
THE BIG BUSINESS OF MARITIME PIRACY AND THE MODERN CORSAIR: DEAD MEN TELL NO TALES

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INTRODUCTION

Piracy attacks constitute one of the principal security risks to commercial shipping in certain regions of the world. Despite international awareness and concerted efforts to combat piracy and armed robbery at sea, piracy attacks against commercial vessels resulting in the disruption of trade have increased exponentially within the last five years. This paper considers the response of the international maritime community to combat piracy attacks.

The visage of the swashbuckling adventurous pirate has fascinated both adults and children for generations. Piracy has been romanticized in the classic adventure novel, *Treasure Island*, by Robert Louis Stevenson, and the well-loved stories of *Blackbeard*¹ who sailed during the Golden Age of Piracy. Peter Pan's Captain Hook is portrayed as a comic character plagued by a crocodile who swallowed a clock. The motion picture industry has also romanticized pirates by portraying them as ruggedly handsome figures gracefully brandishing swords.

Modern buccaneers are not romantic figures. These ruthless mercenaries utilize small, maneuverable, swift vessels with the ability to overtake commercial ships traveling established trade routes on the high seas. The modern corsairs are armed with machine guns and rocket-propelled grenades. The modern buccaneer imperils commercial traffic and hampers maritime commerce along various trade routes in the world, seeking the payment of ransom and holding crews hostage.² Modern piracy has become a large business enterprise that threatens the stability of maritime trade.

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- 1 Blackbeard was actually christened Edward Thatch or Edward Teach and was causing mayhem in the Atlantic Ocean. He manned the vessel QUEEN ANNE'S REVENGE that was shipwrecked off of the North Carolina coast in 1718. Blackbeard – Wikipedia; [HTTP://en.wikipedia.org/wiki/blackbeard](http://en.wikipedia.org/wiki/blackbeard).
 - 2 Acts of piracy impact trade affecting shippers, consignees, carriers and their insurers cargo shipments are delayed and costs of shipment are increased. The threat of piracy in certain regions of the world drastically affects insurance rates and the cost of transportation of marine cargo. As an example, in 2005, Lloyd's, London (the world's primary marine insurance market) designated the Malacca Strait major seaway as war zone based upon concerns that a tanker ship with a cargo of liquefied natural gas or chemicals could be used as a terrorist weapon. The American Institute Hull Clauses (June 2, 1977) includes "*pirates, rovers and assailing thieves*" as insured marine perils. On the other hand, the Institute Cargo Clauses (F.P.A., London Institute 1/63) excludes coverage for cargo destroyed by pirates "*further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or strife arising therefrom, or piracy.*"

The International Maritime Bureau (“IMB”), a division of the International Chamber of Commerce, maintains a real-time map which tracks reported incidents on the website. Although the majority of current piracy attacks occur off the coast of Somalia, piracy attacks are also recorded in other parts of the world. The most recent big surge of piracy in the twenty-first century was centered in the South China Sea. Recent piracy attacks also include Indonesia, Malaysia, Latin America, South America, West Africa, and India.³

THE INTERNATIONAL RESPONSE TO MARITIME PIRACY – PRE 9/11

A. The International Maritime Organization

The Geneva Convention established the International Maritime Organization (“IMO”) in 1948 for the purpose of development of maritime security and a regulatory framework. The IMO, which is an agency of the United Nations with 168 member states, is located in the United Kingdom.⁴ The IMO is a United Nations specialized agency responsible for security at sea and prevention of pollution.⁵ On November 17, 1983, the IMO adopted Resolution A.545(13) styled “Measures to Prevent Acts of Piracy and Armed Robbery Against Ships.”⁶ On October 7, 1985, four armed terrorists affiliated with the Palestine Liberation Organization (“PLO”) hijacked the Italian luxury ship ACHILLE LAURO⁷ and murdered Leon Klinghoffer.⁸ In response to the ACHILLE LAURO tragedy, the IMO adopted Resolution A.584(14) in 1985 for the purpose of eradicating the sharp increase in piracy and armed robbery both at sea and in port.⁹

3 Piracy in various regions has, in the past, been characterized by the part of the world in which it takes place. For example, “South American piracy” and “West African piracy” are characterized by a high degree of violence perpetrated by heavily armed criminals. “Latin American piracy” on the other hand usually occurs while vessels are anchored in territorial waters or moored to a wharf, right under the watch of the local authorities. Buhler, note 40 at 62, cited *infra*, n. 17.

4 International Maritime Organization; Introduction to IMO, <http://www.imo.org>.

5 See Thomas J. Schoenbaum, *Admiralty and Maritime Law*, 4th Ed., § 2.-28A, 63 quoting “*Enhancing Maritime Security: Concern About Unlawful Acts Which Threaten Shipping Since the 1980’s*” available at <http://www.imo.org/newsroom>.

