

PIRATES

HOSTIS HUMANIS GENERIS

BY JAMES W. CARBIN



THE RECENT SURGE IN PIRACY OFF THE EASTERN COAST OF AFRICA HAS CAUSED THE UNITED NATIONS AND THE MEMBERS OF THE INTERNATIONAL SEAFARING COMMUNITY TO FOCUS ON THE OLDEST INTERNATIONAL CRIME AND AWAKENED DEBATE ON AN ACCEPTABLE RESPONSE TO THE PROBLEM UNDER INTERNATIONAL JURISPRUDENCE. THE EXTENDED MEDIA COVERAGE OF RECENT INCIDENTS IS PARTLY ATTRIBUTABLE TO THE SURPRISE THAT PIRACY DID NOT FADE INTO HISTORY ALONG WITH THE SAILING SHIP.

Thousands of ships ply the oceans 24 hours a day, every day of the year, and marine casualties do not keep a schedule, giving rise to two questions: How do we get the ship and cargo back? And how do we keep the crew safe? With the Somali pirates' continuing affronts, these questions are becoming routine. This article offers the attorney's perspective on these issues.

Piracy is hardly a novel occurrence. The earliest written record of an attack dates to one that occurred on the Mediterranean Sea in 1190 B.C.¹ Homer's epics, "The Iliad" and "The Odyssey," both speak of piracy in the eighth century B.C.² The U.S. Constitution, Article I, § 8, Clause 10 (the Offenses Clause) specifically empowers Congress to "punish piracies and felonies committed on the high seas, and offenses against the Law of Nations."

Pirates have historically been recognized as *hostis humanis generis*—the "enemy of all mankind"³—and were once labeled "Ishmaelites" (persons without a country).⁴

Each year approximately 20,000 vessels transit the Gulf of Aden—which services the Suez Canal and ultimately trade between Asia, the Middle East, and Europe—and transport about 12 percent of the world's daily oil supply. The cost arising from modern piracy is estimated to be between \$13 billion and \$16 billion a year and could increase given disparities in the world's economies.⁵

Thus, the presence of pirates off the coast of Somali should hardly be surprising. What is alarming is how successful these pirates have been in their brazen resurrection of one of the world's oldest professions.

International Law

Piracy is the oldest crime and one of the few crimes over which jurisdiction has been generally recognized under international law.⁶ Historically, piracy is considered one of the earliest violations of international law and the rights of nations. One of the earliest recognitions of the international rule of law was that each country had not only a right but also a duty to take action against piracy. Article 100 of the United Nations Convention on the Law of the Sea mandates that "all states shall cooperate to the fullest possible extent in the repression of piracy on the high seas on any other place outside of the jurisdiction of any capital State."⁷ Piracy evokes universal jurisdiction to combat it.

What is Piracy?

It is surprising that there are competing definitions of piracy that have been recognized by relevant bodies. This lack of agreement on what constitutes piracy has often hindered the effective exercise of jurisdiction and interdiction. The United Nations, for example, simply defines piracy as acts of theft and depredation on the high seas beyond the

national jurisdiction of any state. Definitions accepted by other relevant entities include:

- The notion of piracy, as codified in the 1958 Geneva Convention on the High Seas, Apr. 29, 1958 (13 U.S.T. 2312, 450 U.N.T.S. 82), and later in the 1982 United Nations Convention on the Law of the Sea, Dec. 10, 1982 (S. Treaty Doc. No. 103-39, 1833 U.N.T.S. 397).⁸ Article 15 of the Geneva Convention and Article 101 of the UN Convention define piracy as—
 - (1) Any illegal acts of violence, detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.
- The definition of piracy adopted by the International Chamber of Commerce International Maritime Bureau, a nonprofit organization dedicated to suppressing maritime crime, malpractice, and fraud,⁹ includes attacks against ships within territorial waters. Because this definition contrasts with the definition accepted under international law and the law of many nations, which does not include acts within a state's territorial waters, many consider the statistics used by the International Maritime Bureau's a better measure of the extent of piracy.¹⁰
- The U.S. Constitution defines piracy as an act that occurs on the high seas.¹¹
- The definition of piracy adopted by Great Britain's Marine Insurance Act more than a century ago is more expansive and includes "passengers who mutiny and rioters who attack ships from the shore."¹²
- British common law defined piracy as those acts of depredation and robbery committed on the high seas which, if committed on land, would have amounted to a felony.¹³

