QUASI-HOSTILE ACTS: THE LIMITS ON FORCIBLE DISRUPTION OPERATIONS UNDER INTERNATIONAL LAW

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ABSTRACT

One of the most pressing problems in contemporary international law concerns the interaction between hostilities, undertaken in armed conflict, and law enforcement. In situations where law and order collapses, states engaged in transnational law enforcement can be increasingly tempted to blur the boundaries between these paradigms by forcibly targeting objects relating to criminal activity. This Article labels such actions as "forcible disruption operations" ("FDOs") and seeks to offer a comprehensive legal framework for their assessment.

As a case study, this Article builds upon a strangely overlooked 2012 operation conducted by EU Naval Forces, in which "pirate equipment" was attacked from the air in Somalia. Using this case study, the Article makes two main claims. First, it contributes to theory by identifying FDOs as complex hybrids: they forcibly target objects on the one hand (a "hostilities" approach), yet attempt to spare the persons using them on the other (a "law enforcement" approach). Thus, FDOs are best described as "quasi-hostile" acts. This Article explores the unique modalities of such operations in various contexts. Second, through its discussion of FDOs, this Article reveals a surprising difference between the hostilities and law enforcement paradigms. While international humanitarian law ("IHL") prohibits the targeting of civilian objects even if used for criminal activities, international human rights law ("IHRL") – due to its system of derogations – might permit such actions in cases of extreme necessity, provided that

procedural guarantees are in place. This finding uncovers a novel distinction between IHL and IHRL by exemplifying, perhaps counter-intuitively, that the latter can be more permissive than the former.

INTRODUCTION

On May 15th, 2012, the international effort to eliminate maritime piracy off the coast of Somalia reached new heights, as part of an ongoing international campaign that led to a reduction in successful pirate attacks.[1] For the first time, EU Naval Forces ("EU NAVFOR"), acting within the framework of *Operation Atalanta*, conducted an aerial attack – labeled as a "disruption action" – against "pirate equipment" located in Somali coastal territory (The "May 15th Operation").[2] Reportedly, the attack targeted speed boats, fuel depots, and an arms store on the coast near the city of Harardheere, but refrained from targeting suspected pirates.[3]

To justify the operation, EU NAVFOR asserted that it was "merely an extension of the disruption actions carried out against pirate ships at sea" and assured the public that the attack, which was conducted upon Somalia's consent, targeted only "known pirate supplies."[4] EU NAVFOR praised the operation as being "focused, precise and proportionate," emphasizing – importantly – that no Somalis ashore were injured in the attack.[5] Nonetheless, EU naval officers conceded that if and when similar raids would take place in the future, pirates may adapt their tactics, "making it harder for their equipment to be destroyed without also hitting local Somalis."[6]

Beyond its operational novelty – being the first EU NAVFOR strike on

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[1] *See* S.C. Res. 2067, para. 1, U.N. Doc. S/RES/2067 (Sept. 18, 2012) (welcoming the reduction in successful pirate attacks); *see also Key Facts and Figures*, EUNAVFOR, http://eunavfor.eu/key-facts-and-figures (last visited July 7, 2013), http://eunavfor.eu/key-facts-and-figures/ (providing comparative statistics regarding piracy off Somalia).

[2] Press Release, EU NAVFOR, EU Naval Force Delivers Blow Against Somali Pirates On Shoreline (May 15, 2012), *available at* http://eunavfor.eu/eu-naval-force-delivers-blow-against-somali-pirates-on-shoreline/; *see also* ROBIN GEISS & ANNA PETRIG, PIRACY AND ARMED ROBBERY AT SEA: THE LEGAL FRAMEWORK FOR COUNTER-PIRACY OPERATIONS IN SOMALIA AND THE GULF OF ADEN 18–21 (2011) (providing a general account of Operation Atalanta).

[3] *Somali Piracy: EU Forces in First Mainland Raid*, B.B.C. NEWS (May 15, 2012), http://www.bbc.co.uk/news/world-africa-18069685; J.D., *First Official EU Strike on Land*, SOMALIA REPORT (May 25, 2012), http://www.somaliareport.com/index.php/post/3353/First_Official_EU_Strike_on_Land/.

[4] Press Release, *supra* note 2.

[5] *Id.*

[6] Frank Gardner, *Analysis*, B.B.C. NEWS (May 15, 2012), http://www.bbc.co.uk/news/world-africa-18069685.

Somali soil – the May 15th Operation presents legal challenges of a general character, which largely remain unaddressed. It is legally challenging, because on its face, it reflects a perplexing hybrid between a law enforcement action regulated by international human right law and a hostile act controlled also by international humanitarian law, which requires the existence of an armed conflict to apply.[7] The operation seems to have taken a law enforcement approach since EU NAVFOR was careful not to target the pirates themselves, thereby safeguarding their right to life. On the other hand, it targeted "criminal" *objects* in a manner, which bears the characteristics of a "hostile" military attack.

This Article proposes to label actions such as the May 15th Operation as *forcible disruption operations* ("FDOs"). Indeed, since they are on the seam between IHRL and IHL, FDOs reveal the boundaries of both. Exploring their limitations can be valuable in the ongoing effort in international legal discourse to clarify the increasing interaction between these legal spheres. Curiously, the exceptional legal aspects of such operations have not been thoroughly addressed in the literature.[8] Therefore, this Article is the first attempt to treat such operations as a distinct category of forcible actions and to offer a comprehensive legal framework for their analysis.

While EU NAVFOR refrained from conducting similar operations since the May 15th Operation, the potential motivation remains. Indeed, the operational rationale for taking the struggle against piracy to Somali coastal areas is easily understandable: in recent years, pirates have targeted ships in a vast maritime zone,[9] thus stretching out the operational capabilities of a relatively small contingent of international counter-piracy vessels.

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[7] *See, e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 75 U.N.T.S. 31 (stating that provisions apply when one party is armed or occupying another territory); Geneva; Protocol Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1 (1-3), June 8, 1977, 1125 U.N.T.S. 3 (stating that provisions apply only during armed conflict).

[8] Some literature discusses whether drug-related objects constitute targetable military objectives. *See, e.g.*, Edward C. Linneweber, *To Target, or Not To Target: Why 'Tis Nobler to Thwart the Afghan Narcotics Trade with Non-Lethal Means*, 207 MIL. L. REV. 155 (2011). In addition, some writing on piracy addresses the status of pirates and their potential targetability. *See, e.g.*, Douglas Guilfoyle, *The Laws of War and the Fight Against Somali Pirates: Combatants or Criminals?*, 11 MELB. J. INT'L L. 141 (2010). However, none of these sources identify the modalities of FDOs as a general phenomenon, particularly the complexities emanating from their nature as hybrids between law enforcement actions and hostile acts.

[9] *See* Int'l Chamber of Commerce Commercial Crime Services, Piracy & Armed Robbery Map 2013, INTERNATIONAL MARITIME REPORTING CENTRE; *see* http://www.icc-ccs.org/piracy-reporting-centre/live-piracy-map (last visited July 11, 2013) (providing an updated map of worldwide pirate attacks).

Preventing piracy by acting forcibly against pirates on land – where they are presumably concentrated – considerably levels the playing field, while keeping the risk to operating forces at minimum. Accordingly, in justification of its actions, EU NAVFOR explained that "preventing [the pirates from] getting out to sea is a crucial step in removing their impunity ashore and to further the success of counter-piracy operations."[10] It expressed its belief that "this action . . . [will] disrupt pirates' efforts to get out to sea to attack merchant shipping."[11]

Similar incentives to conduct FDOs may exist elsewhere. Indeed, while the problem of Somali piracy has several unique characteristics, the potential allure of FDOs, as well as the dilemmas associated with them, are relevant in other contexts. For instance, the intermingling of trade in narcotics and guerilla warfare has been a long-time feature of the civil war in Colombia.[12] A related issue has arisen in Afghanistan – where the United States has conducted strikes against drug-related objects.[13] Similar questions might arise in the context of the struggle against drug gangs in Mexico;[14] concerning the frequent clashes between Egyptian forces and smugglers-cum-militants in the increasingly unruly Sinai desert;[15] or regarding emerging threats of piracy elsewhere, notably in West Africa.[16] The legal framework suggested in this Article would be generally

[10] Press Release, *supra* note 2.

[11] *Id.*

[12] *See* FRANCISCO E. THOUMI, ILLEGAL DRUGS, ECONOMY AND SOCIETY IN THE ANDES 227–231 (2003).

[13] *See* Linneweber, *supra* note 8, at 156-57 (noting that in one instance, 200 tons of poppy seeds were destroyed by 1000 pound bombs). Reportedly, this policy caused a rift inside NATO. *See* Susanne Koelbl, *Battling Afghan Drug Dealers: NATO High Commander Issues Illegitimate Order to Kill*, SPIEGEL ONLINE (Jan. 28, 2009), http://www.spiegel.de/international/world/battling-afghan-drug-dealers-nato-high-commander-issues-illegitimate-order-to-kill-a-604183.html.

[14] *See* Craig A. Bloom, *Square Pegs and Round Holes: Mexico, Drugs and International Law*, 34 HOU. J. INT'L L. 345, 348 (2012) (arguing that the struggle between the Mexican government and drug cartels amounts to a non-international armed conflict); *see also* Carina Bergal, *The Mexican Drug War: The Case for a Non-International Armed Conflict Classification*, 34 FORDHAM. INT'L L. J. 1042, 1046-47 (2011).

[15] *See, e.g.*, *Egyptian Soldier Killed in Clash with Sinai Militants*, HAARETZ (Sept. 17, 2012), http://www.haaretz.com/news/middle-east/egyptian-soldier-killed-in-clash-with-sinai-militants-1.465348; *Gunmen Open Fire on Military Commander's Car in Sinai: Egypt Army*, AHRAM ONLINE (July 10, 2013), http://english.ahram.org.eg/NewsContent/1/64/76220/Egypt/Politics-/Gunmen-open-fire-on-military-commanders-car-in-Sin.aspx.

[16] A recent report reveals that by 2012, piracy in the Gulf of Guinea has surpassed that of Somali piracy, both in numbers and in the level of violence. *See* INT'L MARITIME BUREAU ET AL., THE HUMAN COST OF MARITIME PIRACY, 2012 12 –21 (2013), *available at* http://oceansbeyondpiracy.org/sites/default/files/hcop2012forweb.pdf.

applicable to all of these cases.

Moreover, further incentives to undertake FDOs emanate from recent technological advancements. For instance, the gradual creep of the use of drones from the battlefield into the realm of law enforcement – domestically and, perhaps, transnationally – will sooner than later raise the question of whether drones could be lawfully used to target criminal assets.[17] Indeed, the ease of conducting FDOs by deploying drones could prove tempting for various actors, particularly in volatile areas where the rule of law is sparse. A comprehensive legal analysis of FDOs is therefore called for, in anticipation of such developments.

This Article seeks to offer such an analysis using the May 15th Operation as a detailed case study. The Somali situation is a valuable case study for several reasons. First – and notwithstanding some recent progress in this context – the absence of effective governmental control over a significant part of the state's territory exposes the practical limitations of traditional law-enforcement approaches.[18] As such, lessons from Somalia can be drawn to other situations of state-failure, where basic concepts of the rule of law are strained to the core. Second, the ongoing armed conflict in Somalia presents challenging legal questions concerning the conduct of law enforcement operations in the proximity of active hostilities. The normative environment regulating such "mixed situations" is complex as it is, and more so where international actors are involved.[19] Third, the interaction between the multiple legal frameworks governing international

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[17] *See, e.g.,* Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. J. INT'L L. 1, 57–58 (2013) (discussing the reported deployment of U.S. unarmed drones over Mexican airspace, for the purpose of suppression of drug trade). As of today, the immediate concern regarding drones in domestic settings relate to privacy rights. *See, e.g.*, JAY STANLEY & CATHERINE CRUMP, AM. CIV. LIB. UNION, PROTECTING PRIVACY FROM AERIAL SURVEILLANCE: RECOMMENDATIONS FOR GOVERNMENT USE OF DRONE AIRCRAFT 6–8 (2011), *available at* http://www.aclu.org/files/assets/protectingprivacyfromaerialsurveillance.pdf (describing the use of drones for law enforcement operations in the United States); *see also* Margot E. Kaminski, *Drone Federalism: Civilian Drones and the Things They Carry*, 4 CAL. L. REV. CIRC. 57 (2013) (discussing privacy issues relating to the use of drones, specifically by civilians).

[18] *Somalia and its Shabab: Are the Islamists Truly on the Ropes?*, THE ECONOMIST (July 6, 2013), *available at* http://www.economist.com/news/middle-east-and-africa/21580523-new-and-much-lauded-president-finding-it-hard-bury-old-divisions-are.

[19] *See, e.g.*, Public Commission to Examine the Maritime Incident of 31 May 2010, Second Report – The Turkel Commission: Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law 64–69 *available at* http://www.turkel-committee.com/content-157-c.html [hereinafter *Turkel Report*] (noting the existence of "mixed situations" in which operations, during armed conflict, are on the borderline between hostilities and law enforcement).

activities in Somalia – such as U.N. Security Council Resolutions, international treaties, customary international law, IHL, IHRL, intra-EU Law, and host-state consent – is a revealing case of the normative fragmentation which characterizes contemporary international law.[20] Uncovering how these frameworks interact in this particular instance is a rewarding endeavor for the understanding of comparable dynamics elsewhere.

Last, this Article seeks to contribute to international legal theory by helping to reconcile a significant rift in contemporary international law and discourse. Indeed, in recent years, it seems that attitudes towards the limits on state use of force are split between two camps: one, consisting mainly of state and military lawyers, emphasizes that international law must accommodate military expediencies; while the other, mostly comprised of NGOs, academics, and international bodies, advocates for a greater role for human rights norms in the assessment of all forcible actions by states.[21] The former feel that they are subjected to a "human rights" onslaught by the latter, which diminishes their ability to address contemporary challenges.[22] However, as recently noted by David Luban, reality dictates that "like it or not, the two legal cultures [represented by the two camps] must live with each other."[23] This Article demonstrates that this dichotomy is indeed unwarranted; and that sometimes – as we shall see – the application of IHRL provides militaries and law enforcement agencies a spectrum of options which is actually *wider* than those they would have, if operating solely under the "hostilities" discourse of IHL.

Part I of this Article starts by briefly outlining the unique traits of FDOs as hybrid operations. It then discusses the modalities of law enforcement actions versus those of hostilities and argues that FDOs are closer to *quasi-hostile* acts than to law enforcement activities – namely since they aim to destroy objects upon executive discretion and generally risk the lives of suspects and bystanders.

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[20] *See generally* Rep. of the Int'l L. Comm'n, 58th Sess., May 1-June 9, July 3-Aug. 11, 2006, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

[21] *See* Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare* 20 DUKE J. COMP. & INT'L L. 339, 348 (2010) (labeling these camps the "Law of Armed Conflict Camp" versus the "IHL Camp."); see *also* David Luban, *Military Lawyers and the Two Cultures Problem*, 26 LEIDEN J. INT'L L. 315 (2013)

[22] This is manifested, for instance, in the proliferation of the term "lawfare" to describe the increasing scrutiny of state actors by human rights bodies and organizations. *See, e.g.*, Laurie R. Blank, *Finding Facts But Missing the Law: The Goldstone Report, Gaza and Lawfare*, 43 CASE W. RES. J. INT'L L. 282, 282–84 (2011) (describing the term "lawfare"); Charles J. Dunlap, Jr., *Does Lawfare Need an Apologia*?, 43 CASE W. RES. J. INT'L L. 121, 121–23 (2010) (noting that the original meaning of the term "lawfare" lacked the malicious connotations prevalent in contemporary discourse).

[23] Luban, *supra* note 21, at 53.

Part II analyzes the legal framework for FDOs in Somalia, as invoked by EU NAVFOR. The Part's key claim is that the legality of FDOs, as quasi-hostile acts, must be traced either to specific arrangements in customary international law or to explicit language in Security Council resolutions. This legal basis is absent in the Somali context, chiefly because the customary framework for counter-piracy operations is one of law enforcement, and relevant Security Council resolutions do not explicitly authorize a deviation from this point of departure.

Part III explores the concept of FDOs under the hostilities paradigm. It addresses the interaction between criminal activities and armed conflict – in particular in situations of state-failure – and outlines, through the example of Somali piracy, the conditions for the targetability of criminal objects. A key theoretical claim of this Part is that the hostilities paradigm does not allow for separate treatment of persons and objects: both are equally immune to attack, unless they are valid *military* objectives. This finding demonstrates the tension between FDOs – which distinguish between objects and persons – and the pure hostilities paradigm. This Part further discusses the relation between host-state consent and the legality of FDOs, suggesting that consent is insufficient, by itself, to legalize such actions absent the required objective conditions.

Noting the difficulty in placing FDOs under the hostilities paradigm, Part IV asks whether FDOs can be rescued under the IHRL paradigm – and offers some surprising findings. It posits that, owing to the non-derogable right to life, IHRL can accommodate life-risking FDOs only if they are conducted in defense of self or others. However, due to the regime of emergency derogations found in key IHRL instruments, the Part demonstrates that IHRL – as opposed to IHL – might indeed allow for the targeting of criminal objects, in exceptional circumstances. For such a possibility to exist, the risk to life emanating from the operation must be virtually negated, and the action must conform to the procedural and substantive conditions found in emergency clauses in IHRL treaties. These findings are generalized in the Conclusion.

I. FORCIBLE DISRUPTION OPERATIONS, LAW ENFORCEMENT, AND HOSTILITIES

This Part places FDOs in the context of the general interaction between the law enforcement and hostilities paradigms. It first describes the unique characteristics of FDOs. It thereafter delineates the key distinctions between the law enforcement and hostilities paradigms. Lastly, it illustrates how these play out with regard to FDOs.