6 Res. A.545(13)

RESOLUTION A.545(13)

Adopted on 17 November 1983

Agenda item 10(b)

MEASURES TO PREVENT ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS

THE ASSEMBLY,

RECALLING Article 16(j) of the Convention on the International Maritime Organization concerning the functions of the Assembly in relation to regulations concerning maritime safety,

NOTING with great concern the increasing number of incidents involving piracy and armed robbery against ships including small craft at anchor and under way,

RECOGNIZING the grave danger to life and the grave navigational and environmental risks to which such incidents can give rise,

DESIRING that Governments take all necessary action to prevent and suppress acts of piracy and armed robbery against ships including small craft,

HAVING CONSIDERED the advice of the Council at its fiftieth session and of the Maritime Safety Committee at its forty-eighth session,

1. URGES Governments concerned to take, as a matter of the highest priority, all measures necessary to prevent and suppress acts of piracy and armed robbery against ships in or adjacent to their waters, including strengthening of security measures;
 2. INVITES Governments concerned and interested organizations to advise ship-owners, ship operators, shipmasters and crews on measures to be taken to prevent acts of piracy and armed robbery and minimize the effects of such acts;
 3. FURTHER INVITES Governments and organizations concerned to inform the Organization of action taken to implement the aims of the present resolution;
 4. REQUESTS Governments concerned to inform the Organization of any act of piracy or armed robbery committed against a ship flying the flag of their country, indicating the location and circumstances of the incident and the action taken by the coastal State;
 5. REQUESTS ALSO the Secretary-General to circulate to Governments and organizations concerned the information referred to in paragraphs 3 and 4 above;
 6. FURTHER REQUESTS the Council to keep this matter under review and take such further action as it may consider necessary in the light of developments.
- 7 See Thomas j. schoenbaum, *Admiralty and Maritime Law*, 4th ed., § 2.-28A, 63 quoting “*Enhancing Maritime Security: Concern About Unlawful Acts Which threaten Shipping Since the 1980’s*” available at <http://www.imo.org.newsroom>.
- 8 The terrorists shot Leon Klinghoffer and dumped him and his wheelchair overboard. The hijackers remained onboard for two days until they received safe passage from the Egyptian government creating international outrage. http://www.palestinefacts.org\pf_1967-1991achillelauro.php: Palestine Facts; Israel 1967-1991 ACHILLE LAURO.
- 9 Res. A.584(14)

RESOLUTION A.584(14)

Adopted on 20 November 1985

Agenda item 10(b)

**MEASURES TO PREVENT UNLAWFUL ACTS WHICH THREATEN
THE SAFETY OF SHIPS AND THE SECURITY
OF THEIR PASSENGERS AND CREWS**

THE ASSEMBLY,

RECALLING Article 1 and Article 15(j) of the Convention on the International Maritime Organization concerning the purposes of the Organization and the functions of the Assembly in relation to regulations and guidelines concerning maritime safety,

NOTING with great concern the danger to passengers and crews resulting from the increasing number of incidents involving piracy, armed robbery and other unlawful acts against or on board ships, including small craft, both at anchor and under way,

RECALLING resolution A.545(13) which urged action to initiate a series of measures to combat acts of piracy and armed robbery against ships and small craft at sea,

RECOGNIZING the need for the Organization to assist in the formulation of internationally agreed technical measures to improve security and reduce the risk to the lives of passengers and crews on board ships,

1. CALLS UPON all Governments, port authorities and administrations, ship-owners, ship operators, shipmasters and crews to take, as soon as possible, steps to review and, as necessary, strengthen port and on-board security;
2. DIRECTS the Maritime Safety Committee, in co-operation with other committees, as required, to develop, on a priority basis, detailed and practical technical measures, including

B. The International Maritime Bureau – Piracy Reporting Center

The International Maritime Bureau (“IMB”) is a nonprofit division of the International Chamber of Commerce.¹⁰ Created in 1981, the IMB maintains a real time map which tracks reported piracy incidents on its website.¹¹ The IMB Reporting Center is funded by voluntary contributions. This information sharing agency raises piracy awareness for the tracking and avoiding piracy attacks.¹²

C. The Crime of Universal Jurisdiction

Piracy is a crime of “*universal jurisdiction*.”¹³ Accordingly, any country which apprehends a pirate has not only the right, but a duty to prosecute the perpetrator. This grant of universal jurisdiction to sovereign nations to prosecute individuals committing acts of piracy is incorporated into several international conventions.

both shore side and shipboard measures, which may be employed by Governments, port authorities and administrations, ship-owners, ship operators, shipmasters and crews to ensure the security of passengers and crews on board ships;