Despite the body of law, some continue to debate whether piracy is a crime under international law, though this can largely be explained by the issue of whether acts within a state's territorial waters are included in the definition.¹⁴ Independent of the criminalization of piracy under international law, piracy is a crime under the law of many of the leading trading nations. Some nations define the crime of piracy in a way that is consistent with international law. The U.S. criminal statute looks to international law to define piracy.¹⁵ Kenya, a neighbor and active resister of Somali piracy that has placed captured pirates on trial,¹⁶

defines the crime of piracy according to international law: “Any person who, in territorial waters or upon the high seas, commits any act of piracy *jure gentium* is guilty of the offense of piracy.”¹⁷ The Philippines defines piracy as: “Any attack upon a seizure of any vessel, or the taking away of the whole or part thereof ... by means of violence against or intimidation committed by any person, including a passenger or member of the complement of said vessel, in Philippine waters, shall be considered as piracy.”¹⁸

National Responses to Piracy

A typical commercial venture highlights the issue confronting anyone seeking to exercise jurisdiction over a pirated ship or suspected pirate activity. The vessel attacked is often owned by a company domiciled in one country, is flagged or registered in another, has a crew of citizens of yet one or more other countries, carries cargoes owned by companies from several other countries, and is scheduled to call at ports in yet several more nations. Thus, divergent national interests compound the issue of jurisdiction generated by the sovereign interests under international law in even routine maritime voyages. This state of affairs has been an impediment to both suppression and prosecution of acts of piracy.

The varying definitions of piracy have impeded efforts to counter the Somali pirates who have become adept at rushing hijacked vessels into Somali waters in order to evade pursuit. Historically, international law was in accord with the United Nations and permits any state to capture pirates on the high seas or outside the territory of a state.¹⁹ Article 51 of the UN Charter recognizes a nation’s right to self-defense. Article 110 of the Law of the Sea Convention provides the right to visit a vessel if there are reasonable grounds to believe it is engaged in piracy. Even though the authority to capture pirates is grounded in international law, pirates are punished under the criminal law of whatever nation prosecutes them.²⁰

The International Maritime Organization (IMO), a UN agency based in London and devoted to improving the safety of ships at sea, gathers statistics on piracy, which show that the number of incidents has been escalating.²¹ In addition, according to the International Maritime Bureau’s Piracy Reporting Center (IMBPRC), which was formed in 1992 in Kuala Lumpur in response to the surge in piracy in Southeast Asia in the 1990s—particularly in the Singapore straits—the growing number of attacks by pirates off the coast of Somalia makes that area the most hazardous in the world. The IMBRC’s statistics show that the waters around Nigeria are the second most hazardous. The difference between Somalia and Nigeria is that almost all the incidents in Nigeria are conducted within its coastal waters, whereas the incidents off the eastern coast of Africa occur on the high seas.

In November 2008, the IMBPRC reported that maritime attacks in Asia had decreased by 11 percent during the first nine months of that year—a figure that shows an even greater decrease than seen in 2007. IMBPRC reported 47 attacks in the Gulf of Aden during the first quarter of 2008 and only two attacks in the Straits of Malacca, home to the

world’s most active pirates until the recent Somali activity. The decrease in Asia is attributed to coordinated naval patrols by Indonesia, Malaysia, and Singapore—a strong argument for making the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia that those nations signed in 2004 the model for an effective response in the waters off eastern Africa.

