibited the intentional targeting of civilians in the first Protocol Additional to the Geneva Convention.²⁷ However, despite these broad promises, realistically speaking, there is no absolute prohibition in the Law of Armed Conflict on military or paramilitary action that could harm civilians. Rather, the Law of Armed Conflict states that civilian injury must never outweigh

²¹ See S.C. Res. 1816 (June 2, 2008); Booth, *supra* note 4, at 73.

²² See S.C. Res. 1816, *supra* note 21; Tan Youzhi, *Somali Piracy: Causes and Countermeasures*, 15 CHINA INT'L STUD. 146, 157 (2009).

²³ See S.C. Res. 1838 (Oct. 7, 2008).

²⁴ See *id.*

²⁵ See UNCLOS, *supra* note 11.

²⁶ See Yael Ronen, *Avoid or Compensate - Liability for Incidental Injury to Civilians Inflections during Armed Conflict*, 42 VAND. J. TRANSNAT'L L. 181, 184 (2009).

²⁷ See *id.*

the military advantage anticipated for a particular military action.²⁸ Civilian casualties are considered “permissible” in two broad categories: as collateral damage as long as the loss of life is not excessive or disproportionate and as reasonable mistakes that result in humanitarian casualties.²⁹

International humanitarian law (IHL) provides the legal framework for conduct that impacts civilians in armed conflict.³⁰ Resolution 1851 seems to imply that IHL could apply to piracy incidents.³¹ Specifically, this resolution requires that all counterpiracy activities comply with UNCLOS, which in turn mandates compliance with IHL principles.³² However, this tacit endorsement of the application of humanitarian principles does not necessarily equate to an acknowledgement that piracy could be defined as armed conflict, which would mandate the application of the heavily pro-civilian policies of IHL.

In addition to protections arising from IHL, civilians enjoy protections through the International Convention on Civil and Political Rights (ICCPR), which sets the framework and concretely defines international human rights.³³ However, incidental civilian death is not considered to be an arbitrary deprivation of the right to life under that Convention, and is therefore generally seen as permissible.³⁴ Additionally, there is no claims mechanism for private citizens to recover for violations of their rights under the ICCPR.³⁵

III. FAILURE TO PROVIDE REDRESS

Despite having robust protections under international law, civilians victimized by international policing efforts have largely been unable to obtain redress from either domestic or international courts. Receiving compensation from international courts is only possible with the active participation of home governments, a requirement which can be prohibitive for some civilians. When victims attempt to secure compensation from domestic courts, they face other

²⁸ *See id.* at 185.

²⁹ Lesley Wexler & Jennifer K. Robbennolt, *Designing Amends for Lawful Civilian Casualties*, 42 YALE J. INT'L L. 121, 135–36 (2017).

³⁰ *See* Joel Christopher Coito, *Pirates vs. Private Security: Commercial Shipping, the Montreux Document, and the Battle for the Gulf of Aden*, 101 CAL. L. REV. 173, 205 (2013). Armed conflict exists “whenever there is a resort to armed force between states or protracted armed violence between governmental authorities or organized armed groups . . . within a state.” *Id.* at 205–06.

³¹ *See id.* at 218–19; S.C. Res. 1851 (Dec. 16, 2008).

³² *See id.*

³³ International Convention on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976).

³⁴ *See* Wexler & Robbennolt, *supra* note 29, at 191.

³⁵ *See id.*

roadblocks, including high litigation costs associated with prolonged litigation and recalcitrance from political institutions seeking to avoid admitting fault.

A. International Courts

There are a number of international venues that could potentially adopt jurisdiction over piracy-related litigation, providing a clear avenue of redress for victims of anti-piracy operations. Unfortunately, none of these venues have demonstrated a willingness to accept this responsibility.³⁶ Nevertheless, litigation related to civilian casualties of anti-piracy operations has, on occasion, reached the international milieu. However, those cases are exceedingly rare and fraught with complications for the victims seeking redress.