3. INVITES the Maritime Safety Committee to take note of the work of the International Civil Aviation Organization in the development of standards and recommended practices for airport and aircraft security;
 4. AUTHORIZES the Maritime Safety Committee to request the Secretary-General to issue a circular containing information on the measures developed by the Committee to Governments, organizations concerned and interested parties for their consideration and adoption.
- 10 ICC Commercial Crime Services: International Maritime Bureau; http://www.icc-ccs.org/index.php?option=com_content&review=active&id=27&Itemid=16
- 11 International Chamber of Commerce Real Time Piracy Map, available at: http://www.icc-ccs.org/index.php?option=com_fabrik&view=visualization&controller=visualization.googlemap&Itemid=8
- 12 <http://www.icc-ccs.org/index.php>, ICC Commercial Crime Services; IMB Piracy Reporting Center. One of the IMB’s principal areas of expertise is in the suppression of piracy. Concerned at the alarming growth in the phenomenon, this led to the creation of the IMB Piracy Reporting Centre in 1992. The International Maritime Bureau, aware of the escalating level of piracy, wanted to provide a free service to the seafarer and established the 24 hour IMB Piracy Reporting Centre (PRC) in Kuala Lumpur, Malaysia. It maintains a round-the-clock watch on the world’s shipping lanes, reporting pirate attacks to local law enforcement and issuing warnings about piracy hotspots to shipping.
- 13 Restatement (Third) of Foreign Relations Law § 404 (1987) (A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.) *United States v. Yousef*, 327 F.3d 56, 103 (2d Cir. 2003) (universal jurisdiction encompasses only limited set of crimes that cannot be expanded judicially); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. 2739, 159 L.Ed.2d 718, 72 USLW 4660, 158 Oil & Gas Rep. 601, 04 Cal. Daily Op. Serv. 5790, 2004 Daily Journal D.A.R. 7907, 17 Fla. L. Weekly Fed. S 515 (U.S. Jun 29, 2004) (Modern international law recognizes two categories of conduct subject to universal criminal jurisdiction. The second category is made up of serious crimes - such as piracy, the crime that prompted the development of the principle of universal jurisdiction). *U.S. v. Garcia*, 182 Fed.Appx. 873 (11th Cir. May 16, 2006)(the High Seas Clause granted Congress the power to define and punish offenses committed on the high seas and we have not required a nexus between the United States and the offense conduct under the MDLEA or its predecessor statute.)

D. The United Nations Convention of the Law of the Sea (UNCLOS)

The United Nations Conference, which first convened in New York in 1973, adopted the United Nations Law of the Sea Convention (UNCLOS) in Montego Bay on December 10, 1982. UNCLOS was entered into effect on November 16, 1994.¹⁴ At the present time, 159 countries and the European Union have ratified UNCLOS. The United States¹⁵ has not ratified UNCLOS, although ratification was favored by the former Bush Administration, a majority of the United States Senate and the Pentagon.¹⁶

The Convention on the Law of the Sea contains eight Articles pertaining to piracy. Article 100 states “[a]ll States shall cooperate to the fullest extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.”¹⁷ Article 101¹⁹ defines piracy as “any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or passengers of a private ship or a private aircraft...”

14 [http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp\=mtdsg3\(=en](http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp\=mtdsg3(=en)

15 Andrew C. Revkin, *As Polar Ice Turns to Water, Dreams of Treasure Abound*, NY Times. 10-10-2005.

16 “Ostensibly, the treaty establishes an international consensus on the extent of jurisdiction countries may exercise off their coasts and allocates rights and duties among nations in all maritime areas. In reality, the treaty -- then as now -- represents a fundamental assault on American sovereignty, one which is all the more troubling in this age of global terrorism.” Bonner Cohen, Ph.D.: *Law of the Sea Treaty Could Prove Dangerous to America*, National policy analysis.

17 Article 100 Duty to cooperate in the repression of piracy

All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

18 UNCLOS, article 100.

19 Article 101 Definition of piracy

All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

Piracy consists of any of the following acts:

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

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

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Article 102 Piracy by a warship, government ship or government aircraft whose crew has mutinied

The acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft

Article 103 Definition of a pirate ship or aircraft

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

Article 105 authorizes every State to seize a pirate ship in international waters and prosecute those arrested, and Article 106 addresses wrongful seizures.²⁰ Article 107 clarifies that only warships, military aircraft, or “other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect” may carry out the seizure.²¹

E. The High Seas Convention

The first United Nations Law of the Sea Conference in 1958 was convened to address the issues of the ownership of vessels at sea, freedom of navigation, and ownership of the seabed. The Conference produced the 1958 Geneva Convention on the High Seas (Geneva Convention).²² The treaty was signed on April 19, 1958 at Geneva and entered into force on September 30, 1962.²³ There are 63 parties to the High Seas Convention including the United States of America.²⁴ The United States signed the Convention on September 15, 1958 and ratified it on April 12, 1961.²⁵

The High Seas Convention contains several articles pertaining to marine piracy that are similar to the provisions in UNCLOS designated Articles 100—108.²⁶ The Convention creates guidelines delineating conditions under which warships are authorized to board foreign merchant vessels, compensation for losses incurred when a ship is boarded on unfounded suspicion, and circumstances warranting the hot pursuit of a foreign ship.²⁷

Article 104 Retention or loss of the nationality of a pirate ship or aircraft

A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.

20 Article 105 Seizure of a pirate ship or aircraft

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Article 106 Liability for seizure without adequate grounds

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure.