One basis for combating piracy has been found in the Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention), 1678 U.N.T.S. 221, 27 I.L.M. 668 (1988), which became effective March 1, 1992, and has been ratified by 149 parties. The SUA Convention, which was originally created in response to the *Achille Lauro* incident in 1985, includes operative provisions that address the apprehension, conviction, and punishment of pirates, rather than their suppression. The convention recognizes criminal offenses and established jurisdiction for extraditing and accepting delivery of persons responsible for attacking a vessel or endangering safe navigation. According to the SUA Convention, a country should either extradite the offenders or prosecute them consistent with the gravity of the crime. The 2005 protocols to the SUA Convention call for countries to develop the capability to arrest and prosecute offenders, requiring that the signatories to the convention designate government officials authorized to receive and respond to requests for assistance, to confirm offenders’ nationality, and to take other appropriate measures related to the pirates’ activity.²²

After piracy spiked in early 1990s, principally in Southeast Asia, the International Maritime Organization’s Maritime Safety Committee (MSC) developed two circulars, MSC/622 and MSC/623, issued in 1993.²³ The first circular made detailed recommendations to governments for preventing and suppressing piracy; the second circular included guidance to the maritime sector. In 2005, the IMO adopted Resolution A. 979 (24), which recommended taking legislative, judicial, and law enforcement action to prosecute pirates; the recommendations included extraditing accused offenders and providing state vessels to cooperate in combating piracy.

International governments have also addressed the problem of piracy. In November 2008, the European Union established Operation Atlanta against Somali pirates. In December 2008, the MSC called for the development of a policy on the use of armed shipboard security teams but acknowledged that implementation and enforcement of such a policy is the responsibility of the flag nation. In January 2009, as a result of the destabilizing influence of piracy on the global supply chain, a multinational task force—including representatives of the United Kingdom, China, Denmark, the Netherlands, France, Pakistan, India, Iran, Russia, and the United States—created a coalition to protect the Gulf of Aden and eventually deployed naval ships to the area.

Despite the progress made in responding to piracy, the Somali crisis presents important legal questions. First and foremost, the proper procedures for investigating and prosecuting acts of maritime piracy remain unclear to some, even though the UN Convention on the Law of the Sea

provides a state that seizes a crew and a ship engaged in piracy with prosecutorial discretion over the penalties to be imposed, and the disposition of the ship is subject only to the rights of third parties acting in good faith.

The UN Security Council passed Resolutions 1816, 1838, 1846, and 1851 to enhance the legal authority endorsing prosecution of the Somali pirates. Resolution 1816 is of particular interest. International law recognizes sovereign jurisdiction up to 12 miles offshore. Recognizing that the Somali pirates have relied on the protection afforded by Somalia's territorial waters by retreating to a Somali anchorage after being captured on the high seas as a way to thwart any pursuit that would arguably violate Somalia's sovereignty, the UN Security Council adopted Resolution 1816, which authorizes pursuit into Somali waters. With Resolution 1816, the Security Council called on flag, port, and coastal states of both the victims and the pirates to cooperate in countering piracy off the Somali coast. The resolution gives states the right to use "all necessary means" that are consistent with international law to repress the unlawful conduct and made it lawful for states' vessels to pursue pirates into Somalia's territorial waters to apprehend them. Navy vessels now have UN Security Council approval—ostensibly with the cooperation of the transitional federal government of Somalia—to pursue Somali vessels that seek safe harbor in territorial waters. The drawback to Resolution 1816 was its requirement that the UN Security Council receive advance notice of such a pursuit.²⁴ However, in response to continuing attacks, the Security Council dropped the notice requirement when it passed Resolution 1838 in October 2008 and reaffirmed the international mandate to take action against piracy as originally set forth in Chapter VII of the UN Charter.²⁵

When the attacks continued into November 2008, the International Maritime Organization urged the Security Council to establish "an effective legal jurisdiction" for bringing alleged offenders to justice. In response, in December 2008, the Security Council passed Resolution 1846, which called on all states to cooperate in efforts to assist in the investigation and prosecution of persons responsible for the piracy. The Security Council also urged signatories to the SUA Convention to fulfill their obligations under the treaty, requiring those nations to "create criminal offenses, establish jurisdiction, and accept delivery of persons responsible for or suspected of" acts of piracy or armed attacks at sea. The resolution encouraged the states that had deployed navies to the area by extending their authority to seize and dispose of "boats, vessels, arms and other related equipment" engaged in the commission of piracy or armed robbery off the coast of Somalia. Notably, Resolution 1846 authorized seizures of vessels when there was "reasonable ground *for suspecting*" that they were engaged in piracy.