For example, the litigation surrounding the *Enrica Lexie* incident demonstrates the challenges that can arise from those cases that make their way to an international venue. In 2012, two Indian fishermen were killed by a unit of Italian marines working on the commercial oil tanker the *M/V Enrica Lexie*.³⁷ The Italian marines allegedly assumed that the fishermen were operating as pirates. This incident triggered a dispute over legal jurisdiction and sovereign immunity between the Indian and Italian governments.³⁸ India sought to prosecute the two Italian marines in its domestic criminal courts and further claimed that Italy had committed a number of violations of UNCLOS in its anti-piracy operations.³⁹

On July 2, 2020, the Permanent Court of Arbitration (PCA) within the U.N. recognized that the Italian marines possessed functional immunity, as they were engaged in an operation on behalf of the Italian government.⁴⁰ However, as part of its ruling, the PCA required that Italy reach an agreement with India to provide compensation for the deaths that the marines had caused, as well as other damages suffered by the targeted vessel and its crew.⁴¹

This decision marks one of the rare circumstances in which an issue related to piracy or anti-piracy enforcement made its way to an international court. The only reason why this case could be heard at the international level is the willingness of the home state of the civilian casualties to bring an action on their

³⁶ See Paul R. Williams & Lowry Pressly, *Maritime Piracy: A Sustainable Global Solution*, 46 CASE W. RES. J. INT'L L. 177, 202 (2013). The International Court of Justice, the Tribunal for the Law of the Sea, and the International Criminal Court have thus far been unwilling to address piracy-related cases, whether it be prosecuting pirates or compensating victims, *id.*

³⁷ See *The "Enrica Lexie" Incident (Italy v. India)*, PERMANENT CT. ARB., <https://perma.cc/S6AA-NFTR> (last visited Sept. 21, 2020).

³⁸ See *id.*

³⁹ See Emma Schoenberger, *PCA Releases Award in Enrica Lexie Incident Case*, *American Society of International Law*, AM. SOC'Y INT'L L. (July 13, 2020), <https://perma.cc/W5FT-HV99>.

⁴⁰ PERMANENT CT. ARB., *supra* note 37.

⁴¹ See *id.*

behalf. It is worth noting that even with the award from the PCA, it is still incumbent upon the Indian government to distribute the funds received from the Italian government to the families of the deceased.⁴² Without the government's involvement and assistance, the victims in this case would never have received compensation.

B. Domestic Courts

In some instances, national courts may be physically closest to the location of a particular incident, which would alleviate burdens associated with evidence collection and witness or prisoner transportation.⁴³ However, as discussed above, these benefits are far from universal given the international nature of maritime commerce and the multinational nature of anti-piracy operations. Additionally, national courts may not have sufficient legal capacity or expertise to address these interactions, which implicate international interests.⁴⁴ In some regions, there is the added concern of regional or ethnic bias, which can increase the difficulty of ensuring that justice is administered in a fair and impartial manner.⁴⁵

In the event that a fair trial can be secured, civilian victims are still often left without compensation by domestic courts. The *Wu Tien Li-Shou*⁴⁶ case is representative of the tactics employed by domestic courts to shield the abuses of military or paramilitary forces. In 2009, a Taiwanese fishing vessel was captured by Somali pirates. The pirates used the vessel as a mothership and continued to perpetrate attacks on other, larger vessels. In 2011, the *U.S.S. Groves* encountered the fishing vessel as part of her service in NATO anti-piracy patrols.⁴⁷ The Dutch commander of the NATO anti-piracy task force directed the *Groves* to intercept the fishing ship.⁴⁸ The *Groves* initially gave verbal warnings, but when the ship failed to comply with demands, the *Groves* fired warning shots followed by fire aimed at the skiff.⁴⁹ After boarding the vessel, the NATO forces discovered that the master of the Taiwanese vessel had been kept alive and held hostage by the

⁴² See Schoenberger, *supra* note 39.

⁴³ See Dutton, *supra* note 6, at 223.

⁴⁴ See *id.* at 224.

⁴⁵ See *id.*

⁴⁶ *Wu Tien Li-Shou v. United States*, 777 F.3d 175, 179 (4th Cir. 2015).

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See *id.*

pirate crew.⁵⁰ Kept alive, that is, until one of the shots fired at the skiff killed him.⁵¹

Master Wu's widow filed suit in the U.S., seeking damages related to the loss of her husband. The Fourth Circuit dismissed the case, ruling that it was not justiciable because it involved a political question that was best resolved by the political branches of government.⁵² In its decision, the court expressed its hesitance to second-guess the tactical decisions of military commanders.⁵³ The court also noted that it is an ill-suited body to evaluate the strategic and operational considerations at play in this case.⁵⁴

This ruling provides strong precedent shielding American domestic courts from evaluating similar cases in the future. Arguments of this nature demonstrate a common theme in litigation brought to recover funds from state governments when their military personnel have caused civilian casualties in other countries.⁵⁵

IV. THE SOLUTION: A TRIBUNAL TRUST FUND

Extending compensation from an internationally run victim compensation fund can be an effective method of addressing harm caused by international activity.⁵⁶ The authority to provide compensation using this method lies with the International Tribunal for the Law of the Sea (ITLOS). This section of the Comment will discuss a number of U.N.-managed compensation funds and examine the particulars of the fund overseen by the ITLOS. This Section will conclude with a discussion of the justifications for this approach to compensation, as well as the potential legal challenges to the implementation of a victim compensation-style trust fund by the Tribunal.