21 Article 107 Ships and aircraft which are entitled to seize on account of piracy

22 Martin Stopford, *Maritime Economics* 152, 156 (1988).

23 http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-2&chapter=21<=en

24 http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-2&chapter=21<=en

25 http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-2&chapter=21<=en

26 Convention on the High Seas, 29 April 1958, U.N.T.S. 450, articles 14—23.

27 Several pertinent provisions are:

Article 14

All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

Article 15

Piracy consists of any of the following acts:

- (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;

III. THE POST-9/11 RESPONSE OF THE MARITIME COMMUNITY TO PIRACY

A. The Model National Law on Acts of Piracy and Maritime Violence

The threat of marine piracy and its detrimental impact upon maritime trade has become the collective focus of the Comite' Maritime International ("CMI"), the Baltic and International Maritime Counsel ("BIMCO"), the International Chamber of Shipping ("ICS"), Interpol, the International Group of P&I Clubs ("IGP&I"), the ICC International Maritime Bureau ("IMB"), the International Maritime Organization ("IMO") and the United Nations (Office of Legal Affairs/Division for Ocean Affairs and the Law of the Sea). On December 7, 2001, the CMI along with representatives of the working group of other agencies (collectively "Working Group") published a draft of the Model National Law on Acts of Piracy and

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- (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
 - (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
 - (3) Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article.

Article 16

The acts of piracy, as defined in article 15, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship.

Article 17

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 15. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

Article 18

A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.

Article 19

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Article 20

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft, for any loss or damage caused by the seizure.

Article 21

A seizure on account of piracy may only be carried out by warships or military aircraft, or other ships or aircraft on government service authorized to that effect.

Maritime Violence (“Model Law”).²⁸ Specifically, piracy in the Model Law is defined as any act of piracy as defined by Article 15 of the 1958 Convention on the High Seas, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.²⁹ The Model Law does not specify penalties that should be imposed upon the commission of piracy. The principal focus of the Model Law is the content of legislation rather than the *form* of legislation. Accordingly, States are encouraged to ratify the concepts proposed by the Working Group. The Model Law contains a definition of the crime of piracy, jurisdiction for the enacting state to prosecute perpetrators,

28 The Joint International Working Group on Uniformity of Law Governing Acts of Piracy and Maritime Violence created a Model National Law in 2001 in the hopes of attacking piracy through more systematic treatment of that offense in national law.

29 Article 15

Piracy consists of any of the following acts:

- (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;
- 2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.

The Model Law also includes the definition of piracy contained in Article 101 of the 1982 United Nations Convention on the Law of the Sea, U.N. Pub. E. 83 v.5 (1983) reprinted 21 I.L.M. 1261 (1983).⁶

Article 101
Definition of piracy

Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

The Model Law provides for extradition, prosecution and reporting of incidents.

30 These guidelines were inspired in part by an incident involving the M/V TAJIMA, a Panamanian flag ship with a mixed Japanese and Philippine crew. The Japanese second officer was killed by two Philippine seafarers while the vessel was on the high seas. The master placed the suspects in custody until the ship berthed in port to discharge cargo in Japan.

extradition standards, and a process for reporting piracy incidents.³⁰ The Model Law was adopted by Singapore in 2008. Criticism of the Model Act has centered around the requirement of a violent act to trigger jurisdiction and the fact that the Model Act does not encompass acts committed against citizens of a state on foreign flagged vessels.³¹

B. The IMO January 22, 2002 Resolution

On November 20, 2001, two months after 9/11, an assembly of the 22nd Session of the IMO adopted 22/Resolution 924 entitled *Review Of Measures And Procedures To Prevent Acts of Terrorism Which Threaten the Security of Passengers and Crew and the Safety of Ships*. The assembly urgently emphasized the importance and priority of security measures to protect ships, passengers and crew on the high seas from terrorism and pirate attacks, and to suppress terrorist acts directed at ports and court personnel. On January 22, 2002, the resolution was passed and published.³²

31 John I. Winn & Kevin H. Govern, *Maritime Pirates, Sea Robbers, and Terrorists: New Approaches to Emerging threats*, 2 Homeland Security Rev. 131, 140 (2008)

32 Resolution A.924(22)

Resolution A.924(22)

Adopted on 20 November 2001

(Agenda item 8)

REVIEW OF MEASURES AND PROCEDURES TO PREVENT ACTS OF TERRORISM WHICH THREATEN THE SECURITY OF PASSENGERS AND CREWS AND THE SAFETY OF SHIPS

THE ASSEMBLY,

RECALLING Articles 1 and 15(j) of the Convention on the International Maritime Organization concerning the purposes of the Organization and the functions of the Assembly in relation to regulations and guidelines concerning maritime safety; and also the general purpose of the Convention on Facilitation of International Maritime Traffic, 1965,

TAKING INTO ACCOUNT United Nations General Assembly resolution 56/1 and Security Council resolution 1368, both adopted on 12 September 2001, condemning the terrorist attacks on the United States of America on 11 September 2001, and also Security Council resolution 1373, calling on the international community to redouble its efforts to prevent and suppress terrorist acts, including full implementation of anti-terrorist conventions,

EXPRESSING great concern for the security of passengers and crews on board ships including small craft both at anchor and underway in the context of incidents involving terrorism and other unlawful acts against ships, and the associated risks to people on shore or populations in port areas as well as to ports, offshore terminals and the marine environment,

