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# *Justa piratica*: the ethics of piracy

JAMES PATTISON\*

**Abstract.** There has been widespread and vociferous condemnation of Somali piracy and several states have used force against the pirates. This reflects the prevailing view of pirates as belligerents and aggressors who act wrongly. In this article, I challenge this view by defending the conditional moral permissibility of piracy. More specifically, I first argue that piracy can be morally permissible when certain conditions are met. These are what I call the principles of ‘*justa piratica*’, that is, the principles of just piracy. Second, I claim that these conditions are likely to apply to some Somali pirates. Third, as a corollary, I argue that the case of piracy shows that one of the shibboleths of Just War Theory – that a war cannot be just on both sides – is mistaken.

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In recent years, there has been a notable increase in the number of pirates operating off the Gulf of Aden. Whilst the Transitional Federal Government has been struggling to establish supremacy and the rule of law, Somali pirates have been targeting international shipping lanes as far as 1,100 nautical miles away. The pirates have used speedboats, sometimes launched from larger motherships, and are often well equipped (for example, with GPS systems) and heavily armed (for example, with RPGs). Once they have captured a vessel, they have typically sailed it back to the port towns of Harardhere, Hobiyo, Kulub, and Eyl, and taken hostages ashore. The International Maritime Bureau estimates that in, 2011, there were 439 attacks

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by pirates worldwide (with Somali pirates launching approximately 54 per cent of the attacks) and 45 ships were hijacked with over 800 hostages taken.<sup>1</sup> In 2012, it reports that there were 297 attacks (25 per cent of which were by Somali pirates).<sup>2</sup>

The international community has been vociferous in its condemnation of the attacks. For instance, piracy off the Gulf of Aden has been classified as a ‘global menace’ in a recent speech by the UN Secretary General, Ban Ki-Moon.<sup>3</sup> Military action has also been taken against the pirates. States such as China, India, Iran, and Russia have deployed their navies and aircraft. In 2008, the EU launched operation EUNAVFOR Somalia-Operation ATALANTA, including surface combatants (for example, destroyers and frigates), auxiliary ships, and maritime patrol and reconnaissance aircraft, as well as around 2,000 military personnel. In 2009, NATO launched Operation Allied Ocean Shield and states set up the (US-led) Combined Task Force 151 to tackle piracy.

On what I will call the ‘Orthodox View’, those using force against the pirates have right on their side. On this view, the pirates are the aggressors who lack the authority to declare and to conduct force. They use force without just cause to steal property from the international shipping companies and others and, in doing so, take innocent hostages, all for their own enrichment. Whereas the pirates act impermissibly, those using force against the pirates act with moral justification. They help the innocent subjects of the pirate attacks to retain what is rightfully theirs by deterring attacks or by using force only against those liable to attack anyway. The pirates, by being engaged in acts of piracy, are liable and so are permissible targets.

The Orthodox View is the prevailing view of pirates in general in the international system.<sup>4</sup> As Lars Erslev Andersen notes, the war against the Somali pirates is politically uncontroversial, attracting numerous UN Security Council resolutions, and there has even been a coordination of efforts between states that otherwise have hostile relationships.<sup>5</sup> Commenting on this effort, Donna Hopkins, the Chair of the Contact Group on Piracy off the Coast of Somalia, has recently claimed that ‘[t]he simple fact is that everyone hates pirates’.<sup>6</sup> Despite states’ relatively sizable anti-piracy efforts, the vast areas of ocean within which the pirates operate and the limited naval resources for anti-piracy measures make it difficult to guard fully against pirate attacks. Such is the prevalence of the Orthodox View that private military and security companies (PMSCs) – who are themselves agents whose use

<sup>1</sup> International Maritime Bureau, ‘Piracy Attacks in East and West Africa Dominate World Report’, *ICC Commercial Crime Services* (19 January 2012), available at: {[www.icc-ccs.org/news/711-piracy-attacks-in-east-and-west-africa-dominate-world-report](http://www.icc-ccs.org/news/711-piracy-attacks-in-east-and-west-africa-dominate-world-report)} accessed 31 May 2013.

<sup>2</sup> ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: Report for the Period, 1 January–12 December 2012* (London: ICC International Maritime Bureau, 2013), p. 24.

<sup>3</sup> Ban Ki-Moon, ‘Remarks at Launch of World Maritime Day Theme for 2011: “Piracy: Orchestrating the Response”’, *UN News Centre* (4 February 2011), available at: {[www.un.org/apps/news/infocus/speeches/statements\\_full.asp?statID=1065](http://www.un.org/apps/news/infocus/speeches/statements_full.asp?statID=1065)} accessed 31 May 2013.

<sup>4</sup> This orthodoxy is also noted by Gilberto Carvalho Oliveira, ‘The “New Wars” at Sea: A Critical Transformative Approach to the Political Economy of Somali Piracy’, *Security Dialogue*, 44:1 (2013), p. 5.

<sup>5</sup> Lars Erslev Andersen, ‘Piracy in the Gulf of Aden: Reflections on the Concepts of Piracy and Order’, in Nanna Hvidt and Hans Mouritzen (eds), *Danish Foreign Policy Yearbook 2009* (Copenhagen: Danish Institute for International Studies, 2009), p. 80.

<sup>6</sup> Shashank Bengali, ‘Suspected Pirates Face Unprecedented Trial in U.S. Court’, *Los Angeles Times* (1 June 2013).

raises several moral concerns – have increasingly been employed in a variety of roles to help fill gaps in states' anti-piracy efforts.<sup>7</sup>

The Orthodox View has also been the predominant image presented throughout the history of piracy. For instance, Cicero claims that pirates are 'the common enemy of every race and nation' and William Blackstone asserts that a pirate has 'reduced himself afresh to the savage state of nature'.<sup>8</sup> For Hugo Grotius, pirates fight an unjust private sea war; he (indirectly) refers to them as 'worthy objects of universal hatred' since they are 'harmful to all mankind'.<sup>9</sup> By contrast, those (for example, Francis Drake) who attacked and robbed with the state's authorisation – privateers – have been frequently commended for their efforts.

This article challenges the Orthodox View by defending the conditional permissibility of piracy. More specifically, it first argues that piracy can be morally permissible when certain conditions are met. These are what I call the principles of '*justa piratica*', that is, the principles of just piracy. Second, the article claims that these conditions are likely to apply to *some* Somali pirates (and, potentially, pirates in other areas). It follows that certain (although *not all*) pirates act permissibly. It may also seem to follow that those using force against the pirates – navies and PMSCs – act impermissibly. However, although some pirates may act permissibly, I also argue that there is a case for attempting to prohibit piracy *in general*. As a corollary, those using force against the pirates – navies and PMSCs – may also act permissibly. Third, the resulting conflict, I suggest, has a major implication for the way that we think about Just War Theory in general: *pace* the view of many, a war *can* be just on both sides. To that extent, although the article is generally concerned with Non-ideal Theory (that is, it is largely an exercise in applied political theory) in that it focuses on the moral permissibility of piracy and the responses to it, it also considers more broadly whether some aspects of the prevailing ethics of war require some re-evaluation.

Before beginning, some points of clarification are required. First, I define a pirate as 'someone who attacks and robs a ship at sea'.

Second, I follow Jeff McMahan in viewing the ethics of war (and Just War Theory) as essentially an extension of moral and political philosophy to war and the use of force more generally, rather than requiring a separate moral theory for warfare.<sup>10</sup> Consequently, even though piracy may not, strictly speaking, involve situations of war (defined as interstate or intergroup armed conflict), on such an approach it is still valid to apply the principles of Just War to piracy (as I do in the next section), given that it involves the use of force and similar ethical dilemmas to that of war.

<sup>7</sup> On the problematic use of PMSCs for anti-piracy, see Scott Fitzsimmons, 'Privatizing the Struggle against Somali Piracy', *Small Wars & Insurgencies*, 24:1 (2013), pp. 84–102; Carolin Liss, 'Privatising the Fight against Somali Pirates', *Murdoch Working Paper No.152* (2008); and Christopher Spearin, 'Against the Current? Somali Pirates, Private Security, and American Responsibilization', *Contemporary Security Policy*, 31:3 (2010), pp. 553–68. I consider the more general ethical problems raised by the use of PMSCs in various publications, including James Pattison, 'Just War Theory and the Privatization of Military Force', *Ethics & International Affairs*, 22:2 (2008), pp. 143–62; James Pattison, 'Deeper Objections to the Privatisation of Military Force', *Journal of Political Philosophy*, 18:4 (2010), pp. 425–47; and James Pattison, *The Morality of Private War: The Challenge of Private Military and Security Companies* (Oxford: Oxford University Press, under contract).

<sup>8</sup> Peter Hayes, 'Pirates, Privateers and the Contract Theories of Hobbes and Locke', *History of Political Thought*, 29:3 (2008), p. 461.

<sup>9</sup> Hugo Grotius, *Commentary on the Law of Prize and Booty*, ed. Martine Julia van Ittersum (Indianapolis: Liberty Fund, 2006), p. 449.

<sup>10</sup> Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009) is essentially a defence of this view.

Third, although space precludes defending this position here, I also follow McMahan in adopting an account of Just War Theory that is ultimately concerned with the moral justifiability of individuals' *ad bellum* and *in bello* actions. This contrasts to the more collectivist, Walzerian approaches to Just War that focus on whether individuals are members of the armed forces.

Fourth, it is worth highlighting further the prevalence and potency of the Orthodox View. The Orthodox View is so ingrained that under the United Nations Convention on the Law of the Sea (UNCLOS) not only is piracy prohibited, states have a right to visit ships suspected of piracy, have universal jurisdiction on the high seas to seize pirate ships and to arrest suspected pirates, and, in fact, are legally *obliged* to cooperate in the repression of piracy.<sup>11</sup> Such is the force of the Orthodox View that, as Carl Schmitt notes, labelling an enemy as a 'pirate' (such as German submarine crews in the Nyon agreement in 1937) entails that they lack rights and fall in a grey zone between war and peace.<sup>12</sup> For instance, in defence of US anti-terror policies during the height of the War on Terror, John Yoo, the deputy assistant US attorney general in the George W. Bush Administration, reportedly compared alleged terrorists to pirates, with the latter being used as an example of those who possess no legal rights.<sup>13</sup> To be sure, although the Orthodox View predominates, some scholars still show sympathy towards the plight of the Somali pirates.<sup>14</sup> In this article, I do not simply show sympathy for the plight of Somali pirates, but, further, claim that some pirates act morally permissibly. (One may maintain sympathy for pirates' actions because, for instance, one holds that piracy is caused in part by poverty, but still deny the permissibility of their resort to piracy.)