Resolution 1846 also suggested, for the first time, that the 1988 SUA Convention is applicable when pirates need to be extradited and prosecuted. The UN Security Council then adopted Resolution 1851, which affirmed that the convention provides a basis for prosecuting pirates and authorizes taking "necessary measures" against piracy including military operations on Somali soil.

How those "suspected" of being pirates—as opposed to those apprehended in the act—should be confronted remains uncertain. The IMO specifically asked the Security Council to provide "clean rules of engagement" for the anti-piracy forces operating in the region. The problem was partially addressed by Resolution 1846, which, as noted, authorized states to suppress piracy on the basis of "reasonable suspicion"—a guideline loaded with discretionary judgment and imprecise definition. In the United States, a working group composed of representatives from the Departments of Defense, Justice, and Homeland Security remain actively engaged with this issue and its broader implications in the war on terror. There is significant prosecutorial concern as to whether an individual arrested as a "suspected" pirate can be successfully prosecuted where he cannot be proven to have committed any affirmative act of piracy.

Proposed Actions

The rules of engagement for confronting pirates and accountability for the use of excessive force are issues that remain unsettled. The lack of accountability affects questions of whether vessel security should be shifted to the private sector.²⁶

Vessel Defenses

Most commercial vessels have a variety of tactics and nonmilitary weapons available to repel a pirate attack. The most basic tactic, for the vessel to travel outside zones suspected of being at risk, is generally not acceptable because of the greatly increased costs of fuel and scheduling. Ships can closely monitor radar for suspicious vessels and can either outrun them or change course in an effort to prohibit boarding. In the event this fails, crews are often trained to employ high-pressure firehoses on those attempting to board the ship. Some vessels carry powerful horns (long-range directional acoustical devices) that generate painfully loud sounds, and some ships line their rails with barbed wire.

Armed Merchant Ships

Arming the merchant marine remains a problematic issue. Some countries do not allow armed vessels to enter their ports and criminally prosecute those who violate this regulation. A vessel severely limits its ability to trade when it is armed. The U.S. State Department has been working with countries in pirate-plagued areas to learn what laws governing weapons exist in their ports in order to clarify the issue for U.S. mariners. Another problem is the dramatic increase in insurance costs from arming merchant ships.

But there is also the concern that arming the merchant marine may pose greater risks than those raised by the pirates, who thus far have caused only commercial losses in the form of ransom demands and delays. Arming a merchant marine would necessarily involve a variety of problems and requirements, including:

- training the crew in the use of weaponry, no small expense itself;

- maintaining weapons aboard ships, a practice generally considered unsafe;
- running afoul of the regulations and laws of the countries and the numerous ports of call that vessels are expected to make;
- raising all the security issues that exist shoreside;
- increasing the risk of harm to the crew members themselves; and
- training the crew to in the identification of suspected pirate vessels and in appropriate measured responses to them.

Unlike movie swashbucklers, modern pirates do not fly the skull and crossbones or announce their intent. Mistaken identification of a fishing vessel prompting a pre-emptive strike could lead to significant liability, not to mention potential human tragedy. In addition, arming crew members of merchant ships has the disadvantage of inciting the pirates to use more lethal measures than those commonly used to date.²⁷

Private Security

Private companies are offering to provide protection for commercial ships transiting the Gulf of Aden. One such security firm, Backwater Worldwide/EX, is marketing a refurbished National Oceanic and Atmospheric Administration vessel with a 7,000-mile range and equipped with a helicopter to scout waters ahead of merchant traffic. This type of response presents many of the same risks posed in arming the crew and also creates other potential risks that arose with private firms during the war in Iraq.