RECALLING resolution A.584(14) on Measures to prevent unlawful acts which threaten the safety of ships and the security of their passengers and crews,

RECALLING ALSO MSC/Circ.443 on Measures to prevent unlawful acts against passengers and crews on board ships, approved by the Maritime Safety Committee at its fifty-third session, in pursuance of the requests of the Assembly as contained in the aforementioned resolution A.584(14),

RECALLING FURTHER MSC/Circ.754 on Passenger Ferry Security, approved by the Maritime Safety Committee at its sixty-sixth session,

FURTHER RECALLING the provisions of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome 1988) and its Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf,

FINALLY RECALLING United Nations General Assembly resolution 55/7 urging States to become party to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Protocol, and to ensure their effective implementation,

RECOGNIZING the need for the Organization to review, with the intent to revise, existing international legal and technical measures, and to consider appropriate new measures, to prevent and suppress terrorism against ships and to improve security aboard and ashore, in order to reduce the risk to passengers, crews and port personnel on board ships and in port areas and to the vessels and their cargoes,

1. REQUESTS the Maritime Safety Committee, the Legal Committee and the Facilitation Committee, under the direction of the Council, to undertake, on a high priority basis, a review to ascertain whether there is a need to update the instruments referred to in the preambular paragraphs and any other relevant IMO instrument under their scope and/or to adopt other security measures and, in the light of such a review, to take prompt action as appropriate;
 2. REQUESTS ALSO the Committees referred to above, when taking action as requested in operative paragraph 1, to take account of the work of other international organizations competent in the development of standards for transport-related safety and security by land, air and sea, as well as industry organizations;
 3. CALLS on Governments which have not accepted the 1988 Rome Convention and Protocol to consider doing so at the earliest opportunity;
 4. ENCOURAGES Governments, pending the outcome of work tasked to the Committees referred to in paragraph 1 above, to put in place and vigorously implement appropriate security measures around and in port areas and terminals, including offshore terminals;
 5. REQUESTS the Secretary-General to take appropriate measures within the Integrated Technical Co-operation Programme to assist Governments to assess, put in place or enhance, as the case may be, appropriate infrastructure and measures to strengthen port safety and security so as to prevent and suppress terrorist acts directed against ports and port personnel as well as ships in port areas, passengers and crews;
 6. REQUESTS FURTHER the Secretary-General to submit a report to the twenty-third session of the Assembly on progress made in the interim.
- 33 James Kraska, Brian Wilson, Piracy Repression, Partnering and the Law, 40 J. Mar. L. & Com. 43, 56-57 (2009).
- 34 http://www.imo.org/Conventions/mainframe.asp?topic_id=248
- 35 Convention for the Suppression of Illegal Acts Against the Safety of Maritime Navigation (1988).
- 36 *Id.*
- 37 Several of the pertinent provisions are as follows:

ARTICLE 3

1. Any person commits an offence If that person unlawfully and intentionally:
 - (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
 - (b) performs an act of violence against a person on board a ship If that act Is likely to endanger the safe navigation of that ship; or
 - (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
 - (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or Its cargo which endangers or is likely to endanger the safe navigation of that ship; or

C. Convention for the Suppression of Illegal Acts Against the Safety of Maritime Navigation

The Convention for the Suppression of Illegal Acts Against the Safety of Maritime Navigation (SUA) was registered by the International Maritime Organization in 1992. The principal purpose of SUA was to enforce retribution and punishment for maritime crimes. Additionally, SUA was, in part, inspired by the hijacking of the *ACHILLE LAURO*. The SUA Convention was adopted on March 10, 1988 and entered into force on March 1, 1992.³³ To date, 153 members have ratified the Convention. The United States ratified the 2005 protocol.³⁴ The Convention outlines several crimes against the safety of maritime navigation in Articles 1-11.³⁵ These crimes include seizing control of a vessel by force, acts of violence against persons onboard vessels, destruction of a vessel or maritime navigational facilities, placing a device or substance that may destroy a vessel onboard, and conspiracy to commit any of the enumerated crimes listed in Article 3.³⁶ The remaining articles discuss jurisdiction requirements and the States Parties' duty to pass domestic laws outlawing the crimes in Article 3 and imposing appropriate sanctions.³⁷

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- (e) destroys or seriously damages maritime navigational facilities or seriously Interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
 - (f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
 - (g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).
2. Any person also commits an offence if that person:
- (a) attempts to commit any of the offences set forth in paragraph 1; or
 - (b) abets the commission of any of the offences set forth in paragraph 1 perpetrated by any person or Is otherwise an accomplice of a person who commits such an offence; or
 - (c) threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or Juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question.

ARTICLE 4

1. This Convention applies if the ship Is navigating of is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States.
2. In cases where the Convention does not apply pursuant to paragraph 1, it nevertheless applies when the offender or the alleged offender Is found In the territory of a State Party other than the State referred to in paragraph 1.

ARTICLE 5

Each State Party shall make the offences set forth in article 3 punishable by appropriate penalties which take Into account the grave nature of those offences.

ARTICLE 6

1. Each State Party shall take such measures as may be necessary to establish Its jurisdiction over the offences set forth In article 3 when the offence is committed:
 - (a) against or on board a ship flying the flag of the State at the time the offence is committed; or
 - (b) in the territory of that State, including its territorial sea; or
 - (c) by a national of that State.
2. A State Party may also establish Its jurisdiction over any such offence when:
 - (a) it is committed by a stateless person whose habitual residence is in that State; or
 - (b) during its commission a national of that State is seized, threatened, injured or killed; or
 - (c) it is committed in an attempt to compel that State to do or abstain from doing any act.

D. United Nations Convention Against Transnational Organized Crime: The Palermo Convention

The United Nations Convention Against Transnational Organized Crime (Palermo Convention) was promulgated “to promote cooperation to prevent and combat organized crime more effectively.”³⁸ To date, there are 147 signatories. The United States signed the convention on Dec 13, 2000, and ratified it on 3 Nov 2005.³⁹ The Palermo Convention⁴⁰ focuses on the profiteering of piracy attacks. Over the past few years, well organized criminal cartels have begun sponsoring and funding the burgeoning business of piracy attacks.⁴¹ Piracy has evolved into the equivalent of racketeering or a Mafia-like industry. It is reputed that pirates creating havoc in the Gulf of Aden are now receiving intelligence on shipping routes, cargo, crews, and vessel schematics from accomplices in London via satellite tele-

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3. Any State Party which has established jurisdiction mentioned in paragraph 2 shall notify the Secretary-General of the International Maritime Organization (hereinafter referred to as "the Secretary-General"). If such State Party subsequently rescinds that jurisdiction, it shall notify the Secretary-General.
 4. Each State Party shall take such measures as may be necessary to establish Its jurisdiction over the offences set forth in article 3 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States Parties which have established their jurisdiction in accordance with paragraphs 1 and 2 of this article.
 5. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.
 - 38 United Nations Convention Against Transnational Organized Crime, 15 Nov. 2000, article 1. The Palermo Convention also includes three supplemental protocols. The first is the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children which calls for the international community to take aggressive measures to combat trafficking in women and children including the confiscation of proceeds from trafficking and the criminalization of money laundering. The second supplementary protocol is the Protocol against the Smuggling of Migrants by Land, Sea and Air which was created to combat the smuggling of migrants and protect the rights of smuggled migrants. The final supplementary protocol is Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their parts and Components and Ammunition. The protocol calls for States Parties to criminalize the illicit manufacture or sale of firearms, implement procedures for the confiscation and destruction of illicitly manufactured firearms, and to classify deactivated firearms as firearms.
 - 39 http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18
 - 40 The SUA Convention Provisions concerning piracy are found in Articles 2-15. Given space concerns, only a few provisions are reproduced here.

Article 5. Criminalization of participation in an organized criminal group

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
 - (a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:
 - (i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;
 - (ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:
 - a. Criminal activities of the organized criminal group;
 - b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;
 - (b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.
2. The knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this article may be inferred from objective factual circumstances.
3. States Parties whose domestic law requires involvement of an organized criminal group for purposes of the offences established in accordance with paragraph 1(a)(i) of this article shall ensure that their domestic law covers all serious crimes involving organized criminal groups. Such States Parties, as well as States Parties whose domestic law requires an act in furtherance of the agreement for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article, shall so inform the Secretary-General of the United Nations at the time of their signature or of deposit of their instrument of ratification, acceptance or approval of or accession to this Convention.

Article 6. Criminalization of the laundering of proceeds of crime

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
 - (a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;
 - (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;
- (b) Subject to the basic concepts of its legal system:
 - (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;
 - (ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.
2. For purposes of implementing or applying paragraph 1 of this article:
 - (a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;
 - (b) Each State Party shall include as predicate offences all serious crime as defined in article 2 of this Convention and the offences established in accordance with articles 5, 8 and 23 of this Convention. In the case of States Parties whose legislation sets out a list of specific predicate offences, they shall, at a minimum, include in such list a comprehensive range of offences associated with organized criminal groups;

phone.⁴² This advance planning now aided by sophisticated communications technology transforms piracy attacks into the equivalent of military operations. Moreover, technology gives the pirates an enormous advantage and adds an additional transnational element to their attacks.

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- (c) For the purposes of subparagraph (b), predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;
 - (d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;
 - (e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence;
 - (f) Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances.

Article 7. Measures to combat money-laundering

1. Each State Party:
 - (a) Shall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer identification, record-keeping and the reporting of suspicious transactions;
 - (b) Shall, without prejudice to articles 18 and 27 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential moneylaundering.
 2. States Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.
 3. In establishing a domestic regulatory and supervisory regime under the terms of this article, and without prejudice to any other article of this Convention, States Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering.
 4. States Parties shall endeavour to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.
- 41 Timothy H., Goodman, “*Leaving the Corsair’s Name to Other Times: How to Enforce the Law of Sea Piracy in the 21st Century Through Regional International Agreements*,” 31 Case W. Res. J. Int’l L. 139, 152 (1999).
- 42 Mike Pflanz, Somali Pirates ‘Helped by Intelligence Gathered in London,’ Telegraph.co.uk, May 11, 2009, available at <http://www.telegraph.co.uk/news/worldnews/piracy/5309692/Somali-pirates-helped-by-intelligence-gathered-in-London.html> (last visited July 27, 2009).

IV. INTERNATIONAL RESPONSE TO UPSURGE IN PIRACY OFF THE COAST OF SOMALIA

A. The Underlying Conditions In Somalia

The largest concentration of piracy attacks in recent years has occurred off the coast of Somalia in the Gulf of Aden. The situation in Somalia is a perfect breeding ground for pirates. There are very few economic opportunities available after decades of war and civil unrest. The Transitional Federal Government (TGF) is nearly non-functional, and as a result there is no military or law enforcement presence to patrol Somali coastal waters. Despite the failures of the TGF, Somalia remains an autonomous state. Therefore, other countries cannot freely send their military vessels into territorial Somali waters to apprehend pirates. In addition, the shipping lanes around the coast of Somalia are high-traffic areas as ships traveling between Europe and the Middle East, or Europe and Asia transit the Gulf of Aden. The combination of economic desperation, lack of effective law enforcement, and high traffic creates an inherent danger to maritime activity.

B. Djibouti Code of Conduct

In January of 2009 a sub-regional meeting was held by the IMO to conclude agreements on maritime security, piracy and armed robbery against ships. The meeting was attended by countries from the Western Indian Ocean, the Gulf of Aden, and Red Sea region. Twelve countries from outside the region and four United Nations bodies also attended. Nine inter-governmental and three non-governmental agencies also attended as observers. The meeting resulted in four resolutions: 1) adoption of a code of conduct convening the repression of piracy and armed robbery against ships in the Western Indian Ocean and the Gulf of Aden, 2) a resolution for technical cooperation and assistance, 3) a resolution for enhancing training in the region, and 4) an expression of appreciation.⁴³

The signatories of Resolution 1 (the Code) agreed to cooperate in a manner consistent with international law in the investigation, arrest, and prosecution of those reasonably suspected of having committed acts of piracy, the interdiction and seizure of suspect ships, the rescue and care of ships, persons, and property subject to piracy, and a shared patrol. The signatories also agreed to share information using existing infrastructures and to review their respective national legislation to ensure laws are in place criminalizing piracy.⁴⁴

Resolutions 2 and 3 request assistance from States and various intergovernmental agencies for countries that need support in implementing and promoting the Code. The government of Djibouti offered to host a regional training center, and the signatories requested the appropriate action from the Secretary-General to establish such a training center. Resolution 4 expressed appreciation of the hosts and monetary contributors to the meeting.⁴⁵

43 International Maritime Organization, *Protection of Vital Shipping Lanes*; Note by the Secretary-General, Apr. 3, 2009.

44 *Id.*

45 *Id.*

C. International Resources in the Horn of Africa Region

The international community has created numerous operations in the Horn of Africa region to combat piracy. The United Kingdom Maritime Trade Operations (UKMTO), Dubai and the Maritime Security Centre—Horn of Africa (MSCHOA) are valuable resources for mariners traveling through the Gulf of Aden. The UKMTO Dubai is the initial contact for ships in the area and serves as an interface between vessel masters and the military. The UKMTO tracks the movement of ships in the region to provide an accurate picture to military operations in the area. Ships are encouraged to provide their intended route to UKMTO three to four days prior to entering the area. It is recommended that ship masters report any sightings of known pirate mother ships to the UKMTO.⁴⁶

The MSCHOA coordinated European Union forces in the region. The MSCHOA works closely with the UKMTO to monitor which ships are in the area and works to reduce the amount of time required for military forces to respond to a reported pirate attack. Routing plans are provided to the MSCHOA which then identifies vulnerabilities and plan for protection during the passage. MSCHOA will also advise ships on the best routes to use to avoid an attack.⁴⁷

D. The United Nations Security Council Resolutions

The United Nations Security Council (“UNSC”) passed resolutions in 2007 and 2008 regarding piracy in Somalia. Resolution 1772 of 2007 stresses the importance of cooperation between the opposing factions in Somalia and reiterates the need for comprehensive and lasting cessation of hostilities. The Resolution authorizes the African Union to maintain its mission in Somalia, to take all measures needed to provide protection to government institutions, and to contribute to a National Security and Stabilization Plan. The Resolution further demands that Member States respect the arms embargo in place and cautions Member States with a military presence in the vicinity of Somalia to be vigilant to piracy.⁴⁸

UNSC Resolution 1816 adopted on June 2, 2008 focused specifically on piracy off the coast of Somalia. The Resolution once again calls for vigilance and encourages States to share information and increase their efforts to deter piracy. Emphasis is placed on training in avoidance, evasion, and defensive techniques, as well as avoiding the area whenever possible. The UNSC authorized a period of six months during which States cooperating with the Somali Transitional Federal Government would be allowed to enter Somali waters to suppress acts of piracy and to use any means allowable under international law to repress acts of piracy or armed robbery.⁴⁹

46 International Chamber of Commerce, *Best Practices to Deter Piracy in the Gulf of Aden and Off the Coast of Somalia*, Feb. 2009.

47 *Id.*

48 S. C. Res. 1772 (2007).

49 S. C. Res. 1816 (2008).

V. SPECIAL CHALLENGES OF THE INTERNATIONAL COMMUNITY IN COMBATING PIRACY

A. The Challenge of High-Risk Zones

Several challenges face the international community in its attempt to combat maritime piracy. Combating maritime piracy requires a high degree of international cooperation including coordination of states affected by maritime piracy and facilitating the enormous number of military vessels that would be necessary adequately to patrol the vast expanse of ocean classified as “high risk.” Two critical challenges are (i) the underreporting of attacks due to the high cost of reporting on the vessel owner and operator and (ii) the debate over whether to arm commercial vessels so that they are better able to protect themselves in the event of a piratical attack.

B. The Underreporting of Attacks

Though maritime predation and piracy cost the shipping industry billions of dollars annually, the majority of incidents go unreported. One alleged cause of under-reporting is the enormous cost of maintaining a ship in port during a protracted investigation that may prove futile, the increase in insurance premiums, negative publicity, corrupt investigators, and delays in movement of cargo. It has been estimated that it may cost vessel owners in excess of \$25,000 per day to report an attack.⁵⁰ Therefore, there is now a concerted focus to increase the efficiency of investigations and thereby reduce the cost of reporting incidents. The IMO adopted Resolution A.922(22), a Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships on November 29, 2001.⁵¹ The resolution provides guidance on criminalizing acts of piracy, training investigators, investigative strategy, and dealing with the initial report as well as conducting the actual investigation. More effort is needed by coastal states to implement these guidelines.

C. The Debate Whether to Arm Merchant Vessels

There are many proponents advocating arming cargo vessels with weapons to allow the crew to defend themselves. The countervailing argument of piracy experts who disapprove of arming commercial vessels is the increased risk of injury to crewmembers caught in the cross-fire. Crews are not trained in the use of weaponry and are therefore at risk for accidents stemming from the misuse of weapons. The employment of trained personnel, while reducing the risk of accidents, creates difficulties in creating a cohesive and integrated crew. Another argument militating against arming merchant vessels is that pirates who are successful in boarding ships even during enemy fire are far more likely to harm or kill captured crewmembers. Moreover, there is a potential risk of prosecution in a foreign jurisdiction for seafarers who kill or injure suspected attackers. The self-defense requirements are often different or non-existent in other jurisdictions.

50 Winn & Govern, *supra* note 11 at 135.

51 International Maritime Organization A 22/Res.922 (2001).

The Coast Guard has issued minimum guidelines for contracted security services⁵² as well as guidance on self-defense or defense of others by United States flagged commercial vessels.⁵³ The United States House of Representatives took a step to address this question when passing H.R. 2984 on June 19, 2009. H.R. 2984 is a bill designed to ensure the traditional right to self-defense against piracy. Unfortunately, this bill will not shield mariners from charges brought by foreign jurisdictions.

Finally, there is a logistical problem created by importing weapons into foreign ports during the course of loading or offloading cargo. Most countries require temporary import permits which can be difficult and costly, if not impossible, to obtain. In the United States, export licenses are also necessary for vessels leaving port with weapons. The exporter must first register with the Directorate of Defense Trade Controls before applying for a license. There is a yearly fee of \$2,250 required to register which includes up to ten licenses per year.⁵⁴ A permit of this nature would be needed from every country the vessel will visit during the course of the voyage.⁵⁵

VI. UNITED STATES RESPONSE TO MARITIME PIRACY

A. Jurisdictional Issues

The issue whether United States federal courts have jurisdiction over piracy cases is a recurring theme in American jurisprudence. Piracy has long been considered a “*universal jurisdiction*”⁵⁶ offense, because it is an offense against all nations, and giving all nations the power to try, convict, and punish pirates. The framers of the Constitution wanted to ensure that Congress had the power to regulate piracy as evidenced by Article 1, § 8 Powers of Congress, which reads in part: “To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.”⁵⁷

In 1861 the Southern District of New York interpreted the 1825 statute reading “And the trial of all offences which shall be committed upon the high seas or elsewhere out of the limits of any state or district, shall be in the district where the offender is apprehended, or into which he may first be brought”⁵⁸ to mean that jurisdiction may be exercised “either in the district in which the prisoners were first brought, or in that in which they were apprehended under lawful authority for the trial of the offense.”⁵⁹ This constitutional interpretation of

52 U.S. Coast Guard Port Security Advisory (3-09).

53 U.S. Coast Guard Port Security Advisory (5-09).

54 U.S. Coast Guard Port Security Advisory (4-09).

55 Dennis L. Bryant, *Ratcheting down the risk of piracy*, Maritime Reporter and Engineering News, June 2009.

56 *United States v. Layton*, 509 F. Supp. 212, 223 (N.D. Cal. 1981) (“[Universal] jurisdiction had its origins in the special problems and characteristics of piracy. M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT’L L. 81, 108 (2001) (“piracy is deemed the basis of universal criminal jurisdiction.”). James Kraska & Brian Wilson, *