Fifth, it is also worth noting that, although the Orthodox View has prevailed historically, piracy has also sometimes been tolerated. According to Bryan Mabee, the lines between piracy and privateering often blurred in the past.<sup>15</sup> He argues that piracy and privateering is best seen as a continuum of private violence that was tolerated and flourished whilst it was seen as economically useful in a mercantilist system based on plunder and exclusivity. He suggests that the shift away from private violence – and so towards the Orthodox View – was because of the move towards a free-market, capitalist system where merchants needed to be protected and global trade was increasing important (as well as because of shifts in naval warfare). Similarly, the case against piracy now – and in defence of the Orthodox View – is often presented in economic terms, with critics typically highlighting the effects of piracy on global trade and the need for the protection of merchant ships (even by hiring PMSCs).

<sup>11</sup> See Articles 100–10 of UNCLOS, available at: {[www.un.org/depts/los/convention\\_agreements/texts/unclos/part7.htm](http://www.un.org/depts/los/convention_agreements/texts/unclos/part7.htm)} accessed 31 May 2013.

<sup>12</sup> Carl Schmitt, 'The Concept of Piracy', *Humanity: An International Journal of Human Rights, Humanitarianism, and Development*, 2:1 (2011, 1937), pp. 27–9. This point is noted by Walter Rech, 'Rightless Enemies: Schmitt and Lauterpacht on Political Piracy', *Oxford Journal of Legal Studies*, 32:2 (2012), p. 252.

<sup>13</sup> Jane Mayer, 'Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program', *The New Yorker* (8 February 2005).

<sup>14</sup> See, for example, Axel Klein, 'The Moral Economy of Somali Piracy – Organised Criminal Business or Subsistence Activity?', *Global Policy*, 4:1 (2013), pp. 94–100; and Abdi Ismail Samatar, Mark Lindberg, and Basil Mahayni, 'The Dialectics of Piracy in Somalia: The Rich versus the Poor', *Third World Quarterly*, 31:8 (2010), pp. 1377–94.

<sup>15</sup> Bryan Mabee, 'Pirates, Privateers and the Political Economy of Private Violence', *Global Change, Peace & Security*, 21:2 (2009), p. 140.

## The principles of *justa piratica*

To help make the intuitive case for the permissibility of piracy, I will present two examples. First, consider *Starving*.

*Starving*: For several years, a fisherman catches just enough to feed himself and to pay for the basic commodities that he needs to live. However, his fishing net has suffered from wear and tear, and now has so many holes that it is no longer effective. He cannot afford to buy a new net and, as a result, cannot feed himself or provide for himself. There is no welfare state or international aid programme to step in to fulfil his basic needs. There are no other ways that he can make a living (fishing is his only skill and there are very few jobs in his community). So, along with some other fishermen in a very similar situation, he decides to use his boat to hijack a container vessel, which is carrying goods from Rich State A to Rich State B. These states are helping to maintain a grossly unjust international system that is to some extent responsible for his impoverishment. The pirates board the container vessel. They use their weapons only as a last resort when those on the container vessel attack them. They obtain a sizable ransom, which they use to maintain only a minimally decent – rather than opulent – lifestyle.

Intuitively, the soon-to-be-starving pirate acts permissibly. This is because, to put it simply, he has little choice but to be a pirate. His resort to piracy does not stem from a desire for personal enrichment but, rather, the intent to ensure that he possesses the commodities required to survive.

Now consider a second case:

*Theft*: A local fishing community is subject to the periodic theft of crops by a rich, neighbouring state. The crops are crucial for the sustainability of the community and the survival of those within it. The community's state lacks the ability to fend off the attackers. The community members decide to take matters into their own hands. They form a small fleet and use armed force to fend off attacks by the neighbouring state when its ships are in their territorial waters. This reactive method has only very limited success. So, they attack and rob proactively any ships from the neighbouring state that are of the same type and that are in the relative vicinity of the community. This more aggressive stance deters the attackers.

Like in *Starving*, the community members of *Theft* act permissibly. In short, necessity forces them to be pirates.

From these two examples, we can begin to flesh out the principles of *justa piratica*. When these principles are met, it can be morally permissible to use force to rob or to demand ransom at sea. The principles of *justa piratica* are not meant to be particularly novel or revisionist; rather, they are essentially the principles of Just War applied to piracy. As such, I will largely assert, rather than defend in detail, each principle. It should also be noted that these principles are not intended to exhaust the moral considerations concerning the permissibility of the resort to piracy and the just conduct of acts of piracy; I focus on only the main moral considerations.

*Just cause for resort to piracy*. The basic needs of the pirate (or of another individual, such as a family member or neighbour) must be unfulfilled or being denied by another to a significant extent, such as that their survival is seriously at risk unless they address their current situation. As such, the right to resort to piracy derives from the right to basic needs, which can be protected by defensive force when the requisite conditions are met.<sup>16</sup>

<sup>16</sup> There may potentially be other just causes for the resort to piracy, such as to obtain some of the conditions that are necessary to enjoy a decent life. In this article, I leave such causes aside and concentrate on basic needs since this seems least controversial.

*Right intention and right motive.* The pirate should intend predominantly to achieve the just end for the right underlying reasons and not for the wrong ones. More specifically, they should intend predominately to achieve the just cause (for example, the tackling of their impoverished situation) (right intention). In doing so, they should be motivated by the appropriate underlying reasons (right motive) and not possess predominately wrong ones, such as bloodlust or personal enrichment.<sup>17</sup>

*Piracy as the last resort.* This is not meant literally, but rather has two elements (both elements apply to the initial resort to piracy and to particular acts during the pirate attack).<sup>18</sup> The first is necessity. There must be no other reasonable options open to the pirate. They cannot permissibly resort to pirating if they could meet their basic needs by, for instance, pursuing other, legitimate forms of employment. The second is that the pirate should be cautious in their use of force. In practice, this may mean that they should sometimes look to other options first, short of piracy, such as campaigning, pleading, and so on, even if these options are less likely to be effective than the resort to force. This is because of the difference between doing and allowing; it is better to allow harm than to cause it oneself. Given that the difference between doing and allowing is not of absolute moral significance, individuals may still permissibly resort to force at times. The difference between doing and allowing means simply that, where possible, the pirate should pursue non-forcible options first.

*Proportionality.*<sup>19</sup> The resort to piracy and particular uses of force during the pirate attack need to be reasonably effective at achieving the just cause, that is, tackling the situation where the pirate's (or other individuals') basic needs are currently unfulfilled, compared to other potential courses of action. In addition, the resort to piracy and the particular uses of force must be in proportion to the gravity of the situation faced by the pirate. As such, pirates should rob and hold to ransom only to the extent necessary to secure their (or others') basic needs.

*Discrimination during Piracy.*<sup>20</sup> Those subject to the attack by the pirates should be liable to it. Otherwise, the pirates would be using force against those who are not culpable and who therefore retain their right not to be subject to attack. It should be noted here that throughout the article I will suggest that liability requires at least some degree of culpability. I do not necessarily intend to endorse the culpability approach over McMahan's 'responsibility account', which requires that agents be only what Seth Lazar calls 'agent-responsible' for liability (that is, those who voluntarily choose to engage in the threatening practice and meet the criteria for rational agency).<sup>21</sup> Rather, I frame the article in terms of culpability so that my case for the potential permissibility of piracy will appeal to both those who adopt the culpability approach and those who endorse the responsibility account (culpability is the more restrictive of the two and the harder standard for my case to meet).

<sup>17</sup> Note here that I draw a distinction, common in other fields (for example, criminal law), between an agent's intentions and their motives. An agent's intention is the objective or purpose that they wish to achieve with their action. On the other hand, their motive is their underlying reason for acting. See James Pattison, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (Oxford: Oxford University Press, 2010), pp. 154–6.

<sup>18</sup> To some extent, I build upon here John Lango, 'The Just War Principle of Last Resort: The Question of Reasonableness Standards', *Asteriskos: Journal of International and Peace Studies*, 1:1–2 (2007), pp. 7–23.

<sup>19</sup> Note that I revise this principle below.

<sup>20</sup> Note that I claim below that this is not a strict principle.

<sup>21</sup> Seth Lazar, 'Responsibility, Risk, and Killing in Self-Defense', *Ethics*, 119:4 (2009), p. 706.

## The Somali case

Having outlined the principles of *justa piratica*, I will now suggest that these principles may apply to Somali pirates. My aim is to show that it is reasonable to hold that *some* Somali pirates meet the conditions outlined above. In arguing that some pirates are likely to act permissibly, I am not claiming that *all* Somali pirates or even that *many* of them are likely to act permissibly. Some clearly violate the above principles and so do not. I should also add that I am not claiming that only some *Somali* pirates are likely to act permissibly. Other pirates, throughout history and more recently (for example, in the Gulf of Guinea), may have also acted permissibly.<sup>22</sup>

Let us start with just cause. First, there have been notable cases of illegal fishing in Somali waters. This threatens the livelihoods of Somali fishermen and ultimately their survival. The absence of an effective government to protect the waters around Somalia has left its population vulnerable to illegal shippers.<sup>23</sup> Local fishermen have been forced out of the market by industrial foreign fishing operations that, in effect, steal their fish.<sup>24</sup> An estimated \$300 million of fish are poached in Somali waters by trawlers from states such as Taiwan and Spain.<sup>25</sup> For instance, in 2005, an estimated 700 foreign trawlers operated in Somali waters.<sup>26</sup>

Second, the absence of an effective government in Somalia has also enabled the discarding of toxic waste by Western companies in Somali waters. This has been dumped on isolated beaches or has washed ashore, and has caused significant harm to individuals in local fishing communities.<sup>27</sup> For instance, people in the towns of Hobbio and Benadir have suffered from high levels of respiratory infections, mouth ulcers and bleeding, abdominal haemorrhages, and unusual skin infections.<sup>28</sup>

Third, even in cases where there is not illegal fishing or toxic dumping, the extreme poverty of much of Somalia means that the just cause principle is likely to be met. Many Somalis are in dire need. They lack the means for subsistence and have few alternative options to remove themselves from their extreme poverty. According to the *Millennium Development Goals Progress Report for Somalia 2010*, in 2002 (the last date from which data is available) 73.4 per cent of Somalis lived on less than US \$2 Purchasing Power Parity (PPP) per day, 43.2 per cent of Somalis lived on less than US \$1 PPP per day, and 71 per cent of Somalis did not meet the minimum dietary energy consumption of 1,600 kca/day. As such, there is a strong likelihood that many of the pirates (or the other Somalis the pirates are attempting to assist) would otherwise be extremely impoverished and the fulfilment of their basic needs would not be met, and ultimately their survival would be under threat.