Partnerships

No single nation has the naval capability to patrol the high seas for pirates effectively. The UN resolutions and the International Maritime Organization's recommendations seek to foster cooperative agreements among those countries that have the capability to confront and capture the pirates as well as with the neighboring nations that need assistance—a measure that was successful in South-east Asia.

U.S. Coast Guard Initiative

In late 2008, the U.S. Coast Guard announced new requirements to improve precautions against piracy taken by vessels sailing under the U.S. flag. The U.S. vessels sailing through the Horn of Africa are now required to have an approved anti-piracy security plan and to post guards on the ships. All U.S.-flagged ships were required to submit security plans to the Coast Guard for approval by May 26. The requirements afford the owner of the vessel significant discretion in deciding the number of guards, whether or not to arm them, and their training. The new directive contains sensitive security information and is not for public disclosure.²⁸

The Ransom

As a practical matter, the victims of pirate attacks have been negotiating with the pirates and paying ransom to

rescue their ships, cargoes, and crew. The ransoms reportedly paid to date for the release of hijacked vessels, including their crews and cargoes, is projected to reach \$50 million dollars relatively soon. The ransoms are being funded in one of two ways: (1) the parties to the voyage contribute voluntarily, or (2) the funds are advanced by the ship's interests, who then invoke the maritime doctrine of General Average to obtain a proportional reimbursement. In fact, the contributions are ultimately borne by the various insurers of the venture. The primary distinction between the two approaches—aside from the level of cooperation in the former versus the obligation to contribute in General Average in the latter—is the contribution that is made on behalf of the lives of the crew. A merchant voyage typically involves multiple interests, the most prominent of which are the ship and its owner, the cargo owners (who may number in the thousands for a general cargo vessel), a charterer if the vessel is operating under a charter agreement, and the ship's officers and crew.

Given the long history of piracy, commercial marine insurers recognize the risks involved. In the United Kingdom's marine insurance market, the vessel's hull insurance typically insures the vessel against the peril of piracy, although there is a trend to treat it as in the U.S. marine insurance market, in which a vessel owner's war risk insurance usually covers piracy. Whichever policy has the risk of piracy contributes to the ransom. Typical cargo insurance covers both the risk of loss of the cargo and the obligation to contribute in General Average.

Traditionally, a value is not assessed or a contribution demanded for the lives of the crew in General Average. But the Protection and Indemnity Clubs, which provide liability insurance for the shipowner for injuries to the crew, have shown a willingness to contribute voluntarily to ransom collections, evidently recognizing the risk to life if they do not contribute. Some vessels that transit dangerous waters such as the Gulf of Aden maintain hijack and ransom insurance. What remains to be seen is whether P&I or hijack insurers will seek reimbursement for their voluntary contribution from the other insurers of the interest that traditionally contribute in General Average, such as the hull/war risk, cargo, and perhaps charterer's interest.

In the second instance, in which the ship interests fund the ransom and declare General Average, a licensed General Average adjuster is appointed who then collects the records of the contributory values of the property at risk during the voyage, such as values for the ship, the cargoes, and any charterer's property (bunker fuel, containers, and so forth, for example) after which the General Average is adjusted according to the generally recognized York-Antwerp Rules. Each interest is assessed a contribution amount. As noted, a contributory value is not ascribed to the lives of the crew.

Although it may be open to debate, the predominant thinking in marine circles is that the ransom paid for the release of a ship, its cargo, and its crew is a General Average expense to be prorated across the interests concerned and ultimately given to their respective insurers for contribution. In an English case heard as early as 1590, *Hicks v.*

Palington Moore's (QD) R 297, the court held that ransom paid to pirates is a General Average sacrifice. The U.S. Supreme Court cited this case with approval in *Ralli v. Troop*, 157 U.S. 386 (1894), and subsequent authorities have followed the analysis.²⁹ Indeed, the *Digest of Justinian*, *Rhodian Law*, and *Consolato Del Mare*, which cover the sixth through the 15th centuries A.D., appear to endorse ransom as a General Average expense.