A. The Model: U.N. Trust Funds

Many of the international trust funds or victim compensation funds were enacted after the ratification of the Basic Principles of Justice for Victims of Crime

⁵⁰ *See id.*

⁵¹ *See* Wu Tien Li-Shou v. United States, 777 F.3d 175, 179 (4th Cir. 2015).

⁵² *See id.* at 180.

⁵³ *See id.* at 180–81.

⁵⁴ *See id.* at 181.

⁵⁵ *See generally* Kenneth P. Kingshill, *Present-Day Effects of United States Bombing of Laos during the Vietnam War: Can Injured Laotians Recover under the Federal Tort Claims Act*, 13 LOY. L.A. INT'L & COMP. L.J. 133 (1990).

⁵⁶ *See generally* Anne-Marie de Brouwer, *Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families*, 20 LEIDEN J. INT'L L. 207, 220–27 (2007); CHRISTINE EVANS, *THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT* 103 (2012).

and Abuse of Power, which was adopted by the U.N. General Assembly in 1985.⁵⁷ The Basic Principles discuss the need for wrongdoers to provide compensation to their victims in a variety of contexts, including in interactions between sovereign nations. Notably, the Basic Principles urge states to establish national programs for reparations and other assistance to victims of either crimes or abuses of power.⁵⁸

The International Criminal Court (ICC) was initially given the authority to award reparations to victims, and it enjoyed substantial discretion and flexibility as to the nature and amount of those awards.⁵⁹ To remedy certain limitations of the ICC reparations mechanism, the Trust Fund for Victims (TFV) operates in conjunction with the ICC to meet the needs of victims. The TFV is not a judicial institution, and it does not need to make extensive findings of fact or of law before granting payments to victims.⁶⁰ The TFV's only focus is supporting the victims who appear before the ICC and mitigating any harm they have suffered as much as is realistically possible.

The U.N. also oversees a variety of victim compensation funds, including the U.N. Voluntary Fund for Torture, the U.N. Voluntary Trust Fund for Victims of Trafficking in Persons, and the Trust Fund in Support of Victims of Sexual Exploitation and Abuse.⁶¹ The Trust Fund in Support of Victims of Sexual Exploitation and Abuse is especially relevant to this discussion, as it was enacted in response to allegations of abuse at the hands of a multinational policing operation—the U.N. Peacekeepers.⁶²

B. The International Tribunal for the Law of the Sea Trust Fund

ITLOS currently oversees and manages a trust fund. The International Tribunal for the Law of the Sea Trust Fund (ITLOSTF) was established in 2000

⁵⁷ G.A. Res. 40/34, at 213 (Nov. 29, 1985) [hereinafter Basic Principles].

⁵⁸ *See id.*

⁵⁹ *See* Anne-Marie de Brouwer, *supra* note 56 at 220-27; EVANS, *supra* note 56 at 103.

⁶⁰ *See* Evans, *supra* note 56, at 106; Anne Dutton & Fionnuala Ni Aolain, *Between Reparations and Repair: Assessing the Work of the ICC Trust Fund for Victims under its Assistance Mandate*, 19 CHI. J. INT'L L. 490, 506 (2019).

⁶¹ *United Nations Voluntary Fund for Victims of Torture*, U.N. HUM. RTS. OFF. HIGH COMM'R, <https://perma.cc/Y3D5-CWJ5> (last accessed Sept. 25, 2022); *United Nations Voluntary Trust Fund for Victims of Trafficking in Persons: Basic Facts*, UNODC, <https://perma.cc/SQ5L-HHPH> (last accessed Sept. 25, 2021); *Trust Fund in Support of Victims of Sexual Exploitation and Abuse*, U. N., <https://perma.cc/PPD8-YY3C> (last accessed Sept. 25, 2021).