<sup>22</sup> I consider this point further at the end of this section.

<sup>23</sup> See Martin N. Murphy, *Somalia: The New Barbary? Piracy and Islam in the Horn of Africa* (London: Hurst & Co., 2011), p. 18.

<sup>24</sup> David Axe, *Somali, Redux: A More Hands-Off Approach*, Cato Institute (2009), available at: {[www.cato.org/pubs/pas/pa649.pdf](http://www.cato.org/pubs/pas/pa649.pdf)} accessed 31 May 2013, p. 6.

<sup>25</sup> Lehr, 'A Western Armada'.

<sup>26</sup> Sarah Percy and Anja Shortland, 'The Business of Piracy in Somalia', *Journal of Strategic Studies*, 36:4 (2013), p. 545, fn. 27.

<sup>27</sup> See Murphy, *Somalia*, p. 21. Also see Jonathan Clayton, 'Somalia's Secret Dumps of Toxic Waste Washed Ashore by Tsunami', *The Times* (4 March 2005). Claims of toxic dumping are also made by the pirates and the local community. See Jay Bahadur, *The Pirates of Somalia: Inside their Hidden World* (rev. edn, New York: Vintage Books, 2011), p. 183.

<sup>28</sup> Clayton, 'Somalia's Secret'.



Although the Somali pirates may act in circumstances where there is just cause, for their action to be permissible they also need to intend predominately to tackle the just cause for the right underlying reasons. For *some* pirates at least – and more clearly for those who act in direct response to illegal fishing and dumping – this does seem to be the case. Some certainly *claim* that this is their purpose and reason for action. For instance, convicted pirate Jamal Akhmed states that '[w]e are not pirates ... We are gentlemen, defending our shores against foreign fisherman. It did become a business, but it was forced upon us because we were attacked. We have bills to pay and families to care for.'<sup>29</sup> Indeed, in response to illegal fishing certain pirate groups identify themselves as the defenders of Somali fishermen and adopt names such as the 'National Volunteer Coast Guard of Somalia' or 'Somali Marines'.<sup>30</sup> More specifically, it has been widely claimed that piracy in Somalia began as a response to illegal fishing, with the pirates boarding foreign fishing vessels and sometimes demanding a small fee of only a few hundred dollars.<sup>31</sup> It was only later that pirate bands started targeting larger commercial ships from which bigger ransoms could be obtained.

Yet, in response to such claims, Stig Jarle Hansen argues that 'Somali piracy is first and foremost profit driven'.<sup>32</sup> This is because, he argues, pirate attacks against fishing boats now comprise only a small amount of the recorded attacks.<sup>33</sup> Pirates instead target larger, more profitable ships, such as cargo ships.<sup>34</sup> To that extent, pirates' claims for justification might be seen as delusional self-rationalisation or as an attempt to develop a narrative to legitimise piracy in the local area.<sup>35</sup> In similar vein, Ken Monkhaus argues that, although pirates were originally interested in protecting Somali waters, 'Somali piracy is a textbook case of a shift in the motives of an armed group from grievance to greed'.<sup>36</sup>

There are three points to note in reply to these suggestions. First, attacks against illegal foreign fishing boats may be underreported, because, for instance, of the embarrassment of being discovered in Somali waters.<sup>37</sup>

<sup>29</sup> Andrew Harding, 'Postcard from Somali Pirating Capital', *BBC News*, (16 June 2009), available at: {news.bbc.co.uk/1/hi/world/africa/8103585.stm} accessed 31 May 2013. See, further, Bahadur, *The Pirates of Somalia*, who details discussions with numerous pirates where they claim that responding to illegal fishing is their rationale. Also see Murphy, *Somalia*, p. 25.

<sup>30</sup> Peter Lehr, 'A Western Armada is Not the Way to Sink Somalia's Pirates', *The Guardian* (19 November 2008).

<sup>31</sup> Murphy calls this 'defensive piracy', *Somalia*, p. 17. Also see Axe, *Somali, Redux*, p. 6; Martin N. Murphy, 'The Troubled Waters of Africa: Piracy in the African Littoral', *Journal of the Middle East and Africa*, 2:1 (2011), pp. 65–83; and Samatar, Lindberg, and Mahayni, 'The Dialectics of Piracy in Somalia'.

<sup>32</sup> Stig Jarle Hansen, 'The Dynamics of Somali Piracy', *Studies in Conflict & Terrorism*, 35:7–8 (2012), p. 523. Also see Stig Jarle Hansen, 'Debunking the Piracy Myth: How Illegal Fishing Really Interacts with Piracy in East Africa', *The RUSI Journal*, 156:6 (2011), pp. 26–30.

<sup>33</sup> Indeed, fishing vessels are not reported to be the main attack of pirates in general (with only five reported attacks in 2012). ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships*, p. 14.

<sup>34</sup> As Justin Hastings puts it, 'cargo ships attacked hundreds of miles from Somalia's coast have little to do with illegal fishing', 'Understanding Maritime Piracy Syndicate Operations', *Security Studies*, 21:4 (2012), p. 687.

<sup>35</sup> Hansen, 'Debunking the Piracy Myth', p. 30. Bahadur, *The Pirates of Somalia*, also generally doubts the genuineness of several pirates' claims to be acting in response to illegal fishing.

<sup>36</sup> Ken Monkhaus, 'Dangerous Waters', *Survival: Global Politics and Strategy*, 51:1 (2009), p. 23.

<sup>37</sup> Murphy, 'The Troubled Waters of Africa', p. 78. Peter Chalk and Stig Jarle Hansen suggest that underreporting may be by as much as 50 per cent, 'Present Day Piracy: Scope, Dimensions, Dangers, and Causes', *Studies in Conflict & Terrorism*, 35:7–8 (2012), p. 499. The point about embarrassment is made by Hansen, 'Debunking the Piracy Myth', p. 28.

Second, pirates who target boats which are not illegally fishing, such as cargo ships, may do so in response to the other potential just causes, such for reasons of extreme poverty. As Martin Murphy notes, there are various accounts of the reasons of the evolution of Somali piracy.<sup>38</sup> One account is what he calls the ‘adaptive explanation’, which asserts that ‘self-protection groups turned their attention to unarmed commercial vessels as the only option left open to them to make a living’.<sup>39</sup> It should also be recalled here that the right intention and right motive principle does not require agents to have a *pure* intention and motive, but rather that the *predominant* intention and motive be to use force to achieve the just cause for appropriate underlying reasons. Consequently, the pirates’ attempting to achieve a larger ransom may still be consistent with this principle, providing that tackling the just cause is their central purpose and reason for their action. In fact, where the just cause is the pirate’s own situation of need, it should generally be expected that they meet this condition. This is because, presumably, an individual who faces a situation where their survival is under threat will be primarily concerned with tackling this situation. Enrichment is likely to be a secondary objective and reason for action, relevant only once the central objective of meeting their basic needs has been met. As Hansen also notes, pirates are eager to retire as soon as possible and many cease piracy once they obtain a minimum earring threshold of \$50,000.<sup>40</sup> This suggests that they are may be influenced primarily by their desire to meet the conditions necessary to meet their basic needs over their lifetime. To reiterate, I am not claiming that responding to illegal fishing or poverty are the *only* reasons for the pirates’ actions. My point, rather, is that such just causes can sometimes be expected to be predominant reasons, given potential pirates’ likely predicament.<sup>41</sup>

It is not only the dire predicament that pirates find themselves that supports this claim. The riskiness of piracy and the relatively low returns also do. In this context, Axel Klein argues that earnings are achieved at a high risk since sometimes pirates are killed in shootouts with naval forces, die on the open sea when their boats become disabled and their supplies run out, and are arrested and imprisoned.<sup>42</sup> Moreover, he argues, the earnings of individual pirates are often shared because of the prevailing ethos of social responsibility for family and clan. According to Klein, piracy is therefore ‘a high risk, low yield survival strategy’ and, as such, should be seen as a subsistence activity rather than a business motivated by profit.<sup>43</sup>

Third, there are also notable differences between: (i) pirate groups and (ii) members of the same group of pirates. The pirate groups are heterogeneous, varying from a small subsistence group of a father and a son, to larger groups of 200 individuals,<sup>44</sup>

<sup>38</sup> Murphy, *Somalia*, p. 18.

<sup>39</sup> *Ibid.*, p. 25.

<sup>40</sup> Stig Jarle Hansen, *Piracy in the Greater Gulf of Aden: Myths, Misconception and Remedies*, Norwegian Institute for Urban and Regional Research (2009), p. 35. It should be noted that, in various publications, Hansen rejects strongly the suggestion that poverty is the *sole* cause of piracy. For instance, he argues that the areas in which piracy has been concentrated are ‘comparatively rich’, ‘The Dynamics of Somali Piracy’, p. 527. Rather, he argues that, in general, piracy is explained mainly by six factors, one of which is poverty (the others are culture, exclusion and relative deprivation, organisational sponsorship, failure of counter-strategies, and weak/weakening state/institutional structures), *Piracy in the Greater Gulf of Aden*, p. 7.

<sup>41</sup> To be sure, when the just cause is others’ dire situation, there is a weaker case for presuming that the pirate will meet the requirement of right intention and right motive.

<sup>42</sup> Klein, ‘The Moral Economy of Somali Piracy’, p. 96.

<sup>43</sup> *Ibid.*, pp. 96, 98.

<sup>44</sup> Hansen, *Piracy in the Greater Gulf of Aden*, p. 34.

with the latter often comprising several different actors, from the financiers in Somalia to those directly undertaking the robberies. Hence, even if Somali piracy now generally involves much more organisation (that is, in order to launch attacks 1,100 nautical miles away) and is viewed as organised criminal activity rather than a one-off response to dire need – which is contested by some – individual pirates may still act permissibly.<sup>45</sup> That is to say, responding to their dire poverty may be much more important for some pirate groups and pirate actors than for others (for example, the financiers), who may resort to piracy for other reasons. In similar vein, Hansen notes that ‘the perhaps 2000 pirates of Somalia are heterogeneous and that motivations may vary from pirate to pirate, group to group and geographical location to geographical location’.<sup>46</sup> Hence, it seems that *some* Somali pirates are likely to meet the requirements of right intention and right motive, given their claims to act in response to illegal fishing, the potential underreporting of illegal fishing, their dire poverty (which is likely to influence their reasons for action), and the riskiness of piracy.