A ship, cargo, and any other property interest assessed a contribution in General Average for ransom are generally insured for the liability. Marine insurers have generally honored the obligation, recognizing the ransom as the result of difficult negotiations and a necessary cost for return of the vessel and cargo, for freeing the crew, and for resuming the voyage. The recognition of the potential to declare General Average and the risks associated with the lives of crew members have motivated the various insurers to voluntarily contribute to fund ransoms to secure the release of a number of vessels.

U.S. Foreign Corrupt Practices Act

One question that has caused U.S. parties to balk at meeting ransom demands is the U.S. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd, which makes it illegal for any U.S. concern or its representative to make payments when they are expected to be shared with foreign government officials, or for parties to affect or influence an act or decision of the government to assist in obtaining or retaining business. The payment of ransom does not appear to be intended to secure a benefit as outlawed by Foreign Corrupt Practices Act.

U.S. Foreign Assets Control Regulations

A similar concern arises with the U.S. Treasury Office of Foreign Assets Control Regulations, which imposes economic sanctions in an effort to further U.S. foreign policy and national security objectives against hostile targets. The sanctions target certain foreign governments, political parties, terrorist groups, and individuals identified on the office's list of "Specially Designated Nationals and Blocked Persons." To date, there has been no indication that any of the pirates who have been paid ransom appear on this list, which should be checked before considering any payment.

Comment

Although the situation off the coast of Somalia remains troubling, there was better news from West Africa. In July 2008, the 20 member states of the Maritime Organization of West and Central Africa adopted a Memorandum of Understanding to create a coast guard based in Accra, Ghana, and Luanda, Angola. The agreement provides for coastal patrols and authorizes hot pursuit to combat unlawful activity, including piracy, mostly off the coast of Nigeria. This organization's approach, which is similar to the one that led to success in Southeast Asia in the 1990s, provides an example of what can be done in the Gulf of Aden in particular. There have been a number of calls for such a cooperative agreement; to date, however, it appears that the

multiple divergent powers that are affected cannot overcome their political differences to achieve a fully unified approach.

The Somali pirates are successful in part because they have distinguished themselves in several ways from their historical predecessors. They are not interested in capturing ships to hoist their own flag or to plunder cargo. Rather, today's pirates have little capability to enjoy their stolen fruit. By all accounts, the pirates are unable to operate large commercial vessels and would not be able to use the vessels for foreign trade, and lack adequate ports and facilities to even offload the cargoes onto Somali territory. The pirates have adopted the practice of demanding ransom for the hijacked ships, cargo, and—perhaps most important—the crew. This demand for ransom in exchange for the release of the vessel and all aboard marks a significant departure from the pirate's traditional role. The Somali's most proven skill is not the ability to capture vessels but their skill at negotiating once they have done so. By all accounts, the discussions with the pirates reflect business negotiations more than ideological demands. They have been careful not to cause damage to the vessel or cargo and, most significantly, not to injure any captured crew member. The sole known crew fatality was reported to have been from natural causes, and although the death may be attributable to the stress of the incident, it is not meant to suggest that the pirates intended to cause the crew member's death. By avoiding damage to the vessels and their cargo and by refraining from injuring the crew, the pirates have succeeded in transforming their acts of piracy into a commercial negotiation that will fix the value to be paid to gain release. The initial demands are often eye-popping figures, but the anecdotal reports of ransoms actually paid seem to range in the single digit of millions of dollars. And while such sums are not insubstantial, they are tolerable when measured against the values of the ship and cargo and the threat to the crew. Thus far, the international shipping community's willingness to meet the Somali pirates' demands ensure that the practice will continue.