⁶² *See* SEXUAL EXPLOITATION AND ABUSE IN PEACEKEEPING OPERATIONS, THE REDRESS TR. (2017); Skye Wheeler, *UN Peacekeeping has a Sexual Abuse Problem*, HUM. RTS. WATCH (Jan. 11, 2020) <https://perma.cc/WK4G-YG3W>.

by the U.N. Secretary-General in accordance with General Assembly Resolution 55/7.⁶³ The jurisdiction of the ITLOSTF is coextensive with the jurisdiction of the ITLOS.⁶⁴ Notably, this jurisdiction extends to any dispute that arises from an international agreement related to the purposes of UNCLOS.⁶⁵ Therefore, the Tribunal also possesses jurisdiction over the U.N. Security Council resolutions addressing Somali piracy, as those resolutions specifically reference UNCLOS and require compliance with its goals and mandates.⁶⁶ The jurisdiction of the Tribunal is limited by Article 295 of UNCLOS, which requires that local remedies be exhausted when required by international law.⁶⁷

C. Authority to Use ITLOSTF For Victim Compensation

There are a number of specific provisions in UNCLOS that may indicate that the Tribunal has the authority, or even the mandate, to award compensation to the victims of multinational piracy operations. The first provision is contained in Article 31, which discusses the responsibilities of flag states for damage caused by government ships being operated for non-commercial purposes.⁶⁸ This Article requires that the flag state bear international responsibility for any loss or damage to the victim state.⁶⁹ This provision is complicated by Articles 95 and 96, which discuss the immunity of government ships.⁷⁰ These Articles note that government ships enjoy complete immunity from the jurisdiction of any state other than their flag state.⁷¹

Additionally, Article 100 of UNCLOS requires that “all states shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any

⁶³ See G.A. Res. 55/7, U.N. Doc. A/RES/55/7 (Feb. 27, 2001). As of April 2019, the ITLOSTF had an approximate balance of \$150,000. Rep. of the International Tribunal for the Law of the Sea to the meeting of States Parties, SPLOS/30/2 (2020). This limited amount is likely due to the intended purpose of the Trust Fund—to defray costs for litigants before the Court. However, it is likely that countries will increase donations to the Trust Fund as the purpose is expanded, as is evidenced by the substantial funding to the Peacekeepers Trust Fund. The available balance in the ITLOSTF has oscillated substantially over the past decade, with a high-water mark of \$513,000 in 2017. Rep. of the International Tribunal for the Law of the Sea to the Meeting of States Parties, SPLOS/304 (2017).

⁶⁴ See *Jurisdiction*, INT’L TRIBUNAL L. SEA, <https://perma.cc/52JA-ZJ7Z> (last visited Dec. 30, 2020).

⁶⁵ See *id.*

⁶⁶ See *id.*; S.C. Res. 1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008).

⁶⁷ See UNCLOS, *supra* note 11, art. 295.

⁶⁸ See *id.* art. 31.

⁶⁹ See *id.* art. 31.

⁷⁰ See *id.* arts. 95, 96.

⁷¹ See *id.*

other place outside the jurisdiction of any state.”⁷² Claims filed by victims of these operations are disputes arising under that grant of jurisdiction in UNCLOS. This idea is bolstered by the provisions in Article 106, which addresses the process for litigating potentially unlawful seizures of suspected pirate vessels.⁷³ This Article states that the state making the seizure is liable to the state that possessed the ship or aircraft for any loss or damage caused by the seizure.⁷⁴

D. Justifications for Use of the Fund

There are a number of justifications found in broader international law for the payment of direct compensation to victims of international policing operations, including ethical and consequentialist arguments. Arguments in favor of prioritizing victim compensation date back to thinkers like Jeremy Bentham, who argued that the state should compensate victims whenever evil results from the unintentional mistakes of the ministers of justice.⁷⁵ International bodies have recognized, in line with this argument, that financial compensation of victims is a foundational element of human rights best practices.⁷⁶

The first justification is the emerging trend of focusing on reparative justice in international litigation. The most basic idea underlying reparative justice as a goal is the concept that an act, most commonly a transfer of resources to the victim, can have the effect of repairing the harm that has occurred.⁷⁷ While there are obvious concerns with this approach, the inadequacies of reparations does not discount that approach as a necessary element of justice.⁷⁸ One of the benefits of a restorative regime, aside from whatever compensation financial support can provide to victims, is the communicative value of reparations.⁷⁹ Reparations can counteract the communicative significance of the harm and restore a sense of dignity and self-worth to victims.⁸⁰ Additionally, when compelled, reparations can

⁷² *Id.* art. 100.

⁷³ *See* UNCLOS, *supra* note 11, art. 106.

⁷⁴ *See id.*

⁷⁵ *See* Frederic Megret, *Justifying Compensation by the International Criminal Court's Victims Trust Fund: Lessons from Domestic Compensation Schemes*, 36 *BROOK. J. INT'L L.* 123, 170 (2010).