In terms of last resort, given the conflict and levels of poverty in Somalia, there will tend to be a lack of reasonable alternatives for the pirates and, as such, piracy is largely a matter of necessity. In addition, until recently at least, many pirates have been cautious in their use of force, both in their initial resort to piracy and in their particular uses of force during the attack. They limit the use of force when seizing a vessel, trying not to fire anything more than warning shots.<sup>47</sup> In addition, according to a EUNAVFOR intelligence officer, it is questionable whether pirates would murder a captive in cold blood (although there is a notable risk of harm to hostages if one of the pirates is killed during the ransom negotiations).<sup>48</sup> Several pirates also claim that they have acted with restraint and try to avoid violence. Boyah, who has been one the most notorious pirates, states that ‘[w]e’re not murderers ... we’ve never killed anyone, we just attack ships’.<sup>49</sup> Another pirate, Ombaali, claims that his group gave their hostages ‘the best treatment ... We never stole anything from them, even their cellphones’.<sup>50</sup> Such claims of adequate treatment have been corroborated by the reports of hostages.<sup>51</sup> The reason for avoiding deliberate harm to hostages, according to Sarah Percy and Anja Shortland, is that the business is ransoms.<sup>52</sup> In short, the hostages are the booty. They therefore need to be protected in order to secure ransoms. In fact, Percy and Shortland argue that there appears to be an agreed (apparently written) code of conduct for Somali pirates, which largely excludes violence and bans the mistreatment of hostages.<sup>53</sup> It is perhaps likely, then, that some pirates will meet the requirements of last resort.<sup>54</sup>

<sup>45</sup> See Percy and Shortland, ‘The Business of Piracy’ for the organised criminal activity claim. This is contested by Klein, ‘The Moral Economy of Somali Piracy’, and Hansen, *Piracy in the Greater Gulf of Aden*, p. 41, who argues that pirate groups lack the advanced structures suggested by many observers.

<sup>46</sup> Hansen, *Piracy in the Greater Gulf of Aden*, p. 12.

<sup>47</sup> The Economist, ‘Piracy: No Stopping Them’, *The Economist* (3 February 2011), available at: {[www.economist.com/node/18061574/](http://www.economist.com/node/18061574/)} accessed 31 May 2013.

<sup>48</sup> Frank Gardner, ‘Growing Risk of Deaths’ at the Hands of Somali Pirates’, *BBC News* (4 October 2010), available at: {[www.bbc.co.uk/news/world-africa-11470238](http://www.bbc.co.uk/news/world-africa-11470238)} accessed 31 May 2013.

<sup>49</sup> Bahadur, *The Pirates of Somalia*, p. 19.

<sup>50</sup> *Ibid.*, p. 61.

<sup>51</sup> *Ibid.*, pp. 205–21.

<sup>52</sup> Percy and Shortland, ‘The Business of Piracy’, pp. 556–7. Also see Murphy, *Somalia*, p. 106.

<sup>53</sup> Percy and Shortland, ‘The Business of Piracy’, p. 557.

<sup>54</sup> This is not to deny that the pirates can be violent. Perhaps the incident that has captured most media attention was the killing of four Americans on a yacht (it is unclear whether this was in response to a US attack to free the hostages). See Ewen MacAskill and Xan Rice, ‘Somali Pirates Kill Four US Hostages’, *The Guardian* (22 February 2011). It has also been widely reported that the pirates have become more violent since 2010.

Is the use of force by the Somali pirates proportionate? In many cases, although a particular attack may not be successful, the resort to piracy in general seems likely to be successful at meeting the pirate's (or others') basic needs. Indeed, piracy has been largely successful at promoting the basic needs of many individuals in the area's coastal regions. Fish stocks have benefited significantly from piracy in the region, with commercial trawlers (and potential thieves) from states such as China and Japan being scared off.<sup>55</sup> This has enabled previously very poor dhow villages on the coasts of Kenya and Somalia to increase their wealth significantly. In addition, the redistribution of the ransom monies, discussed below, has led to notable increases in wealth in certain Somali towns, most notably Eyl. For instance, a mother of five in Haradhere states that '[r]egardless of how the money is coming in, legally or illegally, I can say it has started a life in our town ... Our children are not worrying about food now, and they go to Islamic schools in the morning and play soccer in the afternoon. They are happy'.<sup>56</sup> In her Chatham House study of the economic effects of Somali piracy, Anja Shortland argues that that Somali piracy has led to widespread and significant positive effects on the Somali economy, including increased employment and higher wages.<sup>57</sup>

Moreover, the acts of piracy in several cases are in proportion to the severity of the situation in which the pirates find themselves. Given that just cause requires that the pirate's (or others') basic needs be currently unfulfilled – an extremely serious situation – most acts of piracy that meet the just cause requirement will also be proportionate in this sense. Their resort to piracy is in response to a very grave situation. An important issue here, which will be discussed in the fifth section, is whether the demanding of a ransom larger than that needed to meet the pirate's (or others') basic needs can be permissible. It may appear that pirates should rob and demand only as much ransom as is necessary to secure their survival. To rob or to demand a ransom much more than is necessary to meet one's basic needs (for example, for several millions of dollars) *may* appear to be disproportionate (although I will deny this below) since it would go beyond what is necessary to respond to the just cause.

Establishing the fifth principle – discrimination – is perhaps trickier. It requires showing that some of those subject to the pirate attack are liable to it by, for instance: (i) upholding a morally problematic system that is responsible for the pirate's impoverishment (in the case of *Starving*) or (ii) directly harming (or threatening to harm) the fulfilment of their basic needs (in the case of *Theft*).

Let us start with the latter claim. As discussed above, there have been notable cases of: (i) illegal fishing, which threatens the livelihoods of Somali fishermen and

<sup>55</sup> Roland Marchal, 'Somali Piracy: The Local Contexts of an International Obsession', *Humanity: An International Journal of Human Rights, Humanitarianism, and Development*, 2:1 (2011), p. 47. Also see Channel 4 News, 'The "Benefit" of Somalia's Pirates', *Channel 4 News* (25 October 2009), available at: {[www.channel4.com/news/articles/world/Africa/the+aposbenefitapos+of+somaliaapos+pirates/3399027.html](http://www.channel4.com/news/articles/world/Africa/the+aposbenefitapos+of+somaliaapos+pirates/3399027.html)} accessed 31 May 2013.

<sup>56</sup> Liss, 'Privatising the Fight', p. 6. To the extent that the pirates enjoy the support of the local community, they may be viewed as similar to Eric Hobsbawm's notion of social bandits, in that they act illegally but are admired and revered by the local population. Eric Hobsbawm, *Bandits* (London: Weidenfeld & Nicolson, 2000), p. 20.

<sup>57</sup> Anja Shortland, *Treasure Mapped: Using Satellite Imagery to Track the Development Effects of Somali Piracy*, Chatham House Africa Programme Paper, AFPPP 2012/01 (2012). Several others make similar points. See, for example, Oliveira, 'The "New Wars" at Sea', p. 8. For an alternative view, see Jonathan Beloff, 'How Piracy Is Affecting Economic Development in Puntland, Somalia', *Journal of Strategic Security*, 6:1 (2013), pp. 47–54.

ultimately their survival and (ii) toxic dumping in Somali waters, which can directly harm the Somali population. It seems, then, that those responsible for illegal fishing and toxic dumping may be liable to attack.

Let us now consider the former claim – that some of those attacked by the pirates are liable because they uphold a morally problematic system that is responsible for the pirate’s impoverishment. This seems to be the case if we agree with Thomas Pogge that

[g]lobal institutional arrangements are causally implicated in the reproduction of massive severe poverty. Governments of our affluent countries bear primary responsibility for these global institutional arrangements and can foresee their detrimental effects. And many citizens of these affluent countries bear responsibility for the global institutional arrangements their governments have negotiated in their names.<sup>58</sup>

Pogge argues that this is the case for several reasons, including the following.<sup>59</sup> First, rich states have demanded asymmetrical protection of their markets, especially in the areas in which developing countries are more competitive. Second, affluent states have insisted that their intellectual property rights be enforced, despite the devastating effects of them doing so (for example, if local producers could legally manufacture drugs themselves millions of dollars would be saved). Third, the rich have been able to enjoy their dominant international position by a historical process that was pervaded by massive, grievous wrongs, including conquest, colonisation, severe repression, slavery, genocide, and the destruction of native institutions and cultures. Fourth, rich states maintain a system of resource and borrowing privileges that enable corrupt leaders to sell the natural resources of their state and to build up large debts in their states’ names. These ultimately encourage instability as potential rulers fight over the right to sell and to borrow in their states’ names.

In the case of Somalia in particular, little has been done to tackle the three decades of instability and suffering, and to remedy the negative effects of the global institutional arrangements. On the contrary, certain states, such as the US, have fuelled the conflicts in Somalia and so are in part responsible for the ensuing humanitarian crises.<sup>60</sup> In addition, many of those subject to the pirates’ attacks are international shipping companies that play a very clear role in the upholding of the unjust global economic order. The global shipping industry is responsible for the transportation of 90 per cent of the world’s trade of goods and is often claimed to be the life-blood of the global economy.<sup>61</sup> By doing so, the industry is responsible for maintaining a system that creates impoverishment in countries such as Somalia.

Thus, some of those subject to the pirates’ attack seem to be liable to it. They threaten directly the pirates or others’ basic needs (for example, by theft or toxic dumping) or they uphold a morally problematic system which is in part responsible for the impoverishment of the Somali population.

<sup>58</sup> Thomas Pogge, ‘World Poverty and Human Rights’, *Ethics & International Affairs*, 19:1 (2005), p. 5.

<sup>59</sup> Pogge, ‘World Poverty’; Thomas Pogge, *World Poverty and Human Rights* (2nd edn, Cambridge: Polity, 2008).

<sup>60</sup> Bronwyn Bruton, ‘Somalia: A New Approach’, *Council on Foreign Relations*, Special Report No. 52 (March 2010).

<sup>61</sup> International Shipping Industry, ‘Key Facts: Overview of the International Shipping Industry’, available at: {[www.ics-shipping.org/shippingfacts/home/](http://www.ics-shipping.org/shippingfacts/home/)} accessed 31 May 2013.

## Piracy beyond Somalia

I have argued, then, that the Orthodox View is mistaken, since certain Somali pirates act permissibly. But is it only in Somalia that piracy is permissible? According to the ICC International Maritime Bureau, although piracy in Somalia has recently decreased, it has increased elsewhere, such as in the Gulf of Guinea (where there were 58 recorded incidents in 2012).<sup>62</sup> There also continue to be several attacks in Southeast Asia, and in particular in Indonesian waters (where there were 81 reported attacks in 2012), and in recent decades there were several documented instances of piracy in the Malacca Straits.<sup>63</sup> Is piracy in these other areas likely to be permissible?