Despite the general recognition that piracy is a crime against humanity—and the ample legal authority to rescue the ships or to take prosecutorial action—the Somali pirates appear to be thriving and are becoming increasingly brazen for multiple reasons. The incredible expanse of ocean off the Somali coast at the doorstep of one of the world's busiest and most lucrative shipping lanes—compounded by the pirates' willingness to travel more than 1,000 miles offshore in oceangoing vessels to launch high-speed craft capable of overtaking commercial ships laden with valuable cargo—makes it nearly impossible for the world's forces to protect vessels against pirate attacks.

The leading trading nations are evidently hesitant to take more direct measures. Even though there have been some successes—most notably the rescue by the U.S. Navy of the captain on a Maersk Line ship, an American citizen, and the efforts to prosecute the sole surviving pirate from that episode—a stronger and more concerted response authorized by international law and the UN Security Council resolution is needed.

Fundamental, of course, is the political, social, and economic quagmire that is Somalia. Some observers have attributed the rise of Somalia's lucrative piracy racket partly to the destruction of the Somali fishing industry by illegal fishing practices perpetrated by foreign fleets.³⁰ Until conditions in Somalia improve, we can expect desperate Somalis to view piracy as a viable alternative. **TFL**

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Endnotes

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¹⁴See *United States v. Smith*, 18 U.S. 153, 160–162 (1820) (Story, J.) (“The common law, too, recognizes and punishes piracy as an offense, not against its own municipal

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¹⁵James Kent, 1 COMMENTARIES 184, 186. (“Piracy is robbery, or a forcible depredation on the high seas, without lawful authority, and done *animo furandi*, and in the spirit and intention of universal hostility. It is the same offense at sea with robbery on land; and all the writers on the law of nations, and on the maritime law of Europe, agree in this definition of piracy.”)

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¹⁷Kenya Penal Code (1967) Cap. 63 § 69 (Kenya).

¹⁸Int'l Mar. Bureau, Int'l Chamber of Commerce, PIRACY AND ARMED ROBBERY AGAINST SHIPS, Annual Report 5 (2007); Pres. Dec. No. 532 (Phil.) (emphasis added where definition differs from international law definition).

¹⁹Grotius, THE RIGHTS OF WAR AND PEACE 200 (A.C. Campbell, trans. M. Dunne 1901) (1625) (“Sovereign Princes and States are answerable for their neglect, if they use not all the proper means within their power for suppressing pi-

racy and robbery”).

²⁰UN Convention on the Law of the Sea, Art. 105, Dec. 10, 1982, 1833 U.N.T.S. (“The courts of the State which carried out the seizure [of a pirate ship] may decide upon the penalties to be imposed. ...”); Green Haywood Hackworth, 2 DIGEST OF INT’L L. 681 (1940–1944) (Pirates “may be punished by any nation that may apprehend or capture them.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 404 (1987); L. F. Damrosch, L. Henkin, R.C. Pugh, O. Schachter, and H. Smit, INTERNATIONAL LAW 405 (4th ed. 2001) (“Under the universal principal of jurisdiction ... international law permits any state to apply its national law to punish piracy even when the accused is not a national of the state and the act of piracy was not committed in that state’s territorial waters or against one of its vessels.”); Charles Molloy, DE JURE MARITIMO ET NAVALI 75 (9th ed. 1744) (1676).

²¹See Alfred P. Rubin, THE LAW OF PIRACY 17, 92–94, 97 (2d ed. 1998).

²²Adoption of the Final Act and Any Instruments, Recommendations and Resolution Resulting from Work of the Conference Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, International Maritime Organization, LEG/CONF.15/21 ¶ 15 (Nov. 1, 2005). The 2005 SUA protocols were passed in October 2005 but have not been ratified.

²³IMO Doc. MSC/Circ. 622, Recommendations to Government for preventing and suppressing piracy and armed

robbery against ships and MSC/Circ. 623, Guidance to shipowners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy armed robbery against ships.

²⁴S.C. Res. 1816 ¶ 7, U.N. Doc. S/RES/1816 (June 2, 2008).