⁷⁶ *See* Catherine E. Sweetser, *Providing Effective Remedies to Victims of Abuse by Peacekeeping Personnel*, 83 *N.Y.U. L. REV.* 1643, 1662 (2008).

⁷⁷ *See* Kristin Fisher, *Messages from the Expressive Nature of ICC Reparations: Complex-Victims in Complex Contexts and the Trust Fund for Victims*, 20 *INT'L CRIM. L. REV.* 318, 323 (2020).

⁷⁸ *See id.* at 323.

⁷⁹ *See id.* at 324.

⁸⁰ *See id.*

serve a similar purpose as punishment, in that they communicate the community's understanding of the wrongdoing of the perpetrator.⁸¹

A secondary justification for extending compensation to these victims is the potential for inconsistency in remedy if there is no source of restitution provided. The existence of the ICC's reparations mandate and a number of other trust funds available to various categories of victims indicates that the victimhood of some is less important than that of others. This signaling can create a source of alienation that further entrenches and perpetuates the victimhood of this category of persons.⁸² Extending compensation to the victims of international policing efforts would reduce the "demoralization costs" of leaving victims without compensation for the harm that they have suffered.⁸³

There are also practical justifications for the extension of a remedy to this class of victims. For example, a victim compensation scheme would serve the political agenda of governments that are interested in portraying themselves as victim-sensitive to the rest of the international community.⁸⁴ Some scholars have also argued that victim compensation can have a crime-reducing effect and that it serves as an important auxiliary to the criminal justice system, as compensation reduces the urge to participate in vigilante justice or other acts of desperation.⁸⁵ Finally, making the international community responsible for the losses that occur because of multinational actions creates an incentive to create stricter parameters for those operations or to find other methods of increasing safety for civilians.⁸⁶

V. CONCLUSION

An idea is only as good as its chance of successful implementation, and the utilization of the Tribunal for the Law of the Sea Trust Fund may be challenging. For example, some may argue that the Trust Fund was created for a limited purpose—to offset the costs of litigation for countries bringing claims before the Tribunal.⁸⁷ However, the language establishing the Trust Fund is much broader. The Trust Fund was established to "assist States in the settlement of disputes through the Tribunal."⁸⁸ Additionally, trust funds can reduce the burden of litigation on involved states. Even in other funds that do not require that all

⁸¹ *See id.* at 325.

⁸² *See* Fisher, *supra* note 77, at 338.

⁸³ *See* Megret, *supra* note 75, at 153.

⁸⁴ *See id.* at 154.

⁸⁵ *See id.* at 158–59.

⁸⁶ *See* Megret, *supra* note 75, at 160.

⁸⁷ *See* G.A. Res. 55/7, *supra* note 63.

⁸⁸ *Id.*

litigation rights be waived when receiving a disbursement, litigation has been less likely.⁸⁹

Additionally, a similar complication may result from the actual personnel employed by some policing operations. The rise of piracy targeting international shipping has caused an unprecedented interest in the use of Private Military Contractors (PMCs) to ensure security for valuable cargo and respond to pirate attacks in real time.⁹⁰ In the international law context, PMCs exist in a legal “grey area.”⁹¹ However, modern day PMCs are now subject to more regulation than conventional militaries.⁹² Regardless of the actual opportunities for abuse, in the event that a PMC is involved in a multinational policing operation that results in civilian casualties, there is no clear flag state at issue. One possible solution to this issue is to label the PMC’s domicile state as responsible for the harms. Another option is to hold the PMCs accountable individually or as a corporate entity. The trust fund could also provide compensation absent a formal finding of liability, avoiding the issue entirely.

There are, of course, additional logistical challenges that may arise if the trust fund is used to compensate these victims. However, inaction is injustice. Providing compensation for the victims of anti-piracy policing efforts is an important first step to a broader international policy surrounding the use of force in police contexts.

⁸⁹ See Chloe Gordils, *Victim Compensation Fundamentals: Kenneth Feinberg and Guidelines for Future Compensation Fund Czars*, 39 REV. LITIG. 163, 170 (2019).

⁹⁰ Booth, *supra* note 4, at 181.

⁹¹ See *id.* at 191–92.

⁹² See Schwartz, *supra* note 7 (noting that private security forces lack legal immunity for actions taken against pirates and consequently face significant liability for violations of international law. There are additional limitations under domestic law—under American law, for example, private military forces must pass through a licensing system which sometimes mandates human rights training).