On the one hand, subsistence and defence against illegal fishing often seem to be contributory causes of piracy around the world (if not necessary the main ones) and also appear to motivate pirates. For instance, Southeast Asian piracy is, like in Somalia, reportedly due in part to economic hardship (for example, unemployment and financial crises).<sup>64</sup> In Nigeria, grievances have been claimed to be one of the reasons for piracy (in addition to greed), such as in response to oil companies failing to respect their agreements with coastal communities, and pirates have also (like in Somalia) claimed to be reacting to illegal fishing and pollution.<sup>65</sup>

On the other hand, it seems that instances of Somali piracy are more likely to be permissible than elsewhere. First, this is because of the *degree* of poverty in Somalia, which means that Somali pirates are likely to be in an even worse situation and so more likely to have just cause for their resort to piracy and perhaps right intention and motive. Second, elsewhere the level of violence involved in pirate attacks is often much higher (for example, in the Gulf of Guinea),<sup>66</sup> which means that the pirates are likely to fail to meet the last resort and discrimination conditions. As noted above, piracy in Somalia has often been relatively non-violent since it is ransom-based, which requires that crewmembers be treated well in order to obtain payment. Elsewhere, piracy has been much more violent partly since it adopts a bounty-based model whereby the captured goods are sold on. For instance, in the Straits of Malacca during the 1990s, pirates typically killed the crew and used existing infrastructure to sell ships and cargo.<sup>67</sup> Notwithstanding, it is certainly plausible that *particular* cases of piracy in other regions are morally permissible, given: (i) that there have been thousands of cases of piracy in recent years; (ii) that not *all* cases are violent; (iii) that it is feasible some may use force against those liable to attack; and (iv) and the poverty of several of the areas in which piracy arises (and other potential just causes).<sup>68</sup>

<sup>62</sup> The ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships*, p. 24.

<sup>63</sup> *Ibid.*, p. 5.

<sup>64</sup> Karsten Von Hoesslin, 'Piracy and Armed Robbery at Sea in Southeast Asia: Organized and Fluid', *Studies in Conflict & Terrorism*, 35: 7–8 (2012), pp. 542–52.

<sup>65</sup> Marc-Antoine Pérouse de Montclos, 'Maritime Piracy in Nigeria: Old Wine in New Bottles', *Studies in Conflict & Terrorism*, 35: 7–8 (2012), p. 535.

<sup>66</sup> ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships*, p. 21.

<sup>67</sup> Percy and Shortland, 'The Business of Piracy', p. 546. Samatar, Lindberg, and Mahayni suggest that Somali piracy differs from piracy elsewhere, given that Somalia is a failed state, 'The Dialectics of Piracy in Somalia', p. 1381.

<sup>68</sup> It is unclear whether piracy elsewhere is likely to meet the requirements of proportionality and so do not consider this condition here.

**Objection I: attacks as indiscriminate (or disproportionate)**

There are several potential objections to my rejection of the Orthodox View and to my claim that certain Somali pirates (and potentially those in other areas) act permissibly. The first objection is to deny that the pirate attacks are discriminate and/or proportionate since they use force against those who are not liable.

To start with, pirates may contravene the widely held prohibition on intentionally harming Innocent Bystanders since they sometimes use force against those who do not pose a threat to the pirates and are morally innocent, such as other Somali fisherman and those on private yachts. It might also be claimed that pirates contravene the often-held prohibition on intentionally harming Innocent Threats, that is, those who pose a threat to the pirates but are not morally culpable. Most notably, many crewmembers of cargo ships – which, as noted above, are the most frequent targets of Somali pirate attacks – come from less developed countries<sup>69</sup> and receive only a modest wage.<sup>70</sup> Accordingly, even if by their actions they pose a threat to the pirates by upholding a global economic order that harms Somalis, some of the crewmembers of cargo ships may themselves be impoverished and coerced by their own poverty into becoming a crewmember. This seems particularly to be the case for the lower-ranking crew (for example, messmen), who receive much lower income than the high-ranking officers (for example, captains) and the ship owners.<sup>71</sup>

Moreover, some of those subject to pirate attacks may be what I will call ‘Minor Contributors’, that is, those who are culpable for their contribution, but make only a small causal contribution to the threat. Pirates’ use of force against Minor Contributors may be claimed to be disproportionate to the harm that they are liable. For instance, although those in rich states may vote for a political party that advocates policies that reinforce the prevailing global injustice, this might not make it permissible to use potentially lethal force against them. In addition, in the case of *Theft*, it might seem that the proactive stance adopted by the pirates is problematic because the ship from the neighbouring state has not yet stolen from the local fishing community, even though similar ships from its state have done so. Consequently, it may appear that those on the ship therefore cannot be attacked.

It is clear, I think, that *some* acts of piracy are impermissible because they would be indiscriminate or disproportionate in some of these ways. Most notably, when pirates intentionally attack Innocent Bystanders, they act impermissibly. For instance, there are some reports of pirates attacking Yemeni dhows, killing the crew, and using the vessels as motherships.<sup>72</sup> Notwithstanding, there are four reasons why this defence of the Orthodox View more generally does not establish the impermissibility of piracy.

<sup>69</sup> George Kiourtsoglou and Alec Coutroubis argue that Filipinos comprise 26 per cent seajacked crews, despite being only 6 per cent of the seafarers. (Indian, Chinese, Thai, and Ukrainian seafarers are the next most seajacked nationalities), ‘Is Somali Piracy a Random Phenomenon?’, *Journal of Maritime Affairs*, 11:1 (2012), p. 59.

<sup>70</sup> That said, the threat of Somali piracy has meant that ship owners reportedly doubled the wages of crews. Paul Betts, ‘Somali Pirates on Private Sector Radar’, *Financial Times* (15 June 2009). Bahadur also claims that crewmembers receive hazard pay of an extra 25 to 100 per cent for serving in areas at risk of piracy, *The Pirates of Somalia*, p. 148.

<sup>71</sup> For instance, Filipino officers reportedly earn about \$2,400 per month, with captains sometimes earning more than \$10,000 per month, with lower-ranking seafarers receiving a much lower wage, ‘Philippines Becomes Supply Line for World’s Fleets’, *Asahi Shimbun* (9 October 2011).

<sup>72</sup> See Bahadur, *The Pirates of Somalia*, pp. 140–1; Hansen, *Piracy in the Greater Gulf of Aden*, p. 36.

First, and most straightforward, some of those subject to pirate attacks *are* liable. Consider the trawlers that illegally fish in Somali waters. If: (i) the crew freely choose to participate in illegal shipping and (ii) it is reasonably foreseeable such action is highly detrimental to the local Somali population, they may be acting recklessly or negligently, and so be culpable and thus liable to attack. The first condition seems particularly likely to be met by the officers (who decide to undertake the illegal fishing), but may also be met by lower-ranking crewmembers who (without coercion) agree to be on the ships likely to engage in illegal fishing. The second condition seems likely to be met by all crewmembers in this case, given that this does not require specialist knowledge (the crew are likely to know that they are acting in Somali waters that would otherwise have been fished by local fisherman). Alternatively, consider the private contractors who attempt to protect trawlers in their illegal fishing. It is a reasonable assumption that these contractors should be aware of the detrimental implications of their actions. Again, they seem to be potentially liable to attack.

It might be objected here that, even if this is correct, the occasional private contractor or illegal fishermen will be reasonably unaware or coerced into their situation, and are therefore not liable. More generally, distinguishing between those responsible for the pirates' situation and those who are not may be very difficult. This may mean that, in practice, piracy will seem to be indiscriminate and therefore impermissible. This is not simply a problem for pirates: it is an issue for all agents using force that may involve harm to non-labile individuals. For instance, State A in a war with State B will need to know the liability of State B's soldiers, which may be very difficult to determine, in order for its attacks not to harm non-labile individuals. Indeed, the risk to innocent (just and unjust) combatants is one of the central reasons why some defend contingent pacifism.<sup>73</sup>

One way to avoid contingent pacifism, however, is to maintain that there can be rules of thumb to guide decisions about who is liable to attack and who is not. Let me explain. Suppose that a pirate intends to harm Andy and Brian, who are crewmembers on an illegal trawler. The pirate knows with certainty that one of Andy and Brian is morally innocent and one of Andy and Brian is fully culpable, but does not know whether it is Andy or Brian who is liable. If the pirate nevertheless attacks both Andy and Brian, he seems to be intentionally harming an innocent and therefore acting impermissibly. But suppose now that there is only a *risk* that one of Andy and Brian is morally innocent. It is less clear whether the pirate acts impermissibly. If the risk of harming innocents is low – if, for instance, there is only a 1 per cent chance that one of Andy and Brian is morally innocent – then it seems permissible for the pirate to use force, despite the potential harm to innocents (assuming that the use of force would meet the other requisite conditions, such as being a proportionate response to a just cause). To help to assess the likely risk of harm to innocents, rules of thumb may be adopted. In the previous example, the paramilitary guards of State B, for instance, may be generally liable to attack, despite a small number of potential exceptions, and it is therefore reasonable to hold that they are appropriate targets. Denying that State A could permissibly target the paramilitary guards of State B because of the potential occasional exceptions seems intuitively to be too strong a prohibition on the killing of the innocent, providing that the use of

<sup>73</sup> See, for example, Larry May, 'Contingent Pacifism and the Moral Risks of Participation in War', *Public Affairs Quarterly*, 25:2 (2011), pp. 95–111.



force against the paramilitary guards of State B would be a proportionate response to a just cause. (In addition, given the non-absolute difference between doing and allowing discussed above, the number of lives saved would have to be higher than the number of paramilitary guards killed.) To rule out the use of force against a particular paramilitary guard because of the risk that they might be innocent would be to give the guard's rights much more weight than the rights of those who would very likely benefit from the action (for example, the innocent citizens of State A or State B). Accordingly, there may be certain groups that the pirates could permissibly target – if the other *justa piratica* principles have been met – because there is a rule of thumb that permits such action.

The second reason that this defence of the Orthodox View fails is that even if a particular individual's culpability is only small, and not normally sufficient to render them liable to attack, it may still be permissible to use force against them. Given that the plight of many Somalis means that they have no reasonable alternative but to resort to force, the situation is one of forced choice where harm needs to be distributed. It seems fairer that the harm should be borne by those who are *to some extent* morally culpable, even if only by a small degree, rather than the harm be distributed to the pirates when they are not responsible for their plight.<sup>74</sup> For instance, even if some crewmembers of cargo ships are culpable to only a small degree for the threat that they pose (such as a messman who earns a relatively low wage), they should still bear the harm rather than the innocent pirates. The point about fair harm distribution can also be made about Minor Contributors, that is, those who are somewhat culpable but make only a small *causal* contribution to the harm to the pirates. Gerhard Øverland argues that, in situations when harm must be distributed, it can be permissible to use defensive force against those who have knowledge that in addition to their own small causal contribution there are likely to be several other small causal contributions, which together will combine to form a lethal threat.<sup>75</sup> This is because, again, it seems unfair that those who are morally innocent should bear the harm; it should be distributed to those who are somewhat culpable. It follows that at least some of those who maintain the global economic order – those who somewhat culpably do so – can be liable to defensive force, despite their small contribution.

It might be replied that, even if rich states are to some extent implicated in the imposition of an unjust global order that creates extreme poverty in countries such as Somalia, it does not necessarily follow that the citizens of these states are liable to attack. The decisions that lead to the upholding of the unjust global order may be taken by their state's ruling elite. Thus, the citizens are not causally responsible or culpable for the system – they are Innocent Bystanders.<sup>76</sup> However, as Pogge asserts, individuals within states may well be responsible for global poverty.<sup>77</sup> Citizens of

<sup>74</sup> See McMahan's discussion of the conscientious driver in *Killing in War*, pp. 165, 177. As noted above, I do not intend here to endorse (or deny) McMahan's account of agent-responsibility. The point about the distribution of harms could also be made (although may apply to fewer individuals) about those who are to some extent morally *culpable*. I leave aside the issue of the proper distribution of harm when it is divisible, as well as the question of *post facto* compensation.

<sup>75</sup> Gerhard Øverland, '602 and One Dead: On Contribution to Global Poverty and Liability to Defensive Force', *European Journal of Philosophy*, 21:2 (2013), pp. 285–8. Øverland claims that this point holds even if the threat is overdetermined.

<sup>76</sup> Debra Satz, 'What Do We Owe the Global Poor?', *Ethics & International Affairs*, 19:1 (2005), pp. 50–1.

<sup>77</sup> Thomas Pogge, 'Severe Poverty as a Violation of Negative Duties', *Ethics & International Affairs*, 19:1 (2005), pp. 78–83.

affluent countries (even disadvantaged ones) and rich individuals in poorer states, although often varying in their degrees of responsibility, could do much to tackle global poverty and do not face unassailable epistemic burdens. For instance, we endorse our politicians, choose to remain ignorant, and choose to allow important structural features of the world economy to be conducted behind closed doors.<sup>78</sup> Consequently, many individuals (in both rich and poor states) are in fact causally responsible and culpable for upholding the unjust global order and therefore potentially liable to pirate attack. One implication of my argument *might* be that even voters who culpably elect politicians who uphold the unjust global order can be permissibly subject to lethal force. The liability of voters is complex. It depends on the degrees of causal responsibility and culpability (which is affected by moral considerations related to democratic participation) and whether the other requisite principles of *justa piratica* are met. But *if* the principles are met and, as a corollary, the voters *are* to some extent causally responsible and culpable, this does not seem counter-intuitive. The voters should bear the harms of culpably bringing about a policy that harms others rather than the innocent victims of this policy.

But even if one is not persuaded by these arguments and still holds that it is only a small number of individuals who causally contribute to upholding the unjust global economic order, this group is likely to include some of those who are subject to pirate attacks. In particular, it seems that the crewmembers of cargo ships should be included within this group, given the importance of international shipping to upholding the unjust global economic order highlighted above. (Of course, even if they are causally responsible, it is a further question whether particular crewmembers are somewhat culpable for this contribution.)

The third reason why this defence of the Orthodox View fails is that there is an agent-relative prerogative that renders it permissible for you to harm another individual – for example, Innocent Threats – when they are likely to kill you (and when this is the only reasonable option and you have the right to act in self-defence).<sup>79</sup> What grounds this prerogative? In short, it is the moral relevance of agent-relative considerations. We tend to think that morality allows you to give *some* priority towards yourself. To demand otherwise – to require of you that you treat others' interests, goals, and lives the same as your own – seems too demanding, given the costs that it would place on you. It may require, for instance, that you sacrifice all of your own projects, which are central to your identity – to who you are – in order to secure the interests of others. Some partiality, then, seems to be permissible and this seems to be patent when at issue is your own life.<sup>80</sup> If the choice is between your own life and that of another, you can prioritise your own life. It follows that a pirate could use force against Innocent Threats if they are the agents likely to harm the pirate (and when the pirate acts permissibly by meeting the other *justa piratica* principles).<sup>81</sup>

<sup>78</sup> Pogge, 'Severe Poverty'.

<sup>79</sup> See Jonathan Quong, 'Killing in Self-Defense', *Ethics*, 119:3 (2009), pp. 507–37.

<sup>80</sup> Quong, 'Killing in Self-Defense', p. 516.

<sup>81</sup> By contrast, McMahan, *Killing in War*, pp. 170–1, asserts that, other things being equal, reasons of partiality do not render it permissible to kill threats who are not culpable or agent-responsible. It would not, he claims, overcome the presumption against intentional killing and there is 'nothing' that relevantly distinguishes such threats from Innocent Bystanders. Space precludes evaluating McMahan's argument here, but Quong, 'Killing in Self-Defense', pp. 527–32, presents a robust reply. It should also be noted that the pirates who act on the agent-relative prerogative might themselves be subject to permissible defensive force by Innocent Threats.

To be sure, there are limits to the agent-relative prerogative. To start with, given its emphasis on partiality to oneself, it is arguably limited to cases of *self*-defence (for example, pirates responding to direct threats to themselves) and perhaps does not apply to cases of *other*-defence (for example, pirates assisting those in fishing communities). In addition, the degree of permissible partiality may be limited by the numbers of Innocent Threats (for example, it may not be permissible for a pirate to kill 100 Innocent Threats in order to save himself), as well as the degree of risk posed and the size of contribution to the threat (for example, it may not be permissible for a pirate to kill an innocent crewmember who has only 1 per cent chance of killing him or who makes only a very small causal contribution to the threat). Moreover, as noted above, the agency of the other person needs to be a threat to you. This may rule out several cases where those subject to force by the pirates are not a threat (in such cases, the attacked are Innocent Bystanders). Without this proviso, a pirate could, for instance, permissibly kill an impoverished fisherman in order to steal their catch and thereby maintain their own survival. This is problematic because of the import of the difference between opportunistic and eliminative agency. Opportunistic agency benefits from the presence of the victim, whereas eliminative agency only attempts to eliminate the threat or obstacle posed by the victim.<sup>82</sup> The pirate's killing of the fisherman would be the opportunistic – and morally problematic – use of force since the pirate benefits from the presence of the fisherman. In effect, the pirate would use the fisherman as a means to secure their own survival, thereby violating the Kantian notion that we should not treat others as a means to our ends.<sup>83</sup> Notwithstanding, the agent-relative prerogative may allow for the permissible harming of innocent individuals that pose a threat to the pirates, such as, potentially, those trying to enforce the laws on piracy (I consider this issue further below).

The fourth response to the defence of the Orthodox View is that in cases such as *Theft*, where the pirates use force against those who only appear to pose a threat, the pirates have at the very least a subjective permission to act. There is a reasonable – even if it may turn out to be objectively mistaken – expectation that, given the frequent attacks by the neighbouring state, the ship will launch an attack. Moreover, there is, I think, an objective permission to use force. This stems from the fact the ship is in the vicinity of the community, in knowledge (we can reasonably presume) of the previous attacks by similar ships from its state and, in doing so, appears to pose a threat to the community. As such, those on the ship from the neighbouring state in *Theft* act wrongly. They are culpable for the fact that their behaviour reasonably appears to pose a threat to the local community, even if this threat will not in fact materialise. Their failure to cease the appearance of the threat renders them liable, other things being equal.<sup>84</sup>

Consequently, the objection that pirates cannot act permissibly because their targets are not liable is unconvincing. First, some of those they target are liable to force. Second, even if many of the individuals they target are not culpable or causally responsible to a large degree for the pirate's situation, the small culpability or causal responsibility for the situation that they do possess means that they can permissibly

<sup>82</sup> The most well-known defence of the relevance of this distinction is Warren Quinn, 'Actions, Intentions, and Consequences: The Doctrine of Double Effect', *Philosophy & Public Affairs*, 18:4 (1989), pp. 334–51.

<sup>83</sup> Quong, 'Killing in Self-Defense', p. 525.

<sup>84</sup> See, Jeff McMahan, 'Who is Morally Liable to be Killed in War?', *Analysis*, 71:3 (2011), p. 556.

be attacked, given that this is the most appropriate distribution of harm. Third, the agent-relative prerogative renders it permissible for the pirates to use force when those subject to the force would otherwise kill the pirate. Fourth, pirates can use force against those who appear to pose a threat. To reiterate, I am not claiming that that *most* – or even perhaps *many* – attacks by the Somali pirates will be covered by one of these points. It is simply to show that *sometimes* Somali pirates (and potentially those in other areas) may act permissibly.

## Objection II: ransoms as disproportionate

Let us now turn to a second defence of the Orthodox View, which asserts that pirate attacks are disproportionate and so impermissible. To start with, it might be claimed that piracy will be ineffective at securing basic needs since it has long-term negative effects. For instance, it has been claimed that piracy undermines local governance and increases insecurity by, for instance, increasing the flow of small arms.<sup>85</sup> It might also be argued that, rather than leading to any changes to the global economic order, piracy leads to, first, a violent, indiscriminate response by those upholding this order and, second, a hardening of the opposition to those attempting to reform the system. Indeed, much of the reaction to Somali piracy has been increasingly militarised.<sup>86</sup> Piracy may also contribute to the perception of Somalia as a hopeless, lawless state – the archetypical ‘failed state’ – where aid cannot be effectively delivered and that is governed by criminals and warlords, which may have ultimately contributed to the international community’s lamentable response to tackle the ongoing humanitarian crises in Somalia. Furthermore, the disruption of shipping lanes might harm trade and, as a result, lead to a greater number of individuals worldwide falling into extreme poverty.

I will not consider here whether these claims are accurate, which would require detailed empirical analysis of, amongst other things, the international community’s reaction to Somalia. Notwithstanding, it is worth noting that it is not clear that the causal contribution by a particular act of piracy to these diffuse effects is of sufficient size to hold that the harms of the act outweigh its potential benefits. The act of piracy, on the contrary, may do a large amount of good in terms of the fulfilment of basic needs of those in the Somali coastal towns and make only a small causal contribution to these negative long-term effects.

There is another potential problem with the proportionality of piracy. According to the principle of proportionality noted above, a pirate should rob and hold to ransom only to the extent necessary to secure their (or others’) basic needs. However, Somali pirates sometimes appear not only to rob enough to secure their basic needs, they also demand large ransoms (for example, ransoms typically range from \$500,000 to \$9 million).<sup>87</sup> To that extent, Jonathan Beloff argues that pirates’ spending patterns are not based on simply meeting their basic needs, but rather also a

<sup>85</sup> Christian Bueger, Jan Stockbrugger, and Sascha Werthes, ‘Pirates, Fishermen, and Peacebuilding: Options for Counter-Piracy Strategy in Somalia’, *Contemporary Security Policy*, 32:2 (2011), pp. 356–81. Piracy also has been claimed to lead to the corruption of Puntland’s governance, Percy and Shortland, ‘The Business of Piracy’, p. 560, and ‘bad habits’ in certain towns such as inflation, prostitution, and alcoholism, Oliveira, ‘The “New Wars” at Sea’, p. 8.

<sup>86</sup> See D. L. Rothe and V. E. Collins, ‘Got a Band-Aid? Political Discourse, Militarized Responses, and the Somalia Pirate’, *Contemporary Justice Review*, 14:3 (2010), pp. 329–43.

<sup>87</sup> Percy and Shortland, ‘The Business of Piracy’, p. 545.

desire for luxury items.<sup>88</sup> Their action may therefore appear to contravene the requirement of proportionality and, as a result, be impermissible.

Is this defence of the Orthodox View convincing? In short, no, since, according to Jay Bahadur, ransom amounts can be deceiving, with the costs of the attack and the kidnapping absorbing much of the money. He estimates that those at the bottom of the pyramid can earn relatively little (for example, \$9,000).<sup>89</sup> Moreover, even these estimates are mistaken (Bahadur admits that his estimates are rough), and in general pirates earn significantly more, the above conception of proportionality is too demanding as originally stated. Although the ransom obtained may be larger than that needed for the pirate to secure the basic needs of those whom they are attempting to assist (for example, the family), if pirates decide to redistribute the extra more widely amongst the needy (for example, their local community), their action will be permissible. The intent for the initial resort to force by the pirates may still predominantly be the impoverishment of a particular set of individuals (for example, their family). If we think this redistribution renders their action permissible, we could then add what I will call the ‘Robin Hood Principle’ to the account of proportionality above:

*Robin Hood Principle:* It is permissible to steal and to rob only if the money obtained is that which is necessary for the individuals to secure the basic needs of those whom they are attempting to assist. If beyond this, it must be redistributed to those who are impoverished.

Several of the Somali pirates seem to meet something approaching the Robin Hood Principle. For instance, according to information gathered from pirates in Eyl, the spoils of the ransom are widely shared, if not fully according to the requirements of the Robin Hood Principle.<sup>90</sup> Similarly, Hansen notes that some ‘“Robin Hood’ groups ... invest heavily in the local community’ and that the close-knit family structure of Somalia mean that the booty is expected to be shared amongst the greater family.<sup>91</sup>

It might be argued, against the Robin Hood Principle, that pirates’ taking of a larger ransom is impermissible because they violate the property rights of the attacked. At issue is whether those subject to the attacks – or, more specifically, those that pay the ransoms, such as the international shipping companies and insurance firms – have legitimate claims to the ransom monies. This is questionable if one agrees with Pogge’s claims about the current unjust global economic order or Leif Wenar’s argument that global commerce violates the property rights of indigenous populations on an enormous scale.<sup>92</sup> On such views, much of the world’s property is not in the hands of its rightful owners; rather, it has been misappropriated by the unjust actions of states and other actors. This would seem to apply to the international shipping and insurance firms as well, given that they are central actors in the maintenance of the current global economic regime.

<sup>88</sup> Beloff, ‘How Piracy Is Affecting Economic Development’, p. 51.

<sup>89</sup> Bahadur, *The Pirates of Somalia*, pp. 226–33.

<sup>90</sup> In one report, the split is noted as 30 per cent to the pirates involved in the actual hijacking, 10 per cent to the ground militia, 10 per cent to the local community, 20 per cent to the financier, and 30 per cent to the sponsor. Mary Harper, ‘Chasing the Somali Piracy Money Trail’, *BBC News* (24 May 2009), available at: {news.bbc.co.uk/1/hi/world/africa/8061535.stm} accessed 31 May 2013. There are also several accounts of different splits in Bahadur, *The Pirates of Somalia*.

<sup>91</sup> Hansen, *Piracy in the Greater Gulf of Aden*, pp. 34, 40.

<sup>92</sup> Leif Wenar, ‘Property Rights and the Resource Curse’, *Philosophy & Public Affairs*, 36:1 (2008), pp. 2–32.

If those subject to the pirate attack do not *rightfully* own the property being seized by the pirates, the ransom demanded by the pirates has not violated their property rights. Those subject to the attack lack a legitimate claim over the property of which they are in (physical) possession. As such, the pirates do not wrong them by demanding a larger ransom. This is not to claim that the pirates can permissibly launch an attack in order to obtain a large ransom when their basic needs or others' basic needs *are* being met. In such a situation, they lack just cause for resort to piracy. However, when there is *already* just cause for their action – for instance, when they face starvation – they can then permissibly demand a larger ransom, providing that the Robin Hood Principle be met.

It may be replied that the pirates could not permissibly demand a larger ransom because they too do not have any rightful claim to the ransom. Those subject to the attack, the reply runs, have as good a claim to the money as anyone else. Since they are currently in possession of it, there is a presumption against the pirates taking it. This reply falters, however. The fact that those subject to the pirate attack are currently in physical possession of the money is only a very weak reason to allocate property. It is largely based on the need to allocate property *somehow* in order to resolve conflicting requests for possession when there is no clear, stronger claim, such as a demand of justice or humanitarianism. But when there *is* present such a claim, the import of possession is outweighed. And, in the case of piracy, there does seem to be such a claim. That is, there is a reason in favour of the pirates' taking of the money in order to increase redistribution to those whose basic needs are currently unfulfilled.

A further point can be made here about the Robin Hood Principle. As noted above, several of the pirates meet the Robin Hood Principle *to some extent* in their redistribution of the ransom money. A weaker, suboptimal version of the principle that allows pirates to redistribute only some of the money is acceptable in the following sense. It can be reasonably expected that those subject to the pirate attacks (for example, international shipping companies) will not redistribute the money. Accordingly, despite only a partial redistribution, there is still a reason to favour the pirates' taking of the large ransoms – to increase the redistribution of wealth to those whose basic needs are currently unfulfilled. Even if the pirates keep some of the additional ransom money for themselves in order to purchase luxuries, the pirates' taking of the ransom will still be better in terms of the redistribution of wealth than their not doing so. To be sure, the pirates do act problematically in another sense: they fail to redistribute *more* of the money to the needy. In other words, they should meet fully the requirements of the Robin Hood Principle.

### **Prohibiting piracy and a just war on both sides**

I have argued that two objections to the morality of piracy are largely unsuccessful. Contra the Orthodox View, pirates may act permissibly, even though their action on the face of it appears to be indiscriminate and disproportionate. There is a third objection that I will now consider, which concerns legitimate authority: although it is not a necessary condition of the use of force that the pirates possess legitimate authority, it is still important that the notion of legitimate authority be upheld generally in the international system. I will consider this worry and then go on to argue that

the case of piracy shows that one of the shibboleths of Just War Theory – that a war cannot be just on both sides – is mistaken.

There are good reasons to restrict the number of actors that can legitimately authorise, engage in, and assist the use of force.<sup>93</sup> Fewer actors and fewer types of actors make it easier to develop and to maintain a clear, coherent, and ultimately effective formal *ad bellum* and *in bello* rules to govern the resort to force and its conduct, such as those found in the UN Charter and Geneva Conventions. By limiting and restraining the use of force, such rules limit the opportunities for the resort to force and violations in the conduct of war. Conversely, more actors and more types of actor make it harder to maintain such a system. Since the current *jus ad bellum* and *jus in bello* regimes largely focus on states, state-based institutions, and the military personnel of states, when non-state actors also engage in force, the current rules may not apply to these actors or may not be easily enforced. To resolve this issue, the current system would need to be extended to non-state actors, which is likely to be very tricky, given its statist focus. Alternatively, new rules would need to be developed, which is likely to be very difficult. This is because the new laws would need to apply to different sorts of actors. This is likely to make the law too broad to be effective and would require the agreement of (and perhaps input from) a wide variety of state and non-state actors, which may not be forthcoming. So, a central rationale of the statist legitimate authority principle is to reduce the frequency and horrors of warfare by holding that only states and state-based actors can legitimately use force. This argument for maintaining a statist legitimate authority principle provides one reason for a norm that prohibits piracy – which I will call ‘Prohibition’ – rather than an alternative norm that permits piracy – which I will call ‘Permission’.<sup>94</sup>

Prohibition, however, may seem to be problematic for several reasons. For example, it denies those who could permissibly resort to piracy the legal (or conventional) right to use force and, as such, appears to leave a gap between the law (or the conventional norms governing force) and the morality of piracy. In addition, although the current international order is to some extent responsible for the pirates’ dire situation, one means of redressing this order – piracy – is ruled out. As such, those who cause the pirates’ dire situation have some immunity; they are protected by Prohibition.

Although Prohibition may have *some* problematic consequences (highlighted by some of these concerns), I think it is likely to lead to significantly better consequences overall than Permission. Let me explain. In general, to assess whether there is a case for prohibiting a certain potentially harmful behaviour, we must consider the effects of the prohibition on the potentially harmful behaviour (compared to permitting it) and the potential side-effects of the prohibition on other behaviour, including on morally permissible forms of the behaviour (compared to permitting the behaviour).<sup>95</sup>

<sup>93</sup> For a different sort of defence of the legitimate authority (for non-state entities), see Christopher Finlay, ‘Legitimacy and Non-State Violence’, *Journal of Political Philosophy*, 18:3 (2009), pp. 287–312.

<sup>94</sup> For an account of why the anti-piracy norms of the international system developed, see Janice Thomson, *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (Princeton: Princeton University Press, 1994). Thomson emphasises states’ desires to exert control over force, which necessitated the limiting of piracy. For alternative accounts, see Mabee, ‘Pirates, Privateers and the Political Economy of Private Violence’; and Martin Murphy, ‘Counter-Piracy in Historical Context: Paradox, Policy, and Rhetoric’, *Studies in Conflict & Terrorism*, 35:7–8 (2012), pp. 507–22.

<sup>95</sup> For an interesting discussion of these issues in relation to gun ownership, see Hugh LaFollette, ‘Gun Control’, *Ethics*, 110:2 (2000), pp. 263–81.

The case for prohibiting piracy depends, then, (i) on the deterrent effects of Prohibition in regard to permissible and impermissible piracy, (ii) the encouragement effects of Permission, again, in regard to permissible and impermissible piracy, as well as (iii) Prohibition and Permission's other effects (such as on the statist legitimate authority principle).

If piracy was legally (or conventionally) permitted or tolerated, it can be expected that there would be a greater number of pirates who use force impermissibly, that is, who use excessive and indiscriminate force and resort to piracy when their basic needs are already fulfilled. Why would Permission lead to the encouragement of impermissible piracy? There are two reasons. The first is that Permission would have a legitimising effect. Its condoning, rather than condemning, of piracy would mean, in effect, that it is deemed by the international community as a legitimate practice. If agents in the international system are generally concerned by what others deem to be legitimate practices and more likely to engage in practices condoned by others, the legitimisation of piracy is likely to lead to more incidents of piracy.<sup>96</sup> Prohibition, by contrast, clearly signifies that piracy is not legitimate. The second reason is that Prohibition often (but not always) carries with it the threat of enforcement, but Permission necessarily entails a lack of enforcement. With Permission, potential pirates who are currently deterred by the threat of the use of force and punishment by the international community may become more willing to resort to piracy.

But would Permission not encourage both permissible and impermissible piracy? This is unlikely. Instances of permissible piracy concern individuals who intend to address their or others' situations of dire need. Such individuals are, in effect, forced into piracy. Consequently, they are unlikely to be affected to a large degree by the potential deterrent effects of Prohibition and the encouragement effects of Permission. Their (and others') need drives them to resort to piracy, irrespective of the threat of force and the condemnation of piracy. By contrast, the cases of impermissible piracy often concern individuals who are not impoverished, but rather opportunistically enrich themselves. Given that they are not forced into piracy by dire need, they care about the threat of force and punishment by the international community and by which actions are deemed legitimate. Permission's legitimising of piracy and lack of the threat of enforcement is therefore likely to encourage more instances of impermissible piracy.

The case for Prohibition is therefore stronger than the case for Permission.<sup>97</sup> It does not necessarily follow, however, that Prohibition may be permissibly enforced. It may be that the delegitimising effects of Prohibition at denoting piracy as wrongful behaviour are optimal in discouraging impermissible piracy. Enforcement operations may also be indiscriminate and ineffective, and even encourage impermissible piracy,

<sup>96</sup> See, further, Nicholas J. Wheeler, *Saving Strangers* (Oxford: Oxford University Press, 2000). Wheeler highlights the constraining and enabling significance of perceived legitimacy in the context of humanitarian intervention.

<sup>97</sup> There is a third option: 'Restriction' maintains that piracy is permissible when certain conditions are met. The problem, however, with Restriction is that it would be difficult to develop a set of criteria to govern piracy that would be practicable. For instance, it is likely to be difficult to develop criteria that, first, distinguish accurately and clearly between those pirates who act permissibly and those who do not and, second, would encourage only permissible piracy and not impermissible piracy as well. As such, Restriction would face similar problems to the (numerous) attempts to develop formal criteria to govern humanitarian interventions. On these problems, see Pattison, *Humanitarian Intervention and the Responsibility to Protect*, pp. 219–27.



as has arguably been the case with the current enforcement regime.<sup>98</sup> That aside, there is a potential further issue with enforcement, which I will now consider.

Suppose that both certain pirates and those enforcing the laws on piracy do act permissibly. When these two actors come into conflict, there may appear to be a dilemma since both sides act permissibly in their resort to force against each other. In short, both sides would appear to be fighting a just war. The pirates would be using force against the navies that are permissibly attempting to rule out piracy in general and the navies would be using force against the pirates who are permissibly attempting to secure their survival. Yet, conversely, it may seem that neither side can act permissibly since they would be using force against individuals who do not act wrongly and so are not liable to attack. Both sides' resort to force would therefore appear to be indiscriminate – since they would be using force against those not liable – and seemingly morally impermissible.

Moreover, it is very widely held of Just War Theory that both sides cannot have (objective) justice on their side. For instance, Robert Holmes asserts that 'a war . . . could never be objectively just on both sides'.<sup>99</sup> Similarly, Igor Primoratz asserts that 'there are wars in which one side is fighting for a just and the other for an unjust cause; there are wars in which both sides are fighting for an unjust cause; but there are no wars in which both sides' causes are just'.<sup>100</sup>

Does this mean that one of my two claims that the pirates can use force permissibly or that navies can use force permissibly against the pirates is mistaken? Perhaps not, since there *can*, I think, be an objectively just war on both sides, contra the prevailing view of Just War. That is, there can be differing and potentially conflicting just causes, although they may ultimately stem from the same moral value (for example, the protection of innocent life). As we have seen, given that the pirates' survival is under threat, they are not morally required to relinquish their position and, in effect, sacrifice themselves – to leave themselves to their plight of impoverishment. As we have also seen, the navies too have the permission to use force to attempt to uphold a system of laws that limits harm overall (and reduces the threat to individuals).<sup>101</sup>

Yet even if there are potentially conflicting just causes, how can the use of force against those not liable be morally permissible? The answer, I suggest, is that, for the navies, their use of force may be permissible, despite the contravention of the principle of discrimination, for consequentialist reasons: given (i) the upholding of statist legitimate authority and (ii) the increased risk of abusive, impermissible piracy with Permission, Prohibition significantly promotes the overall good. That is, although it may involve the use of force against those not liable (that is, certain pirates), generally upholding Prohibition may make a very significant, positive impact on a large number of individuals' fulfilment of basic needs. For their part, the pirates can use force against those not liable because of the agent-relative prerogative discussed above. This allows them to prioritise their own lives over the lives of others

<sup>98</sup> Marchal, 'Somali Piracy'.

<sup>99</sup> Robert Holmes, *On War and Morality* (Princeton: Princeton University Press, 1989), p. 151.

<sup>100</sup> Igor Primoratz, 'Michael Walzer's Just War Theory: Some Issues of Responsibility', *Ethical Theory and Moral Practice*, 5:2 (2002), p. 228.

<sup>101</sup> To be sure, McMahan also notes at one point that wars can be just on both sides, although his point is different to mine: he argues that both sides can possess causes that are just and unjust. Jeff McMahan, 'Just Cause for War', *Ethics & International Affairs*, 19:3 (2005), pp. 1–21.

when they would otherwise be killed by, for example, navy or PMSC personnel, and when the pirates meet the other principles of *justa piratica*.<sup>102</sup> Thus, one agent may have agent-relative reasons to justly wage war and its opponent have agent-neutral ones. To that extent, there can be a just war on both sides.

All this is not to say that, in practice, the conflicts between the pirates and navies (and PMSCs) are always just wars on both sides. As I have suggested, although some pirates and those enforcing Permission may act permissibly, others may not. Nevertheless, as I have argued, it is certainly conceivable that there could be permission for the use of force against pirates and, more generally, wars that are just on both sides.

## Conclusion

I have argued, then, that the Orthodox View of the morality of piracy is mistaken. If pirates meet the requisite principles of *justa piratica*, they act permissibly. I have also suggested that some – although not all – Somali pirates meet these conditions, as well as potentially pirates elsewhere (although this seems less likely). In doing so, I have argued that the objections that piracy is impermissible because the pirates act indiscriminately and disproportionately largely fail. Some of those targeted by pirates are liable, some should face harm rather than the pirates, and some (although innocent) are a direct threat to otherwise morally innocent pirates. Even if they obtain a large amount of money, the pirates may redistribute this in a morally preferable manner to those currently in physical possession of it. As such, it can sometimes be morally permissible to be a pirate. But, as we have also seen, it may also be permissible to attempt to prohibit piracy, and consequently it is the case that, contra the commonly held view of Just War Theory, there can be a just war on both sides.

There are three related, practical conclusions from this analysis. First, since some pirates act permissibly and are not liable to attack, and the other potential problems with enforcement, the international community should look to other, non-forcible methods to eradicate piracy in order to avoid harming potentially morally innocent pirates.

Second, the employment of PMSCs in anti-piracy roles – and particularly the use of armed guards on ships – is likely to be morally problematic, given that this may increase the chances of harm to non-liable pirates and that the use of PMSCs, since they are also private actors, undermines one of the rationales for anti-piracy measures (the upholding of statist legitimate authority).<sup>103</sup>

<sup>102</sup> See, further, Quong, 'Killing in Self-Defense', pp. 520–1, who argues that it can be permissible for individuals to fight back, that is, to kill someone who is about to kill them.

<sup>103</sup> It might be thought that it is preferable to have PMSCs, rather than navies, engage in anti-piracy since the latter engage in *offensive* force (such as naval patrols on the hunt for pirates) whereas the latter use *defensive* force (such as providing armed guards for ships to deter pirates and to respond to attacks). For an engaging account of the difference in the type of force in anti-piracy, see Christopher Spearin, 'Private Military and Security Companies v. International Naval Endeavours v. Somali Pirates: A Security Studies Perspective', *Journal of International Criminal Justice*, 10:4 (2012), pp. 823–37. More generally, Ulrich Petersohn interestingly considers how the use of PMSCs is integrated in, and legitimated by, the defensive force frame, 'Reframing the Anti-Mercenary Norm: Private Military and Security Companies and Mercenarism', unpublished paper on file with author.

Third, much more emphasis should be placed on tackling the causes of piracy in Somalia, which largely relate to extreme poverty, political instability, toxic dumping, and illegal fishing. It has been widely noted that doing so is likely to be the most effective way of tackling piracy.<sup>104</sup> But, more than this, many agents in the international community are responsible for the creation of the causes of piracy in Somalia by their maintenance of the unjust global economic order, toxic dumping, and illegal fishing, which ultimately render it sometimes permissible for Somali pirates to resort to force. Eradicating piracy, then, may simply be a matter of states and other actors fulfilling their negative duties not to harm those in Somalia.

However, the difference between offensive and defensive force is of limited moral significance in this context. What seems to be most worrying about offensive force against pirates is that it may harm those who are not liable to attack, such as certain pirates, certain crewmembers, and innocent bystanders. Yet, PMSCs' defensive force may also be problematic in this regard. According to Fitzsimmons, there is a worry that using armed guards on ships could lead to escalation by provoking firefights with determined pirates. This could in turn lead to morally problematic harm to certain non-liable crewmembers (and, it can be added, to certain non-liable pirates), as well as to potentially serious 'safety and environmental hazards if a vessel transporting flammable or toxic cargo' is damaged (which could, in turn, harm non-liable third parties). 'Privatizing the Struggle against Somali Piracy', p. 93. Moreover, he notes that even though offensive, navies often limit the *amount* of harm inflicted on pirates, since they tend not to kill pirates but instead confiscate their weapons and then later release them (despite some notable exceptions).

<sup>104</sup> See, for example, Lehr, 'A Western Armada'.