A. The Special Nature of Forcible Disruption Operations

As implied in the Introduction, FDOs are forcible acts of a complex

nature. Their salient characteristic is that they target *objects* forcibly, while deliberately sparing the *persons* that make use of the attacked objects. [24] Meaning, FDOs draw a bright-line distinction between objects and persons for the sake of targeting. The uniqueness of FDOs, as hybrid operations between law enforcement and hostilities, lies precisely in this distinction.

Indeed, one can rightly argue that, even under the traditional understanding of hostilities, attacking a military objective – such as a weapons factory (an object) – requires sparing, to the extent feasible, its civilian workers (persons).[25] Therefore, as the argument would go, there is nothing special in FDOs. However, this contention does not withstand deeper scrutiny. This is because, under IHL, the duty to spare the factory's workers would be derived from the fact that they are not *themselves* directly participating in hostilities and, hence, are generally protected from attack.[26] By destroying the factory, the attacker seeks to curtail hostilities undertaken by someone *else* – namely by the adversary's armed forces. Killing the workers themselves would not substantially promote this objective.[27]

FDOs, conversely, are attacks that attempt to spare those that are *themselves* involved in the ultimately "unwanted" activity. In the example of the May 15th Operation, the attack expressly refrained from targeting suspected pirates, although they are the same agents conducting the ultimate harmful act (piracy).[28] It is easy to imagine similar examples in other contexts: bombing drug production facilities while sparing the drug gang running it; destroying vehicles used for human trafficking when the human

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[24] All FDOs *attempt* to spare lives. Whether they in practice *risk* lives or not is a question of fact. Part IV will examine the ramifications of FDOs that risk lives versus those that do not.

[25] *See* Geneva Protocol, *supra* note 7, art. 57(2)(a)(ii) (requiring attackers to take all feasible precautions to minimize incidental harm to civilians and civilian objects); *see also* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 96 –97 (2d ed., 2010) (identifying arms factories as valid military objectives).

[26] *See id.* arts. 48, 51(1).

[27] Indeed, a basic principle of IHL is that of necessity, meaning, "[t]hat the only legitimate object which States should endeavor to accomplish during war is to weaken the military forges of the enemy." Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight [Declaration of St. Petersburg, 1868], Nov. 29-Dec. 11, 1868, *reprinted in* 1 AM. J. INT'L L. 95 (1 Supp., 1907). This objective cannot encompass, for instance, punishing civilians for working in a belligerent's weapons factory.

[28] It should be emphasized that the civilian status, under IHL, of *persons* solely engaged in piracy – as in any other type of "criminal" action – and their resulting immunity from attack, has been discussed elsewhere, and is not significantly challenged. FDOs, conversely, are attacks against *objects*. *See, e.g.*, Eugene Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, 13 AM. SOC'Y INT'L L. INSIGHTS (2009), http://www.asil.org/insights090206.cfm (discussing the civilian status of pirates).

traffickers are off to lunch; or, perhaps, targeting network servers by kinetic weapons, while carefully ensuring that the hackers using them are unharmed. The equivalent of FDOs, in traditional scenarios of armed conflict, would be to stage an attack on military vehicles, such as tanks, while expressly attempting to spare their crews. It is clear, therefore, that the underlying logic of FDOs is fundamentally different from that of a military attack. However, the fact that FDOs differ from traditional hostile acts by no means implies that they are similar to ordinary law enforcement actions. The next Sections further elaborate on this issue by discussing the law enforcement and hostilities paradigms in greater detail.

B. Modalities of Law Enforcement and Hostilities

The distinction between acts of law enforcement and acts of hostilities is a crucial one. This distinction is crucial because, in absence of an armed conflict, states are confined in their actions to restrictive measures of law enforcement, as prescribed by IHRL. They cannot, in such cases, resort to the type of force which is permissive during active hostilities.[29] Therefore, establishing whether a certain act conforms to the law enforcement paradigm, or rather to that of hostilities, is a key stepping-stone in assessing the legality of state-action under contemporary international law.[30]

However, distinguishing between these types of actions is not always simple. Notably, the term *hostilities* is neither clearly nor substantively defined in positive international law.[31] Indeed, it is possible to envision

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[29] This contention has been the subject of much discussion in the context of the so-called "global war on terror." *See, e.g.*, NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 112 –21 (2010); Mary Ellen O'Connell, *When is War not a War? The Myth of the Global War on Terror*, 12 ILSA J. INT'L COMP. L. 535, 539 (2006) (discussing how the current definition of war does not include all action against terrorists); *see also* Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶¶ 28–33, Hum. Rts. Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) (discussing the legal framework of targeted killings).

[30] This understanding led the Turkel Commission, mandated by the Government of Israel to examine Israel's investigatory practices, to recommend that after each case of civilian death caused by state action investigating bodies must first assess whether the incident occurred in the context of law enforcement or of hostilities. *See* Turkel Report, *supra* note 19, at 377. *But see* Monica Hakimi, *A Functional Approach to Targeting and Detention*, 110 MICH. L. REV. 1365, 1371–1374 (2012) (arguing for the abandonment of the human rights/armed conflict dichotomy and the adoption of a functional approach).

[31] In IHL, the closest term – *attack* – is defined in Additional Protocol I as "acts of violence against the adversary." Geneva Protocol, *supra* note 7, art. 49(1). In the realm of *jus ad bellum*, the relevant terms are "use of force" and "armed attack." *See* U.N. CHARTER arts. 2(4), 51. Attempts to define the latter are mainly casuistic, sometimes tautological, and do not sufficiently explain the essence of a forcible act. *See, e.g.,* Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), 1986 I.C.J. 14, ¶ 191 (June

easy cases in which a clear-cut determination can be made: for instance, aerial attacks using kinetic ammunition against "pure" military objects such as command centers would definitely qualify as hostile acts; conversely, policing activity against car-thieves in occupied territories is a clear case of law enforcement. However, many gray areas remain. For instance, it is much harder to place, under one paradigm or the other, kill-or-capture operations undertaken in the context of amorphous and borderless struggles against non-state entities.[32] In the same vein, it is difficult to place FDOs under one category or the other, in particular when conducted in proximity to an active armed conflict, such as in Somalia.[33] Nevertheless, it is still possible to identify several key characteristics that can guide us in such hard cases.

1. The Law Enforcement Paradigm

First and foremost, law enforcement actions, under normal conditions, are conducted to bring persons to trial. Owing to the fundamental right to life, as enshrined in key IHRL instruments, law enforcement does not envision the use of potentially lethal force – namely kinetic weapons – except when absolutely necessary in defense of self or others.[34] Although it is conceded that some anticipatory force can be used during law enforcement operations, such force must be strictly necessary to prevent a particularly serious crime involving grave threat to life.[35] Even in these

27); Definition of Aggression, G.A. Res. 3314 (XXIX), U.N. Doc. A/9631 (Dec. 14, 1974). For a recent attempt to define these terms, both in *jus in bello* and *jus ad bellum,* see TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE Rules 45, 54, 106 (Michael N. Schmitt ed., 2013) (noting that Rule 11 defines use of force, Rule 13 discusses self defense against armed attack, and Rule 30 defines cyber attack).

[32] The 2011 Bin-Laden operation is an example where such a controversy has arisen. *Compare* Kai Ambos & Josef Alkatout, *Has "Justice Been Done"? The Legality of Bin Laden's Killing Under International Law*, 45 ISR. L. REV. 341, 344 (2012), *with* David A. Wallace, *Operation Neptune's Spear: The Lawful Killing of Osama Bin Laden*) 45 ISR. L. REV. 367, 369 (2012). Another complex case concerns Israel's 2010 killing of a Hamas operative, Mahmoud al-Mabhouh, in a Dubai hotel room. *See* Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT'L SEC. J. 283, 372 (2011). *See generally* Jens David Ohlin, *The Duty to Capture*, 97 MINN. L. REV. 1268 (2013) (discussing the duty to capture in the context of the struggle against Al-Qa'ida).

[33] See the discussion *infra* Part III.

[34] *See*, *e.g.*, International Covenant on Civil and Political Rights art. 6(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter *ICCPR*]; Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *ECHR*]; *see* Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, art. 9, U.N. Doc. A/CONF.144/28/Rev.1 (Sept. 7, 1990) [hereinafter *Basic Principles*].

[35] Basic Principles, *supra* note 34, art. 9.

circumstances, IHRL allows the use of potentially lethal force only within a strict use-of-force continuum, meaning, only as a last resort.[36]

A further characteristic of the law enforcement paradigm – one which is of particular importance in the context of life-risking FDOs – is that its toleration of collateral damage to uninvolved persons is close to nil, if at all.[37] Therefore, law enforcement does not grant an *ex-ante* authorization to cause incidental harm to bystanders, even when attempting to rescue others. Instead, a law enforcement approach would concede, perhaps, that such incidental harm could be exempted *ex post* through some form of excuse defense, such as is available in criminal law.[38] The philosophical backdrop of law enforcement's aversion towards collateral damage can be found in its Kantian underpinnings: it is hardly possible to justify, under the latter – the deprivation of innocent life by a state actor – in order to save another.[39] Of course, *a fortiori,* these ideals cannot tolerate risking innocent lives for lesser goals, such as protection of property.[40]

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[36] *Id*. arts. 9–10.

[37] *See* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 240 (2000) (arguing that unlike IHRL, IHL tolerates incidental harm to civilians); see also Nina Naske & Georg Nolte, "Aerial Security Law," Case No. 1 BVR 357/05. 115 BVERFGE 118, 101 AM. J. INT'L L. 466, 469 (2007) (citing a claim by German minister Schläuble that "under the law of peace [where the law enforcement paradigm prevails], one person's life must not be balanced against that of another, but under the law of war [hostilities], all that had [sic] to be considered was the principle of proportionality.").

[38] *See, e.g.*, George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 958 (1985) (discussing the difference between excuse and justification); *see also* Rome Statute of the International Criminal Court art. 31(d), July 17, 1998, 2187 U.N.T.S. 90 (recognizing the exclusion of criminal liability when harming innocents in defense of self or others, provided that the person acted reasonably and proportionally). Similar defenses are also available to states under the law of state responsibility. *See* Rep. of the Int'l Law Comm'n 53d Sess., *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 25, Apr. 23 –June 1, July 2 –Aug. 10, 2001, U.N. DOC. A/56/10 [hereinafter *ILC Draft*].

[39] A prime example of this approach can be found in the German Aviation Security Case, in which the Federal Constitutional Court of Germany annulled a post 9-11 act authorizing the shooting down, as a last resort, of hijacked passenger aircrafts intended for use as lethal weapons. The Court ruled that the act violated, *inter alia*, the right to human dignity enshrined in Article 1 of the German Basic Law, since the passengers were objectified by "being used as means to save others." Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] Feb. 15, 2006, 115 BVERFGE 118, ¶ 122, *available at* http://www.bverfg.de/entscheidungen/rs20060215_1bvr035705en.html; *see* GRUNDGESETZ FUR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], art. 1(1), May 23, 1949, BGBI. I; *see also* Naske & Nolte, *supra* note 37 (critiquing the Aerial Security Law case).

[40] For an interesting case see HCJ 2887/04 Abu Madigam v. Isr. Land Admin. 2007 IsrLRep 58, 111 IsrLR 62 [2007] (Isr.) (ruling that Israeli authorities cannot conduct aerial

Granted, in a recent decision, *Finogenov v. Russia*, the European Court of Human Rights ("ECtHR"), seems to have adopted a rather lenient approach towards incidental harm during law enforcement operations. In *Finogenov*, at issue was a botched Russian hostage-rescue operation, where 125 hostages, held in a Moscow theater, were killed when an unidentified gas was dispersed into the building by Russian forces. The Court deferred to Russia's decision to use such force, ruling accordingly that this specific aspect of the operation did not violate the right to life of the innocent victims.[41]

It is doubtful, however, whether *Finogenov* can be interpreted as legitimizing collateral damage in *all* law enforcement operations. First, it can be relevant that the *Finogenov* ruling, to the extent that it was more lenient concerning incidental harm, had to do with unintended harm to the *same* persons that the action was meant to rescue. According to some, the rescuer is ethically more justified to risk a potential rescuee – whose life is already in peril – than to risk completely uninvolved persons.[42]

Second – and returning to the earthly legal discussion – the Court's reasoning was, in any case, more about deference to executive discretion in extreme situations than about permitting collateral damage in advance. Thus, the ruling revolved around the scope of the "margin of appreciation" granted to authorities in a "truly exceptional" situation, where time was pressing, control over the situation was limited, and certain aspects of incident were beyond the Court's expertise.[43] By deferring to Russian discretion *ex post*, the Court in *Finogenov* mostly exercised judicial constraint, being "acutely conscious" of the difficult objective

fumigation to destroy Bedouin agricultural crops cultivated on state-owned land, namely since these actions are harmful to health and violate human dignity). Similar questions have arisen around the U.S. funded aerial fumigation policy in regards to coca crops in Colombia ("Plan Colombia"). *See* COLETTA A. YOUNGERS & JOHN M. WALSH, WASH. OFFICE ON LATIN AMERICA, DEVELOPMENT FIRST: A MORE HUMANE AND PROMISING APPROACH TO REDUCING CULTIVATION OF CROPS FOR ILLICIT MARKETS 3–9 (2010), *available at* http://www.wola.org/sites/default/files/downloadable/Drug%20Policy/2010/WOLA_RPT_Development_web_FNL.pdf.

[41] Finogenov v. Russia, App. No. 18299/03, Eur. Ct. H.R., 53-54 (2012) (explaining in paragraphs 211–213 the departure from the "absolute necessity" standard in the context of terrorist threats as applied to the specific facts of the case). As one commentator remarked, the Court in *Finogenov* "almost entered an "IHL-mode" in its decision. Marko Milanovic, *Important Cases Against Russia Before the European Court*, EUR. J. INT'L L.: TALK! (Jan. 4, 2012), http://www.ejiltalk.org/important-cases-against-russia-before-the-european-court/.

[42] McMahan, for instance, believes that some risk can be shifted towards potential rescuees, since they are the beneficiaries of the action. *See* Jeff McMahan, *The Just Distribution of Harm Between Combatants and Noncombatants,* 38 PHI. & PUB. AFF. 342, 357–65 (2010).

[43] *Finogenov*, App. no. 18299/03, ¶¶ 211–13, ¶ 231.

circumstances faced by Russian authorities.[44] It certainly did not issue a positive, principled, and forward-looking ruling that collateral damage is an acceptable feature of law enforcement.[45] On the contrary, it emphasized that the measures used by Russia were not supposed to be lethal to begin with.[46] Despite some interpretations of this case and others reminiscent of it, it follows that the farthest the law enforcement paradigm is willing to go concerning the question of collateral damage is to defer *ex post* to decision-makers in extreme scenarios; it stops short of authorizing such damage *ex ante*.[47] As we shall see later on, this feature of the law enforcement paradigm certainly implicates life-risking FDOs under IHRL.

Beyond the protection of the right to life, the law enforcement paradigm is controlled also by due-process rights entrenched in various IHRL instruments. These include procedural and substantive rights regarding the deprivation of liberty, the right to fair trial (including the presumption of innocence), and the right to effective remedies.[48] While the application of due-process provisions is obvious when it comes to the protection of persons, the principles of due-process must also extend to *things* associated with these persons – such as objects allegedly relating to criminal offences – although this aspect of due-process is not explicitly mentioned in key human rights instruments. This conclusion can be deduced from the right to property, to the extent it is protected by IHRL,[49] or viewed as an extension

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[44] *Id.* ¶ 212.

[45] *But see* Hakimi, *supra* note 30, at 1389 (understanding the ruling in Finogenov as positively recognizing that law enforcement standards "apply more loosely" in certain situations).

[46] *Finogenov*, App. no. 18299/03, ¶¶ 231–32. (distinguishing the situation at hand from those pertaining to the hijacked aircraft scenario addressed in the German Federal Constitutional Court).

[47] *But see* Hakimi, *supra* note 30, 1371 n.18 (interpreting ECtHR decisions as "permitting" collateral damage). Some other ECtHR judgments that seem to endorse, to some extent, the idea of collateral damage were given in the backdrop of active hostilities. *See e.g.*, *infra* note 226.

[48] ICCPR, *supra* note 34, arts. 2(3)(b), 9 –10, 14; ECHR, *supra* note 34, arts. 5–6.

[49] Although the right to property is enshrined in Article 17 of the Universal Declaration on Human Rights, it is famously absent from the ICCPR as well as from the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter *ICESCR*], *inter alia* since the principle behind individual property rights was an anathema to the ideas of socialist block. *See* THEO R.G. VAN BANNING, THE HUMAN RIGHT TO PROPERTY 3–6, 43–47 (2001) (describing the controversies and process leading to the eventual omission of property from the main human rights covenants). However, the right to property is entrenched in some regional human rights treaties such as the ECHR, *supra* note 34, art. 14; *see also* American Convention on Human Rights art. 21, Nov. 22, 1969, 1144 U.N.T.S. 123. (recognizing right to property but noting that "the law may subordinate . . . use and enjoyment [of property] to the interest of society."). For a recent decision linking between confiscation of property and due process see Silickienė v. Lithuania, App. No.

of social and economic rights, such as the right to gain a living, to an adequate standard of living, to health, to adequate housing, and so forth.[50]

These rights are relevant to FDOs, since they prohibit the arbitrary confiscation (meaning, transfer of title to the state) or destruction of movables or immovables, absent sufficient due-process guarantees. Thus, law enforcement actions cannot, largely, aim for the extrajudicial destruction of property. In general, they can only result – at most – in seizure pending a decision by a competent judicial organ. Transfer of title is prohibited – *a fortiori* destruction (except for imminent public safety reasons) – prior to such a decision. In this context, the general practice of European states regarding confiscation of objects varies. Some allow for confiscation of property allegedly acquired through unlawful activities, even prior to the conviction of the property's holder.[51] Other states require conviction prior to confiscation, or, at least, under some specific exceptions, reasonable grounds that the holder committed the offense connected to the property.[52] Still, others exclude any confiscation prior to conviction.[53] Nonetheless, as recently ruled by the ECtHR, common to all of these arrangements is that they must be in line with "basic principles of fair procedure," providing the holder an "adequate opportunity" to challenge the confiscation through adjudication on counts of illegality, arbitrariness, or unreasonableness.[54] Of course, this notion is entirely incompatible with *destruction* of objects strictly upon executive discretion.[55] This conclusion

20496/02, Eur. Ct. H.R. ¶¶ 45–46, 56–68 (2012),

[50] ECHR, *supra* note 34, arts. 6(1), 10–11; *see also* VAN BANNING, *supra* note 49, at 45-46 (discussing divergent opinions on the scope of property rights).

[51] Those states include Albania, Germany, Georgia, Moldova, Romania, Sweden and Switzerland. *See Silickienė*, App. No. 20496/02, ¶ 33.

[52] Those states include Bulgaria, Estonia, Luxemburg, the Netherlands and Russia. *Id.* ¶ 34.

[53] Those states include Belgium, France and the U.K. *See id.*

[54] *Id.* ¶47. This ruling is in line with the longstanding ECtHR jurisprudence with regard to confiscation of property. *See, e.g.*, Yildirim v. Italy, App. No. 38602/02. Eur. Ct. H.R. ¶¶ 1 –2 (2003), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-23828 (including the sources cited therein).

[55] *See, e.g.*, Handyside v. United Kingdom, App. No. 5493/72, 24 Eur. Ct. H.R. (ser. A) at 24, (1976) (recognizing the "principle of law, common to the Contracting States, where under items whose use has been lawfully *adjudged* illicit and dangerous to the general interest are forfeited with a view to destruction." (emphasis added)). For examples in domestic legislation see *Criminal Property Confiscation Act 2000* (W. Austl. 93); *see also* The Seizure of Criminal Property Act, Sask. 2009, c. S-46.002 (Can.). In traditional international law, there is a principle that property seized by belligerents, such as ships or contraband, cannot be wantonly destroyed, even in the course of hostile actions. These can be condemned as prizes – according to well-established customary international law – only through a decision of a prize court. *See* SAN REMO MANUAL ON INTERNATIONAL LAW

can affect the legality of FDOs, even in cases in which they can be conducted *without* risking lives.

2. The Hostilities Paradigm

A brief survey is sufficient to demonstrate that the hostilities paradigm is at odds with key premises of law enforcement. In the context of active hostilities, the right to life and due-process principles are balanced against considerations of military necessity.[56] Thus, during armed conflict, lethally targeting combatants – as well as civilians directly participating in hostilities or, according to some, persons exercising a continuous combat function within an organized armed group[57] – is lawful even beyond scenarios of self defense. Furthermore, an attack can be lawfully staged without any prior use-of-force continuum or adjudication.[58] In the same vein, objects can be attacked and destroyed – naturally, without any judicial authorization – if they fulfill the functional criteria of a *military objective*,

APPLICABLE TO ARMED CONFLICTS AT SEA 116, 138, 146 (Louise Doswald-Beck ed., 1994). For a classic example of prize adjudication see The Prize Cases, 67 U.S. 635 (1862). In the context of piracy, see United Nations Convention on the Law of the Sea, art. 105, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter *UNCLOS*] ("[t]he courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.").

[56] *See generally* Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795 (2010).

[57] *See* Geneva Protocol, *supra* note 7, arts. 48, 51(3). *Compare* HCJ 769/02 The Pub. Comm. against Torture in Isr. v. Gov't of Isr., 62(1) PD 507, ¶¶ 27–40 [2006] (Isr.) (discussing the concept of direct participation of hostilities; holding that direct participation does not result in negation of civilian status); *with* NILS MELZER, INT'L COMM. RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 32 –36 (2009) (positing that individuals exercising a continuous combat function within an organized armed group cease to be civilians).

[58] This remains the dominant understanding of IHL, despite an emerging trend in recent years to restrict the use of force even in combat scenarios. *See* HCJ 769/02 *The Pub. Comm. against Torture in Isr.* 62(1) PD 507 [2006] (ISR) ¶ 40 (holding that capture is preferable to killing even if the individual is targetable, thus alluding to a use of force continuum in the context of hostilities); *see also* MELZER, *supra* note 57, at 77-78 (adopting a similar position while noting that "the absence of an unfettered 'right' to kill does not . . . imply a legal obligation to capture rather than kill"); Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUR. J. INT'L L. 819 (2013) (arguing that in some narrow circumstances even use of force against combatants should be limited to least restrictive means); Gabriella Blum, *The Dispensible Lives of Soldiers*, 2 J. LEGAL ANALYSIS 115 (2010) (arguing that soldiers should be targeted on counts of their threat to the attacker rather than on the base of status). *But see* W. Hays-Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769, 799–812 (2010) (reflecting the traditionalist rejection of the use-of-force continuum in IHL).

meaning, "by their nature, location, purpose or use [they] make an effective contribution to military action and [their] total or partial destruction . . . offers a definite military advantage."[59]

A related feature of the hostilities paradigm relates to the level of certainty required of those authorizing an attack. The prevalence of the "fog of war," in particular in contemporary non-international armed conflicts, allows the military commander to act forcibly even in absence of absolute certainty concerning the nature of the target.[60] Although there is a general presumption in IHL in favor of protection,[61] the standard of doubt, in this context, is assessed according to the reasonableness-standard of feasible precautions.[62] Of course, under the law enforcement paradigm, the standard applicable to decisions to use potentially lethal force must be significantly higher.[63]

Finally, and importantly, in armed conflict, incidental harm to civilians (or civilian objects) is tolerated so long as it is not excessive in relation to the military advantage derived from an attack on a legitimate target. In stark contrast to the law enforcement paradigm, such damage is tolerated even if expected *ex ante*.[64] This is not merely a legal nuance; it represents the diverging philosophical premises of the two paradigms. By recognizing that civilian lives can be measured against a military advantage, the international law of targeting, under IHL, employs a consequentialist reasoning far removed from the Kantian perception prevalent in most approaches to law enforcement.[65]

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[59] Geneva Protocol, *supra* note 7, art. 52(2); *see* WILLIAM H. BOOTHBY, THE LAW OF TARGETING 100–07 (2012) (discussing the functional tests for military objectives).

[60] *See* BOOTHBY, *supra* note 59, at 101.

[61] Geneva Protocol, *supra* note 7, arts. 50(1), 52(3); MELZER, *supra* note 57, at 75 –76 (arguing for a presumption of civilian protection also in the determination of direct participation in hostilities or membership in organized armed groups). *But see* Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. 697, 736–38 (2010) (claiming that the presumption does not apply as such to situations on the borderline between direct and indirect participation in hostilities).

[62] Geneva Protocol, *supra* note 7, art. 57(2); MELZER, *supra* note 57, at 76; *see also* HCJ 769/02 *The Pub. Comm. against Torture in Isr.* 62(1) PD 507 [2006] (Isr.) ¶ 40 (holding that "well based information" is required before an attack, which has been "most thoroughly verified").

[63] *Cf.* MELZER, *supra* note 57, at 76 (noting that the standard of doubt in criminal proceedings is obviously higher than the standard applicable to targeting decisions).

[64] Geneva Protocol, *supra* note 7, arts. 51(5)(b), 57(2)(a)(ii)–(iii) (requiring, *inter alia*, refraining from an attack that is "expected" to cause excessive incidental harm – by implication, this phrasing allows an attack which is "expected" to cause incidental harm which is *not* excessive).

[65] *See* Naske & Nolte, *supra* note 37, at 469 (pointing out the difficulty in reconciling the Kantian perception employed by the German Constitutional Court with the reality of

3. Forcible Disruption Operations as Quasi-Hostile Acts

Having explored the main differences between the law enforcement and hostilities paradigms, do FDOs clearly fall within one or the other? On the one hand, as demonstrated in Section I.A, they do not fit neatly within the logic of hostilities because FDOs target objects while sparing the persons making use of them.

However, FDOs most certainly do not conform to traditional understandings of law enforcement operations. The May 15th Operation, for instance, was conducted for the preplanned purpose of *destroying* objects "known" as pirate equipment,[66] without reference to a previous decision by a judicial or quasi-judicial body validating such suspicions or an attempt to seize or confiscate the suspected equipment in accordance with principles of due-process. While the term "known," as used by EU NAVFOR, implies a high-level of certainty, it nevertheless alludes to "executive knowledge" – presumably based on military intelligence – rather than to "judicially established knowledge" which usually forms the factual foundation for irreversible law-enforcement actions.[67] Thus, any FDO conducted upon executive discretion, such as the May 15th Operation, raises significant due-process concerns.

Furthermore, in most imaginable scenarios, FDOs would include some risk to the lives of suspected criminals or to innocent bystanders. Indeed, as conceded by EU naval officers, if actions similar to the May 15th Operation are to be repeated in the future, this risk is likely to grow, as pirates would become more sophisticated in concealing their activities.[68] FDOs that risk the lives of suspects hardly conform to the law enforcement paradigm, unless strictly conducted in defense of lives. Moreover, even in instances where FDOs are conducted to defend lives, their potential to incidentally harm innocents poses significant problems under IHRL.

In sum, it seems that FDOs – such as the May 15th Operation – break the boundaries of the law enforcement paradigm. They are closer, at the end of the day, to *quasi-hostile* acts. They are *quasi*-hostile as opposed to "truly" hostile because they only target objects, departing from the usual

IHL's proportionality rule). Indeed, by justifying some incidental harm to civilians, the hostilities paradigm, in its ethical foundations, is closer to the age-old doctrine of double-effect. *See* MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 151–54 (1977) (discussing *jus in bello* proportionality in terms of the doctrine of double-effect). Of course, one can also simply argue that the hostilities paradigm is strictly a lesser-evil, a pragmatic attempt to minimize the scourge of war, devoid of any *positive* ethical merit.

[66] *See* Press Release, *supra* note 2.

[67] *See, e.g.*, Handyside v. United Kingdom, App. No. 5493/72, 24 Eur. Ct. H.R. (ser. A) ¶ 63 (1976).

[68] *See* Gardner, *supra* note 6.

operational logic of hostile acts. However, they are not "usual" law-enforcement measures since they encroach upon due-process and might risk lives. Neither the fact that *persons* are not intentionally targeted, nor the attacker's consideration of the operation as a "mere extension" of regular disruption actions,[69] can bring FDOs into the realm of law enforcement.

II. FORCIBLE DISRUPTION OPERATIONS IN SOMALIA AS A CASE-STUDY: COUNTER-PIRACY LAW AND SECURITY COUNCIL RESOLUTIONS

Part I qualified FDOs as quasi-hostile acts. This Part explores, as a case study, the possible legal basis for the May 15th Operation. Our analysis demonstrates that an authorization to conduct hostile (or quasi-hostile) acts seems absent from the legal basis publically relied upon by EU NAVFOR. Such basis must be traced to an enabling norm of treaty or customary international law or to an explicit authorization by the U.N. Security Council. Indeed, while some components of our discussion are unique to Somali piracy, similar dilemmas can arise regarding future FDOs in other contexts.

EU NAVFOR invoked a complex legal basis to justify the May 15th Operation. This basis consisted of U.N. Security Council Resolution 1851, which authorized – with the consent of the then-incumbent Transitional Federal Government of Somalia ("TFG")[70] – the undertaking of "all necessary measures" for the suppression of piracy in Somalia, *including* on Somali soil.[71] In addition, EU NAVFOR stressed that the TFG consented to the specific operation.[72] In intra-European law, the operation was authorized by a 2012 Decision by the Council of the EU.[73] Adopted with Somalia's consent, the decision authorized EU NAVFOR to conduct a "military operation" in the coastal territory of Somalia in support of Security Council Resolution 1851 and in accordance with the relevant provisions of the United Nations Convention on the Law of the Sea ("UNCLOS").[74] In addition, all counter-piracy actions are regulated, by default, by age-old customary international law. The following Sections thus ask whether there is something in the legal basis referred to above that

[69] Press Release, *supra* note 2.

[70] In late 2012 the transition period in Somalia officially ended. As recognized by the U.N. Security Council, the new Somali authorities replaced the TFG for all matters relating to combating piracy. *See* S.C. Res. 2067, *supra* note 1, para. 14.

[71] S.C. Res. 1851, para. 6, U.N. Doc. S/RES/1851 (Dec. 16, 2008).

[72] Press Release, *supra* note 2.

[73] Council Decision 2012/174/CFSP, Amending Joint Action 2008/851/CFSP on a European Union Military Operation to Contribute to the Deterrence, Prevention and Repression of Acts of Piracy and Armed Robbery off the Somali Coast, art. 1, 2012 O.J. (L89) 69 [hereinafter *Council Decision*].

[74] *Id.*; UNCLOS, *supra* note 55, arts. 100–07.

would authorize FDOs, considering their departure from traditional law enforcement measures. Importantly, we can learn from this case study what would be necessary, perhaps, to enable such actions.

A. Transnational Crime and the Endurance of Law Enforcement: The Case of Piracy

The first step in the analysis of any FDO requires asking whether general international law provides, in a given situation, for such quasi-hostile acts, which depart from traditional understanding of law enforcement. Indeed, it is theoretically possible to envision instances where customary law could deviate, to a certain extent, from the general trend in international law towards greater protection of rights.[75] If, in a particular setting, it is possible to point out such an enabling norm, FDOs might be permissible in that specific context. Customary counter-piracy law, as the oldest attempt in international law to address transnational challenges to law and order, is a telling example of the interaction between customary norms and the law-enforcement paradigm.

The distinction between pirates as *hostis human generis* and maritime piracy as the quintessential "international crime" is as old as international law itself.[76] However, despite the vehement rhetoric towards piracy in traditional international law, acts of piracy have not been recognized themselves as transcending the boundaries of the "criminal" into the realm of hostile or quasi-hostile. Within these boundaries, therefore, it seems that there is nothing in counter-piracy law *alone* that would allow actions that go beyond the law enforcement paradigm.

Indeed, in early international law, some held the view that states could proactively "attack and exterminate [pirates] without any declaration of war," even under normal conditions of peace.[77] For instance, Vattel argued rather militantly that "the King of Spain and the powers of Italy have a very

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[75] An example can be found in the law concerning the conduct of hostilities at sea. As Kolb notes, notwithstanding the general process of "humanization" of IHL, private property at sea remains unprotected during wartime, as belligerents are allowed, for instance, to seize "enemy" property belonging to individuals. *See* Robert Kolb, *The Main Epochs of Modern International Humanitarian Law Since 1864 and their Related Dominant Legal Constructions*, *in* SEARCHING FOR A 'PRINCIPLE OF HUMANITY" IN INTERNATIONAL HUMANITARIAN LAW 23, 37–38 (Kjetil, Mujezinovi & Larsen eds., 2013). However, it would seem that in any case, customary norms that deviate somewhat from IHRL cannot, in general, contradict basic principles that amount to peremptory norms (*jus cogens*). *See, e.g.*, Vienna Convention on the Law of Treaties art. 50, May 23, 1969, 1155 U.N.T.S. 331.

[76] LASSA OPPENHEIM, I INTERNATIONAL LAW § 272 (1912).

[77] JAMES KENT, COMMENTARIES ON AMERICAN LAW 183 (John Roland ed., 15th ed. 2002 (1826); *cited in* Dino Kritsiotis, *The Contingencies of Piracy*, 41 CAL. W. INT'L L. J. 305, 309 n.15 (2011).

good right to utterly destroy those maritime towns of Africa, those nests of pirates, that are continuously molesting their commerce."[78] However, Vattel's writings have already exhibited some traces of the "law enforcement approach" towards piracy. Thus, while he was of the view that "pirates are sent to the gibbet by the first into whose hands they fall," he nevertheless thought it "proper" to have such criminals convicted by trial.[79] Opinions of later international lawyers, such as Wheaton and Oppenheim, clearly adopted the position that pirates, in general, are to be captured and given a fair trial rather than executed on the spot.[80]

In parallel, intricate rules were developed not only regarding fair-trial rights of pirates, but also concerning property related to them. For example, elaborate state-practice has addressed the rights and liabilities of individuals – such as ship-owners – in relation to vessels used by pirates and their cargos.[81] In sum, the application of law-enforcement principles of due-process to pirates and *objects* related to them is by no means a new phenomenon.

Modern developments seem to reflect and consolidate the strict law-enforcement approach concerning piracy. First, the 1994 San Remo Manual, considered by some to reflect a thorough account of customary IHL at sea, does not at all address the repression of piracy.[82] If anything, this omission is a strong indication that piracy remains strictly an issue of law enforcement, and, as such, is beyond the scope of the hostilities paradigm and the sources regulating it. Second, UNCLOS – the key contemporary legal instrument that addresses piracy – sets forth a pure law

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[78] EMER DE VATTEL, THE LAW OF NATIONS 367 (1797) (1758). However, it should be noted that Vattel thought that such a response would be overly cruel, and doubted that any nation "will proceed to such extremities." *See id.* It should be added that early international lawyers referred to the term "piracy" quite loosely. *See* DOUGLAS GUILFOYLE, SHIPPING INTERDICTION AND THE LAW OF THE SEA 26–27 (2009).

[79] VATTEL, *supra* note 78, at 109.

[80] OPPENHEIM, *supra* note 76, § 278 (opining that although some disagree, "the captor may execute pirates on the spot only when he is not able to bring them . . . for trial."); HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 164 §124 (8th ed. 1866) (1936). Death was the usual punishment, although states were always free to prescribe lesser punishments. *See* THEODORE D. WOOLSEY, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW 315 (1860); Edwin D. Dickinson, *Is The Crime of Piracy Obsolete?* 38 HARV. L. REV. 334, 338 (1925).

[81] *See, e.g.*, The Malek Adhel, 43 U.S. 210, 222 –23 (1844) (discussing the liabilities of vessel owners when their ship was used for piracy by its crew without their knowledge); *see also* The Marianna Flora, 24 U.S. 1, 2 (1825) ("Pirates may be lawfully captured by . . . any nation, in peace or in war; for they are *hostes humanis generis*. . . . But, in such cases, the party seizes at his peril, and is liable . . . if he fails to establish the forfeiture.").

[82] SAN REMO MANUAL, *supra* note 55, at 67 (claiming that the manual aims to "establish the content of contemporary international customary law").

enforcement framework for counter-piracy operations, including the entrenchment of due-process guarantees. For instance, Article 105 provides that every state may seize a pirate ship on the high seas, arrest the persons, and seize property on board. However, it is for the domestic courts of the seizing state to prosecute the person and decide the fate of the ships and property.[83] This means, essentially, that while general international counter-piracy law recognizes that seizure of pirate ships can be ordered upon "executive" suspicion, competent courts must determine the ultimate status of the seized objects. Furthermore, Article 106 of UNCLOS imposes liability for seizure without adequate grounds, further demonstrating its commitment to principles of due-process.[84]

Indeed, while the law of the sea recognizes the plausibility of some use of force against vessels for lawful purposes, the jurisprudence of the International Tribunal for the Law of the Sea holds that this force must be "avoided as far as possible" and limited, when unavoidable, by proportionality and necessity considerations.[85] Applied to piracy, this would mean that force can be used only to the extent needed to seize the vessel and arrest the suspects, as provided for in Article 105 of UNCLOS.[86] Force cannot be used, conversely, for the premeditated end-result of *destroying* pirate vessels.

Finally, under customary international law, piracy's essential legal characteristic is *jurisdictional* rather than substantive. In modern international law, piracy is generally accepted to connote the undertaking, *on the high seas*, of "any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship," against another ship or persons and property aboard it.[87] Conversely, similar offenses committed in territorial waters (or on land) are considered as "armed robberies," within the "regular" jurisdiction of the state.[88] This distinction means that a pirate, when operating within a state's

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[83] UNCLOS, *supra* note 55. art. 105.

[84] *Id.* art. 106.

[85] *See* M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of Jul. 20, 1999, ¶¶ 155–56, *cited in* GEISS & PETRIG, *supra* note 2, at 69.

[86] UNCLOS, *supra* note 55, art. 105.

[87] *Id.* art. 101. *Compare* OPPENHEIM, *supra* note 76, § 276. It should be noted that a persistent challenge in defining piracy concerns the distinction between piracy as an international crime and piracy as a domestic crime. The distinction implicates the question of jurisdiction. *See* WHEATON, *supra* note 80, at 193 n. 83; Dickinson, *supra* note 80, at 335–36, 342 –50 (discussing the conundrums of the definition of piracy in international law versus its definition in U.S. law). For a contemporary discussion see generally Tara Helfman, *Marauders in the Courts: Why the Federal Courts Have Got the Problem of Maritime Piracy (Partly) Wrong*, 62 SYRACUSE. L. REV. 53 (2012).

[88] *See* OPPENHEIM, *supra* note 76, § 277; *cf.* GEISS AND PETRIG, *supra* note 2, at 72–75

territory, loses the exotic title and is reverted to a common robber.[89] In traditional international law, in which protection of sovereignty was paramount, this would mean that armed robberies within territorial waters were beyond the reach of international law and that territorial states were free to deal with robbers as they saw fit. As phrased by Oppenheim, "[p]iracy in territorial coast waters has quite as little to do with international law as other robberies on the territory of a State."[90] However, today, methods of dealing with common robbers are indeed an issue of international law and, specifically, the law enforcement standards entrenched in IHRL.

The purely territorial distinction between piracy and regular armed robbery implies that piracy's uniqueness lies more in the jurisdictional-procedural challenges it presents as an extra-territorial act[91] – and the common interest to cooperate in its suppression – and less so in its intrinsic gravity.[92] It is for this reason that the salient legal implication of piracy lies in the conferral of universal jurisdiction in bringing pirates to justice.[93] Conversely, counter-piracy law does not recognize special *substantive* regimes regarding the repression of piracy, which would authorize, for

(discussing the definitional difficulties distinguishing armed robbery at sea and piracy); Dickinson, *supra* note 80, at 336–38. Note, however, that some hold the opinion that piracy can indeed have dry-land "derivatives" such as "inciting" or "intentionally facilitating" piracy. According to such positions, piracy extends to some preparatory acts undertaken on land. *See* Douglas Guilfoyle, *Committing Piracy on Dry Land: Liability for Facilitating Piracy*, EJIL: TALK! (July 26, 2012), http://www.ejiltalk.org/committing-piracy-on-dry-land-liability-for-facilitating-piracy/; *see* United States v. Ali, No. 12-3056, at 935-36, 942 (D.C. Cir., June 11, 2013) (holding that international law recognized universal jurisdiction regarding acts of aiding and abetting piracy while not on the high seas).

[89] This remains true although armed robbery at sea is also addressed in international treaties, imposing on states special obligations on states to repress such actions. However, these treaties do not elevate armed robbery at sea to piracy in the traditional sense. *See* Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, arts. 3–6, Mar. 10 1988, 1678 U.N.T.S. 221.

[90] OPPENHEIM, *supra* note 76, § 277.

[91] *See, e.g.*, WHEATON, *supra* note 80, 193 n.83.

[92] *Cf.* GUILFOYLE, *supra* note 78, at 28 (arguing that piracy "endangers a common interests of all states). *But see* Recent Cases, *International Law – Nature and Extent of Sovereignty – Attempt to Rob as Piracy Jure Gentium*, 48 HARV. L. REV. 853, 854 (1935) (noting the view that piracy, under international law "is no crime at all, but merely a group of facts which confers jurisdiction on any State"). This is not to imply that piracy was never seen as an especially grave form of robbery. *See, e.g.*, Dickinson, *supra* note 80, at 338 (arguing that "of all robbers they [pirates] are peculiarly obnoxious because they maraud on the open seas.").

[93] *See* UNCLOS, *supra* note 55, art. 105; PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 28, 45–48 (2001) (suggesting a list of crimes giving rise to universal jurisdiction).

instance, the use of force against them.

In light of the above, EU NAVFOR's claim that the May 15th Operation was a "mere extension" of regular counter-piracy disruption actions is rather strained.[94] As we have seen, there is nothing in traditional counter-piracy law that authorizes quasi-hostile acts, which are specifically *aimed* for destruction of objects rather than their seizure. On the contrary, it refers to standards of law enforcement. Indeed, any FDO – whether conducted against pirates or otherwise – would have to point to an authority under international law to do so.[95] It follows that, while certain conduct gives rise to significant transnational challenges, it does not result, by itself, in an authorization to deviate from the law enforcement paradigm when confronting them.

B. U.N. Security Council Resolutions and Deviation from Law Enforcement

Where general international law does not provide for FDOs, the question arises whether such actions can be mandated through a U.N. Security Council resolution and on what terms. Specifically, analyzing the question of FDOs in relation to Security Council resolutions invokes the persistent problem concerning the limits of Security Council authority, namely its power to override existing international law or principles of due-process. As the jurisprudence of European courts demonstrates, this problem can arise whenever the Security Council authorizes actions that affect the rights of individuals.[96] The May 15th Operation serves as a valuable case-study for these dynamics, as EU NAVFOR cited Security Council resolutions as legal grounds for its attack on objects allegedly related to piracy.

Security Council Resolution 1851, invoked by EU NAVFOR as a legal basis for the May 15th FDO, is part of a string of resolutions adopted in recent years that set forth the international response to piracy off Somalia.

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[94] Press Release, *supra* note 2.

[95] This statement is premised upon the view that the traditional *Lotus* Principle has lost most of its power in contemporary law, in particular with the advent of the human rights era. *See* S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7, 1927), ¶44 (setting forth the Lotus Principle, according to which states are free to act as they wish when there is no limiting norm under international law). *But see* Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 4, 18 (1990) (discussing the conceptual difficulties inherent in the Lotus Principle).

[96] On clashes between Security Council resolutions and due-process see Nada v. Switzerland, App. No. 10593/08, ¶¶ 170–72, ¶ 197, ¶¶ 212–13 (Eur. Ct. H.R., 2012), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113118; *see also* Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council, 3 C.M.L.R. 41, ¶¶ 281–85 (2008); Juliane Kokott & Christoph Sobotta, *The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?*, 23 EUR. J. INT'L L. 1015, 1015 (2012) (discussing the Kadi judgment and the subsequent response by the Security Council).

In general, this response is built upon three prongs: (1) encouraging and authorizing repression of piracy by naval forces in the area; (2) promoting the adoption of domestic counter-piracy legislation by all states; and (3) capacity building with regard to the Somali justice system, in order to enable it to prosecute pirates itself.[97] While the discussion below deals primarily with the first prong, the two others already reveal the international community's law enforcement-centered approach towards the problem.

The International Maritime Organization ("IMO") first brought the problem of piracy off Somalia to the attention of the U.N. Security Council in 2005.[98] Accordingly, in a 2006 Presidential Statement, the Security Council encouraged states to take action to protect merchant shipping in the area, "in line with relevant international law."[99] This Statement exemplifies a consistent aspect of the Security Council's treatment of Somali piracy: reference to *existing* international norms as governing the response to the problem.

A similar call was echoed in Security Council Resolution 1772 of 2007, adopted under Chapter VII of the U.N. Charter, which dealt with the general situation in Somalia.[100] The Resolution referred to a U.N. Secretary-General report on Somalia, noting the upsurge of piracy and its effects over humanitarian aid, and to a joint Communiqué issued by the IMO and the World Food Programme ("WFP").[101] Like the 2006 Presidential Statement, Resolution 1772 emphasized that all counter-piracy actions must be "in line with relevant international law."[102] Thus, the Resolution clarified that it was not conferring novel legal powers to states engaged in counter-piracy operations – whether in their actions vis-à-vis Somalia or the pirates themselves.

In November 2007, the TFG notified the U.N. Secretary-General and the

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[97] *See* Kritstiotis, *supra* note 77, at 325–35; Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20 EUR. J. INT'L L. 399, 402–05 (2009). For a general survey of Security Council actions regarding Somalia see GEISS AND PETRIG, *supra* note 2, at 70–85; GUILFOYLE, *supra* note 78, at 63–74.

[98] I.M.O. Res. A.979 (24) (Nov. 23, 2005).

[99] S.C. Pres. Statement 2006/1, U.N. Doc. S/PRST/2006/11 (Mar. 15, 2006).

[100] S.C. Res. 1772, U.N. Doc. S/RES/1772 (Aug. 20, 2007); *see also* S.C. Res. 1801, U.N. Doc. S/RES/1801 (Feb. 20, 2008).

[101] U.N. Secretary-General, *Report of the Secretary General on the Situation in Somalia: Rep. of the Secretary-General*, ¶ 51, U.N. Doc. S/2007/381 (June 25, 2007); Joint Communiqué, IMO & WFP, Co-ordinated Action Urged as Piracy Threatens U.N. Lifeline to Somalia (July 10, 2007), *available at* http://www.imo.org/blast/mainframe.asp?topic_id=1472&doc_id=8213. The Communiqué called for the adoption of a resolution that would urge the TFG to take action against pirates, including by authorizing foreign ships to enter Somali territorial waters when acting against pirates.

[102] S.C. Res. 1772, *supra* note 100, ¶ 18.

Security Council of its general consent to receive international assistance in repressing piracy, including within its territorial waters.[103] Accordingly, the first piracy-dedicated Security Council resolution was Resolution 1816 of 2008. Operationally, the Resolution authorized, with Somalia's consent, the taking of "all necessary means" to repress piracy, even within Somali territorial waters.[104] Indeed, such language is usually reserved for an authorization of forcible measures.[105] Does this in itself suffice to mandate FDOs against pirates? This question should be analyzed in light of three important pillars found in the Resolution.

First, Resolution 1816 affirmed that international law, as reflected in UNCLOS, constitutes the applicable legal framework for combating piracy.[106] This framework includes authorization to board, search, and seize pirate vessels (or suspected vessels) and to apprehend persons engaged in piracy in order to prosecute them.[107] Thus, Resolution 1816 clearly addressed piracy in Somalia in terms of the law enforcement paradigm. This approach was further manifested in the Council of the European Union's Decision of March 2012, which referred to UNCLOS as the chief instrument governing the operations in Somalia.[108] The perception of piracy as a crime is likewise expressed in the ongoing international efforts to establish specialized counter-piracy courts in Somalia and other states in the region[109] and in the constant reiteration by the U.N. Security Council that all *prosecution* of pirates, whether in Somalia or elsewhere, must conform to IHRL.[110]

Second, the Resolution noted Somalia's inability to secure both

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[103] S.C. Res. 1816, pmbl., U.N. Doc. S/RES/1816 (June 2, 2008).

[104] *Id.* ¶ 7; *see also* GUILFOYLE, *supra* note 78, at 64–69 (analyzing Resolution 1816).

[105] *See, e.g.*, S.C. Res. 2098, ¶12, U.N. Doc. S.RES/2098 (Mar. 28, 2013) (authorizing the deployment of the first ever U.N. "intervention brigade" against the M23 militia active in the Great Lakes region in the D.R.C., and the taking of "all necessary measures" to perform its tasks); S.C. Res. 2085, ¶ 9, U.N. Doc. S/RES/2085 (Dec. 20. 2012) (authorizing the deployment of international forces in Mali and the taking of "all necessary measures" in support of Malian authorities in their struggle against armed groups); S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011) (authorizing the taking of 'all necessary measures' to protect civilians in Libya).

[106] S.C. Res. 1816, *supra* note 103, pmbl.

[107] *Id.*

[108] Council Decision, *supra* note 73, art. 1.

[109] S.C. Res. 1976, ¶26, U.N. Doc. S/RES/1976 (Apr. 11, 2011); *see also* U.N. Secretary-General, *Report of the Secretary-General on Specialized Anti-Piracy Courts in Somalia and other States in the Region,* U.N. Doc. S/2012/50 (Jan. 20, 2012); Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, *Report*, Annx., U.N. Doc. S/2011/30 (Jan. 25, 2011).

[110] *See, e.g.*, S.C. Res. 2015, ¶ 9, U.N. Doc. S/RES/2015 (Oct. 24, 2011).

international sea lanes off its coast and its own territorial waters,[111] a consequence of the ever-present crisis in the country. This diplomatic nod towards Somalia's state-failure is significant, since the allure of FDOs grows exponentially in cases where effective governmental control is lacking. However, this phrase, as found in Resolution 1816, was merely meant to alleviate other states' concerns that the authority granted to act within Somali waters would be perceived as reflecting new customary international law.[112] Indeed, for this reason, several counter-piracy resolutions include an exceptional disclaimer, stating that they should not be construed as establishing new customary norms.[113] This qualification is in itself telling regarding the potential role of the Security Council as a norm creator in the contemporary international system.[114] Nonetheless, neither the failed state status of Somalia, nor the customary international law disclaimer, can be interpreted as granting novel powers to conduct FDOs.

Third, Resolution 1816 determined – under Chapter VII of the Charter – that acts of piracy off Somalia "exacerbate" the threat to international peace and security emanating from Somalia, as established in numerous previous resolutions.[115] Thus, the Resolution created some linkage between piracy and the general situation of armed conflict ravaging Somalia for over two decades.[116] However, it was careful not to label piracy, alone, as a threat to

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[111] S.C. Res. 1816, *supra* note 103, pmbl.

[112] *See* GUILFOYLE, *supra* note 78, at 68 (explaining the concerns of states, such as Indonesia, that the Resolution be construed as modifying the principles of UNCLOS).

[113] For instance, Resolution 1838 affirmed that it concerns only the situation in Somalia, and that it "[should] not be considered as establishing customary international law." S.C. Res 1838, ¶ 8. U.N. Doc. S/RES/1838 (Oct. 7, 2008); *see also* S.C. Res. 1846, ¶ 1, U.N. Doc. S/RES/1846 (Dec. 2, 2008); S.C. Res. 1851, *supra* note 71, ¶ 10 (stressing the special situation in Somalia and the Somali consent to operations in Somali territory, as negating the emergence of new customary international law). The resolutions concerning piracy in Somalia are the only ones, at least in recent decades, expressly referring to customary international law as such. Before, the only reference to customary international law concerned the downing of two civilian aircraft by Cuba. S.C. Res. 1067, ¶ 6, U.N. Doc. S/RES/1067 (Jul. 27, 1996).

[114] This qualification reflects, perhaps, an indirect affirmation (or fear) of the Security Council's legislating role. *See* Nico Krisch, *Introduction to Chapter VII: The General Framework*, *in* II THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1237, 1251–54 (Bruno Simma et al. eds., 3d ed., 2012); Stefan Talmon, *The Security Council as World Legislature,* 99 AM. J. INT'L L. 175 (2005).

[115] S.C. Res. 1816, *supra* note 103, pmbl.

[116] Another indirect link between piracy and the armed conflict in Somalia is found, for instance, in Resolution 1844, in which the Council noted the possible cooperation between pirates and armed groups in Somalia in financing embargo violations, in contravention of longstanding Chapter VII sanctions imposed on Somalia. S.C. Res. 1844, pmbl., U.N. Doc. S/RES/1844 (Nov. 20, 2008).

international peace and security.[117] Such a determination could have been understood as a justification to take exceptional measures – maybe even ones bordering hostile acts – against pirates.

In sum, the Security Council's note, in Resolution 1816, of the special situation in Somalia is not sufficient in itself to transform the struggle against piracy to one which can be lawfully conducted by quasi-hostile acts. In this context, the Resolution's reference to "all necessary means" for the repression of piracy[118] must be read in conjunction with its emphasis that such means must conform to existing rules of international counter-piracy law. As mentioned, the Resolution itself identified these rules as the law enforcement norms entrenched in UNCLOS.[119]

However, two later Security Council Resolutions – Resolutions 1846 and 1851 – have seemingly complicated the normative situation. Nonetheless, they did not dramatically alter it. Resolution 1846 called upon states to participate in counter-piracy operations, namely "through seizure and disposition of boats, vessels, arms and other related equipment used in the commission of piracy and armed robbery . . . or for which there is reasonable ground for suspecting such use."[120] As carefully noted by Guilfoyle, this phrasing – ambiguous as it may be – could be interpreted as creating a novel power to act *preventively* against piracy-related objects, strictly upon reasonable suspicion, notwithstanding the due-process requirements of counter-piracy law.[121] If taken at face value – and assuming that the term *disposition* admits destruction – one could argue that this Resolution authorizes FDOs. However, even if one accepts that Resolution 1846 grants states enhanced powers to interdict suspected vessels at sea and to deal with captured equipment on the spot, it is highly unlikely that it would condone preventive bombing campaigns on land, prior to any seizure, merely upon "reasonable" suspicions. This conclusion is fortified considering the accepted view that Security Council resolutions, if potentially derogating from human rights standards, must be interpreted

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[117] *See* GUILFOYLE, *supra* note 78, at 65.

[118] S.C. Res. 1816, *supra* note 103, ¶ 7. For a similar approach, see GUILFOYLE, *supra* note 78, at 66 ("the words 'all necessary means' cannot encompass striking at pirate command centres on land").

[119] *Id.*, pmbl.; *see also* GUILFOYLE, *supra* note 78, at 66 ("the words 'all necessary means' cannot encompass striking at pirate command centres on land").

[120] S.C. Res. 1846, *supra* note 113, ¶ 9.

[121] GUILFOYLE, *supra* note 78, at 69. A possible example for such "disposition" is EU NAVFOR's practice of destroying suspected pirate vessels at sea, after the arrest of their passengers. *See, e.g.*, Press Release, EU NAVFOR, EU Naval Force Quick to Capture Suspect Pirate Boat (Oct. 11, 2012), *available at* http://www.eunavfor.eu/2012/10/eu-naval-force-quick-to-capture-suspect-pirate-boat/.

narrowly.[122] Therefore, any relaxation of law enforcement principles by the Security Council cannot be effected through constructive ambiguity.[123] In the context of Resolution 1846, this interpretive presumption is further entrenched considering that it refers to "relevant international law"[124] and to UNCLOS as controlling counter-piracy actions.[125]

Likewise, Resolution 1851, cited by EU NAVFOR as the primary international legal basis for the May 15th Operation, presents an interpretive challenge.[126] Like previous resolutions, it detailed the law enforcement measures that can be taken against pirates.[127] However, Resolution 1851 was novel in two aspects. First, it extended – with Somali consent – the existing mandate to take "all necessary measures" against pirates also to Somali *land*. Second, it emphasized that such actions must be "consistent with applicable international *humanitarian* and human rights law."[128]

On its face, this phrasing presents a legal conundrum. On one hand, Resolution 1851 stressed, once again, that UNCLOS' law enforcement framework is the relevant legal basis for counter-piracy actions in Somalia.[129] On the other hand, by referring to IHL, it hinted that laws governing hostilities might also regulate such actions.[130] Indeed, virtually

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[122] *See* Markus Benzing, *Midwifing a New State: The United Nations in East Timor*, 9 MAX PLANCK Y.B. UNITED NATIONS L. 296, 329 (2005) (arguing that it would be "bizarre" to suppose that the Security Council would implicitly derogate from human rights norms, as such derogation must be explicit); Krisch, *supra* note 114, at 1264-66 (arguing for a restrictive interpretation of resolutions that implicate human rights and other core international values); Marko Milanović, *Norm Conflict in International Law: Whither Human Rights?*, 20 DUKE J. COMP. & INT'L L. 69, 98 (2010) (advocating for a rebuttable interpretive presumption that Security Council resolutions are compatible with human rights). *See generally* Joy Gordon, *The Sword of Damocles: Revisiting the Question of Whether the United Nations Security Council is Bound by International Law*, 12 CHI. J. INT'L L. 605, 626-41 (2012) (surveying literature and jurisprudence regarding the question of legal limitation on Security Council action).

[123] Many commentators are of the opinion that, in any case, Security Council resolutions cannot derogate from peremptory norms of international law (*jus cogens*). *See generally* Gordon, *supra* note 122, at 639-40; Alexander Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16 EUR. J. INT'L L. 59, 82 (2005). *But see* Krisch, *supra* note 114, at 1259-60; Milanović, *supra* note 122, at 71-72.

[124] S.C. Res. 1846, *supra* note 113, ¶ 9.

[125] *Id.* pmbl.

[126] S.C. Res. 1851, *supra* note 71.

[127] *Id.* ¶ 2.

[128] *Id.* ¶ 6 (emphasis added). The mandate set forth in Resolution 1851 was renewed in later subsequent resolutions, most recently in S.C. Res. 2077, U.N. Doc. S/RES/2077 (Nov. 21, 2012).

[129] S.C. Res. 1846, *supra* note 113, pmbl.

[130] Guilfoyle viewed this phrasing as a "worrying" development. GUILFOYLE, *supra*

all Security Council resolutions that have used the same phrasing – before Resolution 1851 and after it – have specifically dealt with clear situations of armed conflict, such as in Afghanistan, the D.R.C., Sudan, and others.[131] Nonetheless, a closer look reveals that Resolution 1851 adds little by way of legal novelty, and in any case, does not result in granting new powers to states to repress piracy through quasi-hostile acts.

Thus, the Resolution's statement that actions conducted on Somali land must conform to IHL can be reasonably understood as emphasizing that if, *in the future*, the struggle against pirates, by itself, would fulfill the conditions of an armed conflict – an option to be explored in the next Section – it would obviously be governed by IHL.[132] Furthermore, and importantly, even if this phrasing would be construed to imply that the struggle against piracy is somehow affected, *at present*, by the general environment of armed conflict surrounding it,[133] this in itself still would not

note 78, at 69-70.

[131] *See, e.g.*, S.C. Res 2096, pmbl., U.N. Doc. S/RES/2096 (Mar. 19, 2013) (calling upon all parties in Afghanistan to comply with the law); S.C. Res. 2085, ¶ 18, U.N. Doc. S/RES/2085 (Dec. 20, 2012) (emphasizing that the forcible support given to Mali against armed groups must be consistent with international humanitarian and human rights law); S.C. Res. 2031, ¶ 14, U.N. Doc. S/RES/2031 (Dec. 21, 2011) (condemning violations by armed groups in the conflict in the Central African Republic); S.C. Res. 2014, ¶ 5, U.N. Doc. S/RES/2014 (Oct. 21, 2011) (demanding Yemen respect the law in the context of the Yemenite armed conflict); S.C. Res. 2000, ¶ 7(a), U.N. Doc. S/RES/2000 (July 27, 2011) (mandating the U.N. operation in Côte d'Ivoire to monitor violations); S.C. Res. 1996, ¶ 3(b)(iii), U.N. Doc. S/RES/1996 (July 8, 2011) (mandating the U.N. mission in South Sudan monitor violations of humanitarian and human rights law in the context of the Sudanese conflict); S.C. Res. 1925, pmbl., ¶ 17, U.N. Doc. S/RES.1925 (May 28, 2010) (condemning violations in the DRC and calling upon MONUSCO to document them); S.C. Res. 1910, pmbl., U.N. Doc. S/RES/1910 (Jan. 28, 2010) (condemning violations of parties to the internal armed conflict in Somalia); S.C. Res. 1746, ¶ 25, U.N. Doc. S/RES/1746 (Mar. 23, 2007) (comprising part of a string of resolutions calling upon all parties to the conflict in Afghanistan to respect international humanitarian and human rights law); S.C. Res. 1564, pmbl., U.N. Doc. S/RES/1564 (Sept. 18, 2004) (stressing that Sudanese rebel groups must respect international humanitarian and human rights law); S.C. Res 1468, ¶ 5, U.N. Doc. S/RES/1468 (Mar. 20, 2003) (addressing responsibility for violations in the Congolese conflict); S.C. Res. 1296, ¶ 5, U.N. Doc. S/RES/1296 (Apr. 19, 2000) (adopting a thematic resolution noting that violations of international humanitarian and human rights law can threaten international peace and security); S.C. Res. 1270, ¶ 22, U.N. Doc. S/RES/1270 (Oct. 22, 1999) (calling upon all parties to the conflict in Sierra Leone to respect international humanitarian and human rights law).

[132] I am thankful to Ken Watkin for this point. *See also* GEISS & PETRIG, *supra* note 2, at 132; *cf.* GUILFOYLE, *supra* note 78, at 70 (arguing that the suggested application of IHL in the resolution is not tantamount to an implicit assertion that a state of warfare exists in Somalia).

[133] On the geographical scope of non-international armed conflict see generally Noam Lubell & Nathan Derejko, *A Global Battlefield? Drones and the Geographical Scope of*

provide a legal basis for FDOs. On the contrary, since the reference to IHL does not in itself alter IHL's rules – to the extent that the Security Council has, at all, the power to do so[134] – it might serve to *constrain* the use of force, rather than to enable it. As we shall see in the next Section, the Resolution's reference to IHL could reinforce the notion that pirates (and their property) enjoy the protections reserved by IHL to civilians (and to civilian objects).

In sum, the legal framework laid down in relevant Security Council resolutions offers a shaky ground for the justification of FDOs. This is mainly due to the repeated references to law enforcement principles in general, and to UNCLOS specifically, as the applicable legal framework governing counter-piracy. As demonstrated in this Section, the ambiguities found in Resolutions 1846 and 1851 do not confer new powers for states. Such new powers – if at all within the authority of the Security Council – would have to be provided explicitly. The latter conclusion is naturally relevant not only to the struggle against Somali piracy, but also to other cases where forcible disruption operations would be contemplated in conjunction with Security Council involvement.

III. FORCIBLE DISRUPTION OPERATIONS UNDER THE HOSTILITIES PARADIGM

The previous Part demonstrated through the example of counter-piracy operation in Somalia that FDOs – since they deviate from regular law enforcement measures – must either be authorized by general international law or by explicit U.N. Security Council resolutions. This Part discusses the circumstances, in *absence* of such legal bases, that IHL might be relevant to FDOs and explores the possible interaction between these notions. It then discusses whether host-state consent plays any part in the analysis of this interaction.

A. Between Crime and Armed Conflict

As discussed in Part II, Security Council Resolution 1851 authorized the use of "all necessary measures" against pirates in Somalia, as long as these measures are consistent with IHL and IHRL.[135] However, the Resolution did not alter the substance of these legal regimes in any way. In such cases, we must resort to the relevant default rules and analyze how these would interact with FDOs. As this Section demonstrates, any resort to hostile or

Armed Conflict, 11 J. INT'L CRIM. JUST. 65, 69-73 (2013). *Cf.* SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 250-52 (2012).

[134] *See* Gordon, *supra* note 123, at 38-42 (finding an emerging consensus that the power of the Security Council to override IHL is limited, if even existent).

[135] S.C. Res. 1851, *supra* note 71.

quasi-hostile acts, under IHL, would require the fulfillment of two cumulative preconditions: (1) the targeted objects must be connected to groups involved in an armed conflict; and (2) the attacked objects must be military objectives in accordance with the principle of distinction.

It is worthwhile to address a preliminary, theoretical point concerning the general relationship between criminal activity and the notion of armed conflict. Simply put, can criminals, when operating for private ends, be also involved in an armed conflict? Or rather, does the existence of an armed conflict presuppose at least some public or political motivations beyond personal gain?[136] If armed conflict requires public motivations, then IHL would never be relevant to FDOs conducted against those whose motivations are purely criminal. Here too the law of piracy is telling since it exemplifies the development of international law in its interaction with traditional laws of war. Thus, a salient modality of piracy is that it can only be committed by a *private* vessel for private ends.[137] If, conversely, a *public* ship commits an unlawful violent act, the flag state could be liable through regular rules of state responsibility.[138] The mutual-exclusiveness of piracy and public acts – meaning, those sanctioned by a public authority[139] – has had important ramifications in traditional international law.

For instance, during an armed insurgency or a recognized civil war ("belligerency"), rebel vessels could gain a quasi-public character, allowing them to exercise significant powers at sea – including the power to capture certain vessels – without being considered pirates.[140] Indeed, the intent to shield recognized insurgents from allegations of piracy was a traditional rationale for the inclusion of the "private ends" requirement in the

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[136] For instance, some international relations scholars define an armed conflict as a violent *political* dispute. *See, e.g.*, Michael E. Brown, *Introduction*, *in* THE INTERNATIONAL DIMENSIONS OF INTERNAL CONFLICT 1, 1 (Michael E. Brown ed., 1996).

[137] UNCLOS, *supra* note 55, art. 101(a).

[138] OPPENHEIM, *supra* note 76, § 273 (stating "[p]rivate vessels only can commit piracy . . . [i]f [a public ship] commits unjustified acts of violence, redress must be asked from her flag state"); *see also* GUILFOYLE, *supra* note 78, at 33-42; Kritsiotis, *supra* note 77, at 312-19 (contextualizing the idea of piracy as committed for private ends).

[139] GUILFOYLE, *supra* note 78, at 36-37 (clarifying that the term "private ends" means acts not sanctioned by a public authority and does not refer to subjective intent); *see also* Wolf Heintschel Von Heinegg, *The Special Issue of Piracy*, *in* NON-STATE ACTORS AND INTERNATIONAL HUMANITARIAN LAW: ORGANIZED ARMED GROUPS: A CHALLENGE FOR THE 21ST CENTURY 170, 171 (2010) (positing that "private ends" are all ends that are not public in the strict sense).

[140] *See, e.g.*, GUILFOYLE, *supra* note 78, at 33-38; WHEATON, *supra* note 80, at 196, n.84 (discussing thoroughly the relations between rebels, recognized belligerents, and piracy); Joseph H. Beale, *The Recognition of Cuban Belligerency*, 9 HARV. L. REV. 406, 412, 419 (1896).

definition of piracy.[141] To gain such recognition, rebels had to fulfill certain conditions, reflecting *de facto* public authority.[142] In absence of these conditions, the struggle was not at all considered a "war" subject to international law.[143] It follows that the mere notion of war, at least in 19th century international law, was intrinsically bound to its relation to public or quasi-public authority.

However, the traditional distinctions of insurgency and belligerency are distant from the modern concept of "armed conflict."[144] As demonstrated in the next Section, for reasons beyond the scope of this Article, today's notion of armed conflict is divorced from the private or public nature of the participants. Our discussion will therefore proceed under the assumption that criminality does not *per se* preclude participation in armed conflict and *vice versa*.[145]

1. Linkage between Criminal Activity and Armed Conflict

As noted above, a preliminary condition for any analysis of FDOs under IHL requires the existence of an armed conflict. For this precondition to be fulfilled, one of two situations must exist. The first possibility is that the targeted groups are engaged in an armed conflict against external states. In such a case, the situation would be one of a *transnational* armed conflict, regulated by Article 3 Common to the Geneva Conventions[146] and customary IHL applicable to non-international armed conflicts ("NIAC").[147] In the Somali example, this would require that pirate groups participate in an independent armed conflict against external elements such as EU NAVFOR.

The second possibility would be that the relevant groups are parties to an

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[141] GUILFOYLE, *supra* note 78, at 33, 36.

[142] *See* ELIAV LIEBLICH, INTERNATIONAL LAW AND CIVIL WARS: INTERVENTION AND CONSENT 76-84 (2013) (surveying the traditional doctrines of belligerency and insurgency).

[143] WHEATON, *supra* note 80, at 34, n.15.

[144] On this historical process see LIEBLICH, *supra* note 142, at 162.

[145] A primary reason for this "divorce" lies in the fact that in the past, participation in "war" mostly resulted in rights and privileges, which could not be afforded to "criminals." *See* WHEATON, *supra* note 80, at 50, § 31. This is not to imply that criminals are *justified* to conduct hostilities, but merely that in practice, they might participate. *Id.*

[146] *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135; Hamdan v. Rumsfeld, 548 U.S. 557, 630-31 (2006); Christine Gray, *The Meaning of Armed Conflict: Non-International Armed Conflict*, *in* WHAT IS WAR? AN INVESTIGATION IN THE WAKE OF 9/11 69, 77 (Mary Ellen O'Connell ed., 2012).

[147] *See generally* 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005) (providing a list of customary rules of IHL, including those applicable to NIACs).

internal armed conflict against the territorial government.[148] In Somalia, for instance, the question would be whether pirates are involved in an armed conflict against Somali authorities. If such a conflict exists, the Somali government, when attempting to confront these pirates-turned-insurgents, might possess the power to consent to external forcible assistance.[149]

The widely accepted threshold for NIAC, whether transnational or internal, was set-forth by the International Criminal Tribunal for the former Yugoslavia ("ICTY") in the *Tadic* case.[150] There, the Tribunal held that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state."[151] The key elements of the *Tadic* standard are the requirements of armed violence of a protracted nature and the organization of the non-state party.[152] The notion of "organization" is assessed on a case-by-case basis on counts of several indicia.[153] The requirement of "protracted armed violence" implies an interaction between the temporal scope of the violence and its intensity.[154] A further logical extension of the *Tadic* standard, albeit seldom noted as such, requires that the armed violence be *between* authorities and organized armed groups (or between armed groups themselves), meaning, some *reciprocal* violence between the involved parties must be envisioned.[155]

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[148] In some cases, such conflicts can be regulated – in addition to the sources regulating transnational armed conflicts – also by Protocol II Additional to the Geneva Conventions. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1(1), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter *APII*].

[149] *See generally* LIEBLICH, *supra* note 142, at 122-53.

[150] Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

[151] *Id.* ¶ 70.

[152] As evident from the language of the *Tadic* test, the requirement of "protracted" armed violence is absent from the definition of *international* armed conflict, which generally erupts whenever there is armed violence between states' armed forces. *See* LUBELL, *supra* note 29, at 86-88, 95.

[153] For example, the existence of a command structure; ability to carry out organized military operations, logistical ability, some level of adherence to IHL, etc. *See* SIVAKUMARAN, *supra* note 133, at 170-72 (surveying the many indicia for organization used by international tribunals).

[154] *See* Masahiko Asada, *The Concept of "Armed Conflict" in International Armed Conflict*, *in* WHAT IS WAR?, *supra* note 146, at 57-58; Gray, *supra* note 146, at 69-73; *see also* LIEBLICH, *supra* note 142, at 49 (suggesting that an "inverse ratio" exists between the requirements of duration and intensity).

[155] "Reciprocity" here should be interpreted broadly. For instance, it does not exclude

Cases of upheaval that do not satisfy the *Tadic* armed conflict threshold are treated as mere internal disturbances to be addressed strictly through law enforcement measures.[156] The latter generally exclude, as we have demonstrated, quasi-hostile acts such as FDOs.

The factual thresholds of protracted armed violence, organization, and some reciprocity serve as important protectors of the international human rights regime: they prevent states from easily circumventing IHRL obligations by falsely claiming that an armed conflict exists or by creating one *unilaterally*, simply by deploying their armed forces against non-armed or non-organized opposition groups. These objective requirements must mean that unilateral forcible operations against criminals are not potent enough, in and of themselves, to transform the struggle into an armed conflict; protracted armed violence by the criminals, acting as an organized armed group, is also required.

Turning to the Somali example, it is rather simple to rule out – even in absence of a fact-intensive analysis – the possibility that a transnational armed conflict exists between pirates and states involved in EU NAVFOR or other international efforts in the region. This is chiefly because any violent interaction between pirates and foreign forces is scarce and by no means approaches the level of intensity required for an armed conflict to materialize.[157]

The question of whether pirates are involved in an *internal* armed conflict against Somali authorities – which could potentially allow the latter to request forcible support against them – requires a more nuanced analysis. Indeed, at least since the 1991 ouster of dictator Siyad Barre, Somalia has been torn by a series of complex, shape-shifting internal and internationalized armed conflicts. In its current form, the conflict mainly

protracted, organized armed violence conducted by non-state actors against civilians. Moreover, as we shall see in the discussion *infra* Section 2, control by armed groups over territory, while denying the exercise of governmental control, can also amount to reciprocal armed violence.

[156] *See* APII, *supra* note 148, art. 1(2) (providing that the Protocol "shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts"); MELZER, *supra* note 57, at 24.

[157] For a similar conclusion see Guilfoyle, *supra* note 8, at 144 ("When pirate–naval encounters take place they are sporadic, brief, and usually involve only small-scale fire."). Moreover, even if adopting the view that pirate attacks – as a particular form of violence against civilians – could amount to hostilities it is certain that the objective criteria of protracted and intense armed violence would not be fulfilled. For instance, in 2012 there were thirty-five validated pirate attacks in EU NAVFOR's zone of operations – only three attacks per month. In 2013, as of August, only three attacks occurred in total. *See Key Facts and Figures*, *supra* note 1; *see also* MELZER, *supra* note 57, at 47 (recognizing that inflicting harm on civilians can amount to a hostile act).

pits the government of Somalia, heavily supported – if not completely upheld – by international elements, against the al-Qaeda affiliated Al-Shabaab militia.[158] Establishing that pirates are party to this armed conflict requires a sufficient *linkage* between their activities and ongoing hostilities involving Al-Shabaab or other militias.[159] In this context, it is worthwhile to consider the language of relevant Security Council resolutions, which note the role of piracy in financing embargo violations by Somali armed groups.[160] Does this determination suffice to link between the pirates and organized armed groups in Somalia? The answer seems negative; even if pirates would have *directly* financed such groups, these actions alone would still not constitute direct participation in hostilities or membership in an organized armed group, nor, by extension, would they automatically render objects used for generating such funds military objectives.[161]

In the absence of a sufficient linkage between pirates and al-Shabaab, pirates must independently constitute organized armed groups involved in a separate internal armed conflict against Somali authorities. Most commentators deny this possibility, namely because pirates do not engage in protracted, intense armed violence against the state.[162] However, a question of general importance is whether such a conclusion can be affected

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[158] For a brief summary of the conflict in Somalia, see Int'l Crisis Group, *Somalia: An Opportunity that Should Not Be Missed,* 87 AFRICA BRIEFING 1, 2-5 (2012).

[159] Whether such linkage should be determined according to functional or formal criteria (or a combination of both), as well as the nature of the functions that would give rise to such a linkage, are controversial matters, which will not be resolved here. At least according to the ICRC, individual membership in non-state organized armed groups is determined strictly in light of functional criteria. *See, e.g.*, MELZER, *supra* note 57, at 33 (stating "the concept of organized armed group refers to non-State armed forces in a strictly functional sense"). If this is so, it is only logical that assimilation of a criminal group – such as one consisting of pirates – into an existing organized armed group be assessed in terms of its functional linkage to that group. *See id*. However, some criticize the purely functional criteria and argue for a wider test for membership. *See* Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641, 690-92 (2010) (arguing that combat function is but one indication for membership in an organized armed group, but identifying the key factor as membership in an organization operating under a command structure).

[160] *See, e.g.*, S.C. Res. 1851, *supra* note 71, pmbl.; S.C. Res. 1844, *supra* note 116, pmbl.

[161] *See* HCJ 769/02 The Pub. Comm. Against Torture in Israel v. The Gov't of Israel 62(1) PD 507, ¶ 35 [2006] (Isr.) (stating "a person who sells food or medicine to an unlawful combatant is not taking a direct part, rather an indirect part in the hostilities. The same is the case regarding a person who aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid"); MELZER, *supra* note 57, at 51-54 (positing that war-sustaining activities such as funding do not amount to direct participation in hostilities and *a fortiori* not to the fulfillment of a combat function).

[162] *See, e.g.*, Guilfoyle, *supra* note 8, at 143–47; Treves, *supra* note 97, at 412.

by state-failure in areas where criminal groups operate. The next Section suggests a framework through which to analyze this question.

2. The Relationship between State Failure and Armed Conflict

How does state-failure affect, if at all, the determination of whether an armed conflict exists, in which hostile or quasi-hostile actions against criminal groups would be potentially allowed? In the context of Somalia, for instance, relevant Security Council resolutions expressly refer to the state's incapacity to deal with piracy.[163] This language alludes to the absence of effective governmental control over large swaths of the state's territory, among other problems.

Loss of effective control by governments and the acquisition of such control by opposition forces have traditionally been requirements for the recognition of rebels as belligerents, which would possess, upon recognition, nearly all the rights and powers available to a party in a "regular," inter-state war.[164] In modern international law, remnants of this approach can be found in the preconditions for the application of Additional Protocol II.[165] The requirement of loss of effective control was traditionally a shield for state-sovereignty. Since effective control and sovereignty were deeply intermingled, sovereignty could only be compromised – by granting belligerent rights to rebels – when rebels accumulated some measure of effective control.[166] In today's human rights era, loss of effective governmental control implies that the state is *incapable* of suppressing the rebels through its law enforcement mechanisms and must, perhaps, resort to hostilities.[167] In other words, while the loss of effective control is not a sufficient condition in itself for the existence of an armed conflict, it could nevertheless serve as an indication that one exists. This could be particularly true in cases where the Security Council explicitly recognizes that loss of effectiveness has in fact occurred, such as in Somalia.

In Somalia, some coastal areas are arguably controlled by organized pirates. Reportedly, pirates exercise some level of control over a significant

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[163] *See* S.C. Res. 1816, *supra* note 103, pmbl.; *supra* Section II.B.

[164] *See* WHEATON, *supra* note 80, at 29, n.15 (presenting a detailed analysis of the traditional belligerency doctrine).

[165] APII, *supra* note 148, art. 1(1) (stating the Protocol "shall apply to all armed conflicts which . . . take place in the territory of a High Contracting Party between its armed forces and dissident armed forces . . . which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol").

[166] *See* LIEBLICH, *supra* note 142, at 21-22 (exploring the emergence of effectiveness as a source of sovereignty in traditional international law); ANNE ORFORD, INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT 14 (2011).

[167] *See* LIEBLICH, *supra* note 142, at 49-50.

part of the country's coastal area, from Harardheere in the south to Eyl in the north.[168] In Harardheere, in 2009, pirates even set up a stock exchange where "pirate firms" were publically traded, and financed public infrastructure.[169] However, when considering the relationship between such control and the existence of an armed conflict, the key question is whether control was passively accrued simply because of the power-vacuum in the area, or, rather, the groups *actively defend* the area against others, particularly against agents of state power. This principled question might very well arise in other scenarios of complete or partial state-failure, where might-makes-right anarchy replaces state control.[170] As a rule of thumb, it can be suggested that only if pirates would actively and violently oppose attempts by Somali authorities to reestablish control over the state's coast, their *de facto* control would elevate into an armed conflict with the government of Somalia.[171]

In sum, effective control by criminal groups emanating from the collapse of state-authority in the area is not sufficient by itself to establish that these groups are involved in an armed conflict and thus trigger the application of IHL. Before making such a determination, it must be assessed whether such groups would actually resist a serious governmental attempt to retake control over said area.

3. Forcible Disruption Operations and Person/Object Equality under IHL

Last, even if criminal groups are sufficiently linked to an armed conflict, and IHL "kicks-in," this would still not give *carte blanche* to FDOs. Granted, in cases where criminal groups also constitute organized armed groups participating in an armed conflict, it is reasonable that there would

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[168] See *Somalia and the Shabab: It's Not Over Yet*, THE ECONOMIST, Oct. 6, 2012, *available at* http://www.economist.com/node/21564258.

[169] Mohamed Ahmed, *Somali Sea Gangs Lure Investors at Pirate Lair*, REUTERS, Dec. 1, 2009, *available at* http://www.reuters.com/article/2009/12/01/us-somalia-piracy-investors-idUSTRE5B01Z920091201 (according to one pirate, "The shares are open to all and everybody can take part . . . we've made piracy a community activity.").

[170] A similar question could arise, for instance, concerning the situation in the Sinai Desert. The recent ousting of President Morsi has led to rising chaos in Sinai, in which Bedouin tribes, Islamists, and smugglers exercise control over large swaths of land. Whether this situation will give rise to an armed conflict depends, to a large extent, on the reaction of these elements to current attempts by the government to retain control. *See* Matt Bradley & Tamer El-Ghobashy, *Egypt's Coup Sparks Rising Chaos in Sinai*, WALL STREET JOURNAL, July 21, 2013, *available at* http://online.wsj.com/article/SB10001424127887324144304578619931690114670.html.

[171] This does not seem to be the likely scenario in Somalia. As in the past, when approached by armed groups, the pirates simply fled. *See Somali Rebels Move Into Pirates' Den*, THE GUARDIAN, May 2, 2010, *available at* http://www.theguardian.com/world/2010/may/02/somalia-pirates-hizbul-islam-rebels.

be a significant overlap between objects used for criminal acts and those used for military purposes. For instance, if Somali pirates were involved in an armed conflict, it would make sense that some of the equipment targeted in the May 15th Operation, such as arms and skiffs, would also be used for hostilities. However, a correct legal analysis under the hostilities paradigm would still require the attacker to verify that every targeted object is *also* a valid military objective, meaning, that it makes an effective contribution to "military action," and that its destruction offers a definite military advantage *beyond* use for criminal acts.[172] Indeed, despite the overlap mentioned above, the merger between crime-related objects and military objectives is not absolute, at least conceptually.[173]

The requirement that attacked objects always be *military* objectives reveals a theoretically significant point that is crucial to understanding the legal framework applicable to FDOs. Under IHL, the principle of distinction applies *equally* to civilians and civilian objects. Both civilian persons and objects enjoy a similar, non-derogable immunity from direct attack, unless they fulfill certain criteria: respectively, direct participation in hostilities and effective contribution to military action.[174] Therefore, even

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[172] API, *supra* note 7, art. 52(2); HENCKAERTS & DOSWALD-BECK, *supra* note 147, r. 7-8. Some would argue that "criminal" objects that support military efforts are targetable as "war sustaining" objects. *See, e.g.*, Michael N. Schmitt, *Unmanned Combat Aircraft Systems and International Humanitarian Law: Simplifying the Oft Benighted Debate*, 30 B.U. INT'L L.J. 595, 610-11 (2012) (noting the U.S. position that "war-sustaining" objects, including economic objects that sustain the enemy's war-fighting capability, are military objectives). *Cf.* Linneweber, *supra* note 8, at 181-86. However, mainstream commentators believe that the "war sustaining" standard is too wide. *See* DINSTEIN, *supra* note 25, at 95-96 (rejecting the concept of "war-sustaining" objects as military objectives, requiring a "proximate nexus" between the object and "war-fighting").

[173] Indeed, even where a criminal group constitutes an organized armed group, this will not automatically result in targetability of objects used by that group for non-military purposes, including for criminal purposes. Examples could include buildings used strictly for storage of stolen goods or drugs, objects that relate to illegal trade, safe-houses used by smugglers, etc. *See* Linneweber, *supra* note 8, at 186-88 (concluding that according to the standards of API, narcotics in Afghanistan do not amount to military objectives).

[174] *See* Linneweber, *supra* note 8, at 117, 159, 160, 178-79. This similarity is particularly evident in NIACs, in which "targetability" of both persons and objects is almost always determined upon functional criteria – as opposed to international armed conflict, where targetability of combatants is status-based. *See* API, *supra* note 7, art. 50-52. I reserve here the complex question of destruction of property during occupation, whether for the sake of public order and safety or on counts of *military* necessity during hostilities. *See* Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV) art. 53, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Convention (IV) Respecting the Laws and Customs of War on Land its Annex: Regulations Concerning the Laws and Customs of War on Land art. 23(g), 43, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter *Hague Regulations*].

during armed conflict, IHL does not condone direct attacks against civilian objects, such as those strictly used for "criminal" activity even if the attacker is careful to spare the persons using them. Thus, despite its intuitive moral appeal, EU NAVFOR's separate treatment of objects and persons – a central pillar of its justification of the May 15th Operation – does not get us very far if analyzed strictly under the hostilities paradigm. However, as we shall see in Part IV, this justification can be surprisingly rescued within the humanist discourse of the law enforcement paradigm.

B. Host-State Consent and Transnational Forcible Disruption Operations

The international framework developed for combating piracy off the coast of Somalia emphasizes that Somalia granted consent to all aspects of its operations. Thus, it stresses that Somalia consented to the general idea of an international struggle against piracy; to international operations against piracy within its territorial waters and land; to the identity of the states participating in such activities; and also to specific operations.[175] Can state consent, in itself, affect the legality of the resort to quasi-hostile acts against criminal elements?[176]

State consent, in general, is not a legal precondition for the adoption of binding Security Council resolutions under Chapter VII of the U.N. Charter, although consent might have important political and "secondary" legal implications, the discussion of which is beyond this Article.[177] Furthermore, the importance attached to the consent of the ineffective Somali authorities is telling with regard to the contemporary understanding of sovereignty.[178] Be it as it may, the existence of host-state consent – whether in conjunction with a Security Council resolution or in its absence – primarily affects questions of sovereignty and *jus ad bellum*. Essentially, external forcible acts conducted with state consent can be excluded from the prohibition on the use of force.[179] As such, consent mainly affects the

[175] S.C. Res. 1851, *supra* note 71, pmbl., ¶ 6; Press Release, *supra* note 2.

[176] Guilfoyle, for instance, implies that consent could legalize striking pirate objectives on land. *See* GUILFOYLE, *supra* note 78, at 66. *But see id.* at 70 (opining that the law of targeting would generally not apply to pirates ashore).

[177] *See* LIEBLICH, *supra* note 142, at 31-35 (discussing the political and legal relevance of state consent to Chapter VII resolutions); *see also* Treves, *supra* note 97, at 406-08 (addressing specifically the consent of Somalia to counter-piracy actions).

[178] According to traditional law, an ineffective government could not, in general, authorize external use of force in its territory. *See* LIEBLICH, *supra* note 142, at 165-69 (arguing that the international reliance on the consent of the Somali government, in a myriad of contexts, exemplifies that territorial effectiveness is no longer the primary source for consent power).

[179] It is widely accepted that government consent can exclude the wrongfulness of the use of force in host-state territories, subject to limitations which we shall elaborate upon

relations between the consenting state and the intervener.

Conversely, host-state consent has no bearing on the application of the legal instruments of *jus in bello* – or, for that matter, of IHRL – which mainly set out to protect individuals from state power. Host-state consent cannot, by itself, transform internal disturbances or anti-crime operations into armed conflict, since a state cannot circumvent its own legal obligations by authorizing other states to act in its territory.[180] Intervening states are limited not only by the scope of the territorial state's consent,[181] but also by the territorial state's legal obligations, including those pertaining to IHL and IHRL.[182] Intervening states are likewise not relieved from their own obligations – to the extent the latter apply extra-territorially[183] – merely because another state consents to their actions. In sum, a state can consent to forcible assistance during an armed conflict or to lawful assistance in law-enforcement when confronting crime, but it cannot confound these situations.

In the context of the May 15th Operation, it must follow that the consent of the Somali government is inconsequential, in and of itself, to the compatibility of the operation with either IHL or IHRL. Consent's sole potential legal effect is in precluding the *jus ad bellum* wrongfulness of foreign operations in Somali territory.[184] Repeated references to Somali consent in various international forums are to be understood strictly in this context. To conclude, in the absence of an armed conflict, and where law-

here. *See, e.g.*, LIEBLICH, *supra* note 142, ch. 6; GEORG NOLTE, EINGREIFEN AUF EINLADUNG (1999) (Ger.) (concerning the scope of the consent exception); Ademola Abass, *Consent Precluding State Responsibility*: *A Critical Analysis*, 53 INT'L & COMP. L.Q. 211 (2004); Jean d'Aspremont, *Legitimacy of Governments in the Age of Democracy*, 38 N.Y.U. J. INT'L L. & POL. 877, 906-07 (2005); Deeks, *supra* note 17, at 15; Terry D. Gill, *Military Intervention at the Invitation of a Government, in* THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 229, 229-32 (Terry D. Gill & Dieter Fleck eds., 2010); Michael N. Schmitt, *Drone Attacks under the Jus ad Bellum and Jus in Bello: Clearing the 'Fog of Law'*, 13 Y.B. INT'L HUMANITARIAN L. 311, 315 (2010); *see also* ILC Draft, *supra* note 38, art. 20.

[180] *See* John L. Hargrove, Intervention by Invitation and the Politics of the New World Order, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 113, 116-17 (Lori Fisler Damrosch & David J. Scheffer eds., 1991); *see also* David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7 DUKE J. COMP. & INT'L LAW 209, 215 (1996).

[181] Otherwise their actions could amount to aggression. *See* Definition of Aggression, *supra* note 31, art. 3(e).

[182] *See* LIEBLICH, *supra* note 142, at 207; *see also* Deeks, *supra* note 17, at 32-40 (arguing that intervening states are not only bound by the host-state's international legal obligations, but also have a duty to inquire regarding their *domestic* law before acting).

[183] *See generally* MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES AND POLICY 1-18 (2011); *see also infra* Section IV.A.

[184] *See* GEISS & PETRIG, *supra* note 2, at 84-85.

enforcement operations are called for, states cannot legalize quasi-hostile acts in their territories by consenting to external action.

C. Interim Summary

It seems that the prospects for justifying FDOs under IHL alone are rather bleak. First, for IHL to apply, the criminal group must be involved in an internal or transnational armed conflict, which is not an insignificant barrier. Second, even if IHL does apply, states still do not have *carte blanche* to attack criminal objects; the latter would still have to fulfill the criteria of a military objective, despite a possible overlap between criminal activities and hostilities. Consent by the host state does not alter the situation in any way.

In essence, we have demonstrated that under the IHL paradigm there is no distinction between non-participating civilians and civilian objects: both enjoy a non-derogable protection from direct attack. However, surprisingly, the law enforcement paradigm can be more lenient than the law of targeting with regard to the distinction between persons and objects. The next Part proceeds to explore this possibility.

IV. RESCUING FORCIBLE DISRUPTION OPERATIONS UNDER THE IHRL PARADIGM

As we have seen, EU NAVFOR's emphasis that the May 15th FDO targeted only *things*, and that no persons were hurt, is not an entirely relevant justification under IHL. However, this Article has also claimed that FDOs are generally closer to quasi-hostile and thus are foreign to the logic of IHRL. Is there a way to rescue FDOs from this legal limbo? Is it possible, if not under IHL, to justify FDOs under IHRL? In other words, can FDOs be perceived, in any circumstances, as "extensions" of law enforcement-based disruption actions?[185]

A. Transferring Territorial Human Rights Obligations through Host-State Consent

The first step in our analysis of FDOs under IHRL requires a brief discussion of the main legal instruments potentially applicable to such actions. In general, human rights obligations in such cases can emanate from extra-territorial application or materialize through host-state transference of territorial human rights obligations. This Section explores these possibilities in relation to FDOs.

In the context of EU NAVFOR's operations, for instance, potential sources for human rights obligations can be found in the International

[185] Press Release, *supra* note 2.

Covenant on Civil and Political Rights ("ICCPR"), the International Covenant on Economic, Social and Cultural Rights ("ICESCR'), and the European Charter of Human Rights ("ECHR").[186] However, for the latter sources to apply directly to EU NAVFOR states, the question of extra-territorial application must be resolved, meaning, whether, and to what extent, human rights instruments apply to actions taken beyond a state-party's border.[187] In this context, there is considerable agreement that the ICCPR and ICESCR apply extra-territorially.[188] Moreover, the general understanding of U.N. Treaty Bodies is that this application extends not only to territories under the *effective control* of state parties, but also to instances where a state exercises power over an individual.[189] However, it is unclear how these extra-territorial obligations would play out in cases where power was exercised against *objects* associated with persons, rather than against the persons themselves. Moreover, it remains unsettled whether this extended understanding of extra-territorial application could also encompass swift aerial attacks, such as the May 15th Operation, that involve no *physical* control over land or persons.

The latter dilemma has also surfaced predominantly in the jurisprudence of the ECtHR. Granted, the ECHR is certainly applicable to extra-territorial law-enforcement actions where states exercise effective control. For instance, there is no doubt that the ECHR would apply to actions against ships on the high seas, at least after the vessels come under the effective

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[186] Reserving, for now, the question regarding the attribution of EU NAVFOR's actions to individual European states. *See, e.g.*, Stefano Piedimonte Bodini, *Fighting Maritime Piracy under the European Convention on Human Rights*, 22 EUR. J. INT'L L. 829, 845-48 (2011); *see also* Behrami v. France, App. No. 71412/01, Eur. Ct. H.R., ¶¶ 121-52 (2007), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80830 (analyzing the question of state attribution in Security Council mandated operations, finding that there is no such attribution in the case at hand since the ultimate authority was retained by the United Nations). *But see* Nada v. Switzerland, App. No. 10593/08, Eur. Ct. H.R., ¶¶ 120-22 (2012), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113118; Al-Jedda v. United Kingdom, App. No. 27021/08, Eur. H.R. Rep. 789, ¶¶ 53, 83-86 (2011), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105612.

[187] This is chiefly a matter of interpretation of the term "jurisdiction" as found in the relevant treaties' application clauses. *See, e.g.*, ICCPR, *supra* note 34, art. 2(1); ECHR, *supra* note 34, art. 1.

[188] *See, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 109-11 (July 9) [hereinafter *Wall Opinion*].

[189] *See* Hum. Rts. Comm., General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/REV.1/Add.13 (May 26, 2004) (positing that the ICCPR applies to all persons within the *power* or effective control of state parties); *see also* MILANOVIC, *supra* note 183, at 175-79.

control of the interdicting state.[190] However, its application is questionable regarding aerial attacks on land, the operational method that would be probably preferred in most FDOs. This gap in the ECHR's application can be traced to the famous *Banković* case, where the ECtHR excluded instantaneous extra-territorial acts conducted in the absence of direct physical control over territory or individuals from the Convention's ambit.[191]

However, *Banković*-type loopholes will not always be available to FDO-conducting states. When operations are conducted with the consent of the host-state, as is the case in Somalia, two crucial points push towards the application of human rights instruments *even* to "instantaneous" attacks. First, at least concerning the ECHR, the ECtHR has recognized that an extra-territorial jurisdictional-link can materialize when a state, through the consent of another, exercises public powers – such as executive or judicial functions – normally exercised by the territorial government.[192] For instance, to the extent that countering piracy on land is a normal executive function of the Somali government, it is arguable that FDOs undertaken upon Somalia's consent could give rise to ECHR application.[193] Second, regarding *all* IHRL instruments, the acting state could be bound by the *territorial* IHRL obligations of the consenting state. This conclusion derives from the principle, discussed in Section III.B, according to which consent to external actions does not absolve states of their own international

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[190] *See* Medvedyev v. France, App. No. 3394/03, ¶¶ 64-67, Eur. Ct. H.R. (2010), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97979 (ruling that a French warship gained extraterritorial control over a merchant vessel upon its interception, thus giving rise to French jurisdiction and ECtHR application); MILANOVIC, *supra* note 183, at 162-63.

[191] *See* Banković v. Belgium, 2001-XII Eur. Ct. H.R. 333, ¶¶ 59-61, 70-71, 75, 82 (rejecting the notion of accumulation of jurisdiction by "cause and effect"). *But see* Issa v. Turkey, App. No. 31821, ¶ 96, 71, Eur. Ct. H.R. (2004) (accepting the notion of state-agent control as conferring jurisdiction); *see also* Al-Skeini v. United Kingdom, App. No. 55721/07, ¶¶ 53, 130-39, Eur. H.R. Rep. 18 (2011), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105606; Medvedyev, App. No. 3394/03, ¶ 64 (interpreting *Banković* narrowly, as referring only to "instantaneous extraterritorial act[s]"). Note, however, that in at least one case, killing of persons by fire from a helicopter was sufficient to give rise to extraterritorial jurisdiction. *See* MILANOVIC, *supra* note 183, at 184-85 (citing Pad v. Turkey, App. No. 60167/00, ¶¶ 53-54, Eur. Ct. H.R. (2007), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81672). For a detailed analysis of the ECHR application to counter-piracy see GEISS & PETRIG, *supra* note 2, at 101-30.

[192] Al-Skeini, App. No. 55721/07, ¶ 135.

[193] *Cf.* Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To*, 25 LEIDEN J. INT'L L. 857, 873-74 (2012) (referring to this type of jurisdictional-link as based on "normative-guidance").

obligations.[194] Otherwise, a significant accountability gap will ensue: states would be able to authorize quasi-hostile law enforcement operations on their territories, while shielded from international scrutiny. In the case of Somalia, since the latter is party to the ICCPR, ICESCR, and the African Charter on Human Rights,[195] these instruments, at minimum, would cover all FDOs conducted on its territory. The next Section thus discusses FDOs under principles common to most human rights regimes.

B. Forcible Disruption Operations and Defense of Life

Although only directed against objects, FDOs might still threaten the lives of suspected criminals and uninvolved bystanders. Since the right to life is a fundamental, non-derogable right under IHRL,[196] the law enforcement paradigm limits all use of potentially lethal force by stringent necessity and proportionality requirements. In terms of necessity, such force can be used only for defense of self or of others; as to proportionality, force must be strictly limited to what is required to achieve this end.[197] The scope of the right to self-defense during law enforcement operations is a complex issue, which cannot be exhausted in this Article.[198] For our discussion, it suffices to adopt, as a working formulation, the standards found in the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. These permit the use of potentially lethal force only in the following cases:

> against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their

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[194] *See* LIEBLICH, *supra* note 142, at 207 (suggesting that the intervening state is an agent of the consenting state and thereby is limited by the latter's international obligations). *Cf.* INT'L COMM. OF THE RED CROSS, EXPERT MEETING: OCCUPATION AND OTHER FORMS OF ADMINISTRATION OF FOREIGN TERRITORY 62 (Tristan Ferraro ed., 2012) (outlining possible bases for extraterritorial application of IHRL during occupation, including those stemming from the obligations of the ousted territorial government).

[195] *See* African Union, African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217 (1988); *see also* UNITED NATIONS TREATY COLLECTION, http://treaties.un.org (last visited July 25, 2013) (listing the status of ratification concerning relevant treaties).

[196] ICCPR, *supra* note 34, art. 4(2), 6; ECHR, *supra* note 34, art. 15(2); *see also* Hum. Rts. Comm., General Comment 29: States of Emergency (Article 4), ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) [hereinafter *GC 29*]; Hum. Rts. Comm., General Comment 6: The Right to Life (Article 6), ¶ 1, U.N. Doc. HRI/GEN/1/Rev.1 (Apr. 30, 1982) [hereinafter *GC 6*].

[197] *See* Basic Principles, *supra* note 34, art. 9-10.

[198] For a famous case see McCann v. United Kingdom, 324 Eur. Ct. H.R. (ser. A) at 49, ¶¶ 146-50, 192-214 (1995).

> authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.[199]

Under the ECHR, in order to resort to force, an "absolute necessity" requirement must be met. However, the ECtHR has conceded that the standard of judicial review can be looser in extreme scenarios, for instance, where time is especially pressing and state-control over the situation is minimal.[200]

In light of this framework, can FDOs qualify under some IHRL paradigm of defense of life? This question requires a case-by-case answer. Nonetheless, the types of dilemmas arising in most cases will be similar. One argument could be that FDOs are in a different ballpark and, thus, have nothing to do with the right to self-defense and its stringent limitations. As the argument would go, assuming that FDOs adhere to stringent precautionary obligations and target only objects, they do not significantly jeopardize the right to life, at least no more than is acceptable in any type of law enforcement operations.[201] If this is true, the only human rights issue arising from FDOs relates to the violation of due-process and related rights emanating from the extrajudicial destruction of objects. In such a case, FDOs would not need to fulfill the strict requirements of self-defense, but only those of due-process, as discussed in Section D below. In other words, if a credible argument can be made that FDOs do not endanger lives, they could be undertaken beyond the defense of life paradigm.

However, the burden on such an argument is a heavy one. First, if FDOs could indeed be conducted without any risk to persons, a question would paradoxically arise regarding their initial necessity. In most cases, if the operational environment is so sterile that attacks can be staged with certainty that no unintended casualties would result, this in itself implies a level of control over the area that could allow "regular" law enforcement methods. Second, it is arguable that a non-negligible risk to life is *always* involved when targeting objects with kinetic weapons. If one accepts these contentions, the discussion of FDOs returns to the restrictive defense of life paradigm.

An additional feature of the defense of life framework restricts FDOs even further. Simply put, when judging whether a particular FDO risks lives, it is crucial to ask *whose* lives are placed in danger. Indeed, the law-

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[199] Basic Principles, *supra* note 34, art. 9.

[200] *Compare* McCann v. United Kingdom, 324 Eur. Ct. H.R. (ser. A) at 49, ¶¶ 45-46, 147-50 (expounding the term "absolute necessity") *with* Finogenov v. Russia, App. No. 18299/03, ¶¶ 210-13 (relaxing the absolute necessity standard, namely in situations of time pressure and lack of control over the general situation).

[201] We shall discuss the precautions required for making such a determination in *infra* Section C.

enforcement paradigm tolerates risking the lives of *perpetrators* when acting in necessary self-defense, because it presumes that perpetrators, by their actions, have forfeited their own right to life.[202] However, as previously discussed, law enforcement hardly tolerates *ex ante* justifications for causing incidental harm to innocents.[203] Thus, any analysis of FDOs under the defense of life paradigm – even when an imminent threat exists – requires that extensive precautions be taken to prevent innocent loss of life.[204]

How would the May 15th Operation, as a paradigmatic FDO, play out under the defense of life discourse? First, it is helpful to understand the pirates' tactics in order to establish whether they pose a threat to life – the preliminary condition for any defensive action. Commonly, attacks commence with the approach of two high-speed "skiffs" towards the victim ship. Skiffs are usually deployed from larger "motherships."[205] In some cases, pirates fire small arms and even rocket-propelled grenades towards ships, in order to force them to stop.[206] Once stopped, the skiffs are placed alongside the attacked ship to enable the pirates to climb on board.[207] In general, the IMO advises ships, in such situations, to increase speed and make other maneuvers to impede the pirates' approach.[208] If pirates manage to take control of a ship, the crew is advised to offer no resistance.[209] If successful in hijacking the vessel, the pirates will take the crew members as hostages until ransom is paid.[210] These tactics undoubtedly present a considerable threat to life.[211] Therefore, some acts

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[202] *See, e.g.*, Jon Yorke, *Introduction: The Right to Life and the Value of Life: Orientations in Law, Politics and Ethics*, *in* THE RIGHT TO LIFE AND THE VALUE OF LIFE: ORIENTATIONS IN LAW, POLITICS AND ETHICS 1, 5 (Jon Yorke ed., 2010).

[203] *See supra* Section I.A.

[204] A related question is discussed in *infra* Section B.2.

[205] *See* INT'L MARITIME ORG., BEST MANAGEMENT PRACTICES FOR PROTECTION AGAINST SOMALIA BASED PIRACY, ¶¶ 4.1-4.2 (2011).

[206] *Id.* ¶ 4.3.

[207] *Id.* ¶ 4.4.

[208] *Id.* ¶¶ 9.2-9.3.

[209] *Id.* ¶ 10.3.

[210] *Id.* ¶ 1.2; *see* International Convention Against the Taking of Hostages art. 1, Dec. 17, 1979, 1316 U.N.T.S. 205 (defining hostage-taking under international law). In some instances, pirates have taken captured persons to Somali land. *See* Press Release, EU NAVFOR, European Union Naval Force Commander Reminds Yacht and Leisure Craft Owners That Piracy Still a Clear and Present Danger in Gulf of Aden and Indian Ocean (Nov. 7, 2012), *available at* http://www.eunavfor.eu/2012/11/european-union-naval-force-commander-reminds-yacht-and-leisure-craft-owners-that-piracy-still-a-clear-and-present-danger-in-gulf-of-aden-and-indian-ocean/.

[211] In 2011, thirty-five hostages held by Somali pirates died. *See* INT'L MARITIME BUREAU ET AL., *supra* note 16, at 7.

of forcible self-defense by crew members could be legally justified, although these are not advised by the IMO for various policy reasons.[212] Theoretically, this right could be transformed into a justification to use force "in defense of others" by law enforcement agents such as EU NAVFOR.[213]

Would such actions conform to the proportionality requirement? Indeed, considering the threat to life emanating from piracy, FDOs such as the May 15th Operation could be viewed, in terms of proportionality, as least-restrictive means. Indeed, although they might pose incidental risk to pirates, such operations do not *deliberately* target them. However, this does not suffice. If called upon to justify the May 15th Operation, EU NAVFOR would also have to demonstrate that any risk to innocents was virtually negated.

Additionally, the fact that the operation was *preventively* conducted on land complicates the analysis. On the one hand, this course of action arguably augments the operation's proportionality because disruptive actions at sea would pose *more* risk to the lives of pirates and, in some cases, to their victims.[214] On the other hand, such actions present an ever-present paradox of self-defense: while preventive action could lower the overall harm emanating from a particular act in some cases, it always poses a significant risk of abuse.[215] In other words, the farther the forcible action is from the actual conduct it seeks to prevent, the more suspicious we are of its actual, absolute necessity as a defensive action.[216] Precisely for this reason, the more we are removed temporally from the harmful conduct, the

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[212] INT'L MARITIME ORG., GUIDANCE TO SHIPOWNERS AND SHIP OPERATORS, SHIPMASTERS AND CREWS ON PREVENTING AND SUPPRESSING ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS, ¶¶ 59, 60-61, 63 (2009).

[213] The authorization to use force "in defense of others" is a common feature, for instance, of hostage-taking scenarios. *See* Finogenov v. Russia, App. No. 18299/03, ¶¶ 165, 210, 217-18.

[214] Indeed, most fatalities associated with piracy occur during rescue operations when pirates use seafarers and hostages as human shields. INT'L MARITIME BUREAU ET AL., *supra* note 16, at 7-8.

[215] This problem is often debated in the context of "preventive" self-defense under *jus ad bellum*, in particular concerning the threat emanating from the development of nuclear weapons. *See generally* MICHAEL W. DOYLE, STRIKING FIRST: PREEMPTION AND PREVENTION IN INTERNATIONAL CONFLICT (2008). *See also* TOM RUYS, "ARMED ATTACK" AND ARTICLE 51 OF THE U.N. CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 96-97 (2010) (discussing the international reaction to the 1981 Israeli attack against an Iraqi nuclear reactor in terms of self-defense and necessity).

[216] As aforementioned, departing from the absolute necessity standard could be justified *ex post* in extreme cases of pressure. *See* Finogenov v. Russia, App. No. 18299/03, ¶¶ 210-12. This, however, was not the case in the circumstances of the May 15th Operation.

more checks are placed on those who seek to prevent it.[217] It follows that it would be difficult to justify the May 15th Operation as a genuine act conducted for the defense of life since it seems to fail the preliminary test of imminent threat.

In sum, if FDOs are conducted in a manner that risks the lives of suspected criminals, they would be permissible only under the stringent restrictions of the self-defense paradigm; if FDOs also risk the lives of innocent bystanders, they might not be permissible at all, or, at least, not justified *ex ante*. In any case, FDOs conducted in defense of life must adhere to the precondition of imminent threat. The next Sections discuss whether and when FDOs can be conducted *beyond* the defense of life paradigm.

C. Forcible Disruption Operations beyond Defense of Self or Others: the Person/Object Distinction

1. The Person/Object Distinction under IHRL

As argued in the previous Section, FDOs could theoretically circumvent the strict limitations of the self-defense paradigm if they only target objects and are conducted in a manner that does not risk the lives of suspected criminals or innocent bystanders. Under this assumption, FDOs do not implicate the right to life, but only raise concerns regarding due-process and related rights. This distinction has significant theoretical and practical importance, since it reveals an overlooked difference between the paradigms of hostilities and law enforcement: under IHRL, as opposed to the law of targeting, the protection afforded to these sets of rights is differential.[218] While IHRL reserves a superior, non-derogable status for the right to life, even during public emergency,[219] measures derogating from due-process or property-related rights are not *per se* outlawed in major IHRL instruments, so long as they are taken during a declared state of emergency and conform to several procedural and substantive requirements.[220]

In sum, as opposed to IHL, which does not recognize necessity

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[217] For example, in the realm of *jus ad bellum*, preventive self-defense would require Security Council authorization. *See, e.g.*, DOYLE, *supra* note 215, at 43-98 (providing theoretical and practical justifications for subjecting preventive self-defense to Security Council authorization).

[218] As discussed in *supra* Section III.A.3., the law of targeting protects equally and absolutely uninvolved civilians and civilian objects, without a substantive distinction between them.

[219] ICCPR, *supra* note 34, art. 4(1), 4(2).

[220] *See id.* art. 4(2); ECHR, *supra* note 34, art. 15. These requirements are discussed in *infra* Section III.

exceptions that could enable FDOs against non-military objects, IHRL's system of derogations might open the door to such operations.[221] The rationale behind the supreme status of the right to life under IHRL is easily understandable. After all, according to liberal theories of human rights, safeguarding human life must be the ultimate end of any exercise of institutional power.[222] However, less obvious explanations exist for IHRL's relative leniency – in comparison to IHL – regarding the protection of *objects*. One explanation could be that the law of targeting simply never envisioned law enforcement dilemmas. Another could be that, since IHL presupposes a basic condition of enmity between the parties, it seeks to offer greater protection from abuse by establishing a bright-line rule of protection. This normative situation sheds interesting light on the all-too-dichotomic IHL/IHRL debate: it reveals that IHRL, in certain instances, can be more permissive than IHL.

2. The Right to Life and Enhanced Precautionary Obligations

Before discussing the conditions in which the previously mentioned derogations can be made, it is worthwhile to briefly address the level of precaution required to ensure that an FDO does not risk the lives of suspected criminals or innocent bystanders, and can thus be conducted, perhaps, *beyond* the self-defense paradigm.

Under IHL, an attacker must "take all *feasible* precautions in the choice of means and methods of attack" in order to prevent incidental harm to civilians.[223] In this context, the term *feasible* suggests that the attacker is allowed some operational leeway in taking these precautions, to be judged on a case-by-case basis.[224] After taking these measures, the attack would be permissible if the expected incidental harm is not excessive. Does the same standard apply when assessing the means and methods of force in relation to the right to life under IHRL? Intuitively, the superiority of the

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[221] Indeed, the ICJ has construed the necessity doctrine narrowly when analyzing it as a possible source for derogations from IHL. *See* Wall Opinion, *supra* note 188, ¶ 140; *see also* ILC Draft, *supra* note 38, art. 25 (outlining the general conditions for invoking necessity as a ground for precluding the international wrongfulness of an act).

[222] *See, e.g.*, JOHN STEWART MILL, ON LIBERTY 23 (2d ed. 1863) (claiming, famously, that "the only purpose for which power can be rightfully exercised over any member of a civilized community . . . is to prevent harm to others"); B.G. Ramcharan, *The Concept and Dimensions of the Right to Life*, *in* THE RIGHT TO LIFE IN INTERNATIONAL LAW 1, 4-5 (B.G. Ramcharan ed., 1985) (concerning the fundamental importance of the right to life under IHRL).

[223] API, *supra* note 7, art. 57(2)(a)(ii) (emphasis added).

[224] *See, e.g.*, Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 INT'L REV. RED CROSS 446, 460-61 (2005); *see* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 681-82 (Yves Sandoz et al. eds., 1987).

right to life under IHRL and its Kantian underpinnings must call for a more stringent test.

However, in the *Finogenov* case, the ECtHR used the standard of feasible precautions also when assessing law enforcement operations. As per the Court, states must take "all feasible precautions in the choice of means and methods" of action in order to minimize human loss prior to resorting to force in a "policing operation."[225] Moreover, "not every presumed threat to life obliges the authorities to take specific measures to avoid the risk."[226] Nonetheless, this reasoning, in and of itself, cannot be interpreted as importing "IHL-feasibility" into pure law-enforcement scenarios. First, feasibility, by nature, is a context-sensitive term: its meaning during law-enforcement operations must differ from that during armed conflict, where chaos rules. Second, in *Finogenov,* action was taken during an acute hostage crisis in a pressing defense-of-others scenario, where those placed at risk by the operation were already under grave threat caused by the perpetrators holding them. Granted, the feasible-precautions test was used by the ECtHR in other cases as well, but all involved either an imminent threat to life or situations where military operations were undertaken during an armed conflict.[227] Conversely, at issue here are FDOs, which are conducted *beyond* instances of defense of life and outside the context of hostilities.

In such cases, it is reasonable that the feasible precautions standard would be construed more narrowly, perhaps coming closer to an "all

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[225] Finogenov v. Russia, App. No. 18299/03, ¶¶ 208-09.

[226] *Id.*

[227] *See, e.g.*, Dimov v. Bulgaria, App. No. 30086/05, ¶ 72, 74, Eur. Ct. H.R. (2012), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114253 (regarding results of a shootout between police forces and armed criminals); Isayeva v. Russia, 41 Eur. Ct. H.R. 791, ¶ 176, 180 (2005) (employing the all feasible precautions standard in the context of the conflict in Chechnya); Ergi v. Turkey, 1998-IV Eur. Ct. H.R. 59, ¶ 79 (addressing an incident occurring during armed clashes between Turkey and PKK insurgents); Andronicou v. Cyprus, 1997-VI Eur. Ct. H.R. 2059, ¶¶ 10, 171, 181, 186, 192-93 (concerning a rescue operation); McCann v. United Kingdom, 324 Eur. Ct. H.R. (ser. A) at 49, ¶¶ 146-50 (dealing with use of force in light a perceived imminent threat to life). On the ECtHR's application of human rights standards in the backdrop of an armed conflict see generally William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT'L L. 741 (2005). Hakimi argues that, under IHRL, there are indeed situations where lethal force can be justified even when states do not pursue every possible measure to avoid the suspect's death. *See* Hakimi, *supra* note 30, at 1393-98. She suggests the standard of *reasonable* alternatives. *Id.* Hakimi relies, *inter alia*, on the ECHR judgment in Bubbins v. United Kingdom, App. No. 50196/99, ¶¶ 132, 152, Eur. Ct. H.R. (2005), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68548. However, even in that case – and as Hakimi acknowledges – force was used only when a police officer believed the suspect was about to shoot, which places the case conveniently within the self-defense paradigm.

possible precautions*"* test. For instance, it is obvious that even under operational constraints, a state would not be justified in conducting an FDO using imprecise weapons – as the latter would place lives at risk in a non-defense-of-life scenario. This stringent precautionary principle could require states to develop, acquire, and deploy high-tech intelligence systems and precision weapons. Unlike precautionary measures under IHL, this "enhanced" precautionary duty would require that the state refrain from an attack if such means are *unavailable* to it. As in the Somali case, states that do not possess such means and would wish to conduct FDOs could request the assistance of the international community.

3. Derogations from Property and Due-Process Rights in Public Emergencies

The system of derogations under IHRL can theoretically permit forcible actions against objects, assuming that the stringent precautionary measures discussed above have been taken and the right to life is not jeopardized. However, for such actions to be lawful, they must comport with the conditions set forth in relevant IHRL derogations clauses. Under the ICCPR, for instance, derogations can be made only in accordance with the provisions of Article 4(1):

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law . . . .[228]

In general, as interpreted by the Human Rights Committee, not every "disturbance or catastrophe qualifies as a public emergency."[229] As expounded in IHRL jurisprudence, the term is viewed as "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community."[230]

How would this framework apply to FDOs? In order to demonstrate this possibility in a complex transnational setting, we shall return to the Somali example. EU NAVFOR states cannot invoke a state of emergency directly,

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[228] ICCPR, *supra* note 34, art. 4(1); *see also* ECHR, *supra* note 34, art. 15(1). *See generally* Scott P. Sheeran, *Reconceptualizing States of Emergency Under Human Rights Law: Theory, Legal Doctrine, and Politics*, 34 MICH. J. INT'L L. 491 (2013).

[229] GC 29, *supra* note 196, ¶ 3.

[230] Lawless v. Ireland, App. No. 332/57, 1961 Y.B. Eur. Conv. on H.R. 438, Eur. Ct. H.R. (ser. B) at 66, ¶ 28 (Eur. Comm'n on H.R.); *see also* Sheeran, *supra* note 226, at 530-33.

as neither piracy nor Somali state-failure threaten the organized life, for instance, in France or the United Kingdom. However, these nations might exercise the extended powers available in a public emergency through a Somali declaration of emergency. Through host-state consent, such a declaration can authorize external actors to exercise emergency powers in the country.

Indeed, there can be little doubt that Somalia's failure – namely, the near complete absence of central government – qualifies as a public emergency of the most catastrophic kind.[231] Thus, in order to bring the unique measures undertaken in Somalia, such as the May 15th Operation, within this legal framework, a necessary first step would be for Somalia to proclaim an emergency according to the procedure required in the ICCPR[232] and in conformity with its new Provisional Constitution.[233]

In this context, both the decision to proclaim a state of emergency and the measures taken pursuant to it must be proportional: they must be limited to the strict requirements of the situation.[234] It would be necessary to state, in clear terms, the challenges that could require resorting to measures such as FDOs. In Somalia, for instance, loss of effective governmental control over the state's territory, in general and specifically in coastal areas, results in complete inability to repress piracy through "traditional" law enforcement. Piracy, in turn, exacerbates state-failure by inhibiting humanitarian aid and perhaps by financing organized armed groups. In assessing the possible proportional responses, one could argue that the exigencies of the situation require the state to reassume effective control by all means necessary before resorting to derogations from due-process rights. However, if this means engagement in a full armed conflict, it is highly doubtful whether this would indeed be the proportional response in terms of the same values human rights seek to protect. In light of these considerations, FDOs that target *objects* could, in certain cases, be a proportional reaction within IHRL's emergency regime.

However, the analysis does not end here. Proportionality also requires that the scope of derogation from due-process rights be proportional. Undoubtedly, a public emergency by itself cannot result in a blanket executive authority to destroy property suspected of being related to criminal behavior. In particular, this means that FDOs must be controlled by some procedural guarantees, including judicial or quasi-judicial ones. Such guarantees are not rendered *per se* irrelevant – even if altered – in

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[231] *See* GC 29, *supra* note 194, ¶¶ 4-5.

[232] *Id.* ¶ 17.

[233] The Somali Provisional Constitution provides for the proclamation of an emergency, more or less in accordance with relevant IHRL provisions. *See* THE FEDERAL REPUBLIC OF SOMALIA PROVISIONAL CONSTITUTION, Aug. 1, 2012, art. 131.

[234] GC 29, *supra* note 196, ¶¶ 4-5; *see also* Sheeran, *supra* note 228, at 507-08.

times of emergency.[235] Indeed, exceptional "administrative" measures, such as sanctions taken against individuals in Security Council Resolutions, have been subjected, in recent years, to due-process guarantees both by European courts[236] and by the Security Council itself.[237] In the context of FDOs, one can think of a host of measures that would put them within the ambit of proportional derogations from due-process obligations. Two types of measures, however, are paramount: those that deal with *ex ante* and (perhaps more so) *ex post* review. While the technical-procedural questions relating to such mechanisms in their entirety are beyond the scope of this Article, it is nevertheless helpful to highlight some general directions.

First – on the *ex ante* level – provisions could be made for *ex parte* procedures in front of competent bodies, which could rule on whether sufficient *prima facie* evidence exists for criminal activity, and, if so, whether an FDO in any form is the necessary and proportional response in the given situation. Such procedures can be conducted *ex parte* because prior notification could allow criminals to preempt any action against them.[238] In the context of Somalia, a natural candidate for this role is the (hopefully) up and coming specialized Anti-Piracy Court in Somalia.[239] Moreover, it should be considered whether EU NAVFOR state courts can exercise jurisdiction over such cases through some form of state-agent doctrine, or, at least, whether the Council of the EU can amend its relevant Joint Actions regarding Somali piracy in order to mandate independent administrative mechanisms within EU NAVFOR itself.

Second, due-process obligations require sufficient mechanisms for independent, *ex post* review. Even during times of emergency, operational debriefings by forces in the field cannot be the ultimate review procedure.[240] In contrast to regular law enforcement measures, in which

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[235] GC 29, *supra* note 194, ¶¶ 14-15.

[236] See *supra* note 96 and the cases cited therein.

[237] *See, e.g.*, Security Council Committee Established Pursuant to Resolutions 1267 (1999) & 1989 (2011); Concerning Al-Qaida and Associated Individuals and Entities, Guidelines of the Committee for the Conduct of its Work (Apr. 15, 2013), *available at* http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf.

[238] *Cf.* Basic Principles, *supra* note 34, art. 10 (providing that advance warning must be given prior to use of force in law enforcement operations "unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident").

[239] Such courts are contemplated in Somalia, Seychelles, Kenya, Mauritius, and Tanzania. *See* U.N. Secretary-General, *Report of the Secretary-General on Specialized Anti-Piracy Courts in Somalia and other States in the Region,* U.N. Doc. S/2012/50 (Jan. 20, 2012) (reporting on the progress and problems in the establishment of such courts).

[240] *See, e.g.*, Turkel Report, *supra* note 19, at 378-83 (discussing the problems of operational debriefings as a basis for legal conclusions).

criminal property cannot be forfeited or destroyed absent a decision by a competent court, FDOs result in *destroyed* property.[241] Therefore, questions arise concerning compensation for loss of "innocent" property.[242] In the Somali example, there are two main potential forums where such proceedings can take place. The first is the ECtHR. However, due to some of the Court's aforementioned jurisprudence, it remains unsettled whether this route will be available to claimants.[243] The second option is, again, state courts, such as Somali Anti-Piracy Courts. In such a scenario, the Somali government as the entity authorizing these actions (or even foreign states directly, if they consent to such procedures) would answer challenges to specific FDOs. While it is politically unlikely that EU NAVFOR states would be willing to answer to such courts – and might even invoke sovereign immunity to block such proceedings – they might have to agree to some method of review in order to bring their actions into conformity with the international rule of law.

CONCLUSION

This Article sought to offer a legal framework through which to assess forcible disruption operations, meaning quasi-hostile acts in which criminal objects are targeted and destroyed by forcible means while the persons making use of these objects are deliberately spared. While the Article addressed, as a detailed case-study, the overlooked EU NAVFOR operation of May 15th, 2012, its conclusions are applicable to similar future scenarios. These might indeed arise, considering the relationship between state-failure and criminal activity and the temptation to employ forcible means, such as drones, in law-enforcement scenarios.

Beyond presenting a comprehensive framework under which FDOs can be analyzed, this Article highlighted the surprising legal situation, in which IHRL might allow, in exceptional circumstances, what IHL forbids – as the former distinguishes between the treatment of persons (protected by the higher right to life) and that of objects (protected "only" by rights derogable in times of emergency, such as due-process). This conclusion can promote the reconciliation between the different "camps" found in the international legal community, as it demonstrates that in extraordinary circumstances of national emergency – and assuming that stringent requirements are met – IHRL can serve as an enabling normative system, rather than strictly a constraining one.

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[241] *See supra* Section I.A.

[242] Indeed, a related obligation is envisioned in UNCLOS. *See* UNCLOS, *supra* note 55, art. 106.

[243] *See* Banković v. Belgium, 2001-XII Eur. Ct. H.R. 333, ¶¶ 59–61, 70–71, 75, 82.