²⁵UN Security Council Resolution 1838, S/RES/1838 (Oct. 7, 2008).

²⁶Carolyn Liss, Asia Research Centre, *Privatizing the Fight against Somali Pirates*. Working Paper No. 152 (November 2008).

²⁷Rod Norland (Newsweek), Interview Shamun Indhabur, December 2008. Regarding private security, Indhabur said: “It will not protect them. We also have rocket-propelled grenades and we can destroy them. For those with the sonic guns, we hijacked some of them even after they fired the sonic guns. Truly speaking, when we go to sea we are drunk and we are like hungry wolves running after meat. We don’t know what we are doing until we have boarded.”

²⁸INSURANCE JOURNAL (May 13, 2009), available at www.insurancejournal.com/news/national/2009/05/12/100437.htm. (last visited Aug. 19, 2009).

²⁹Theophilus Parsons, PARSONS ON MARITIME LAW, 299 (Little, Brown & Co., 1859); *Clarkson v. Phoenix Insurance Company*.

³⁰*The Indian Ocean: The Most Dangerous Seas in the World*, THE ECONOMIST (July 17, 2008).

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⁴⁶Human Rights Watch, *supra* note 40, at 6–7.

⁴⁷Kenneth Anderson, *What to do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARVARD J. LAW & PUBL. POL. 610 (2002) (emphasis in original).

⁴⁸*Id.* (emphasis in original).

⁴⁹*Id.* (“True enough, citizenship alone is enough to qualify a person to be tried for attacks upon that order. ...”).

⁵⁰Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600 (2006).

⁵¹*Boumediene v. Bush*, *supra* note 37, at 64.

⁵²*Id.*, at 53–54.

⁵³Linda Greenhouse, *Justices, 5-4, Back Detainee Appeals for Guantanamo*, N.Y. TIMES (June 13, 2008).

⁵⁴*Id.*

⁵⁵See, for example, United Nations, Concluding Observations of the Human Rights Committee, United Nations (Sept. 15, 2006), available at [www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/0d83f7fe89d83ed6c12571fb00411eb5/\\$FILE/G0644318.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/0d83f7fe89d83ed6c12571fb00411eb5/$FILE/G0644318.pdf) (expressing concerns over the United States’ adherence to the International Covenant on Civil and Political Rights: “The Committee regrets that the State party has not integrated into its report information on the implementation of the Covenant with respect to individuals under its jurisdiction and outside its territory. The Committee notes however that the State party has provided additional material ‘out of courtesy.’ The Committee further regrets

that the State party, invoking grounds of non-applicability of the Covenant or intelligence operations, refused to address certain serious allegations of violations of the rights protected under the Covenant.”

⁵⁶Harold Hongju Koh, *We Have the Right Courts for Bin Laden*, N.Y. TIMES (Nov. 23, 2001).

⁵⁷*Id.*

⁵⁸*Id.*

⁵⁹18a U.S.C. § 4.

⁶⁰Mark S. Hamm, TERRORISM AS CRIME: FROM OKLAHOMA CITY TO AL-QAEDA AND BEYOND 221 (New York: New York Univ. Press, 2007).

⁶¹*Id.*

⁶²*Id.*, see also David E. Kaplan, *Paying for Terror: How Jihadist Groups are Using Organized-Crime Tactics—and Profits—to Finance Attacks on Targets Around the Globe*, U.S. NEWS & WORLD REPORT (Dec. 5, 2005).

⁶³*Id.*

⁶⁴*Id.*

⁶⁵*Id.*

⁶⁶Human Rights Watch, *supra* note 40, at 6.

⁶⁷50 U.S.C. § 403.

⁶⁸Kaplan, *supra* note 62.

⁶⁹*Id.*

⁷⁰See Human Rights Watch, *supra* note 40, at 8.

⁷¹Hamm, *supra* note 60.

⁷²*Boumediene v. Bush*, *supra* note 37, at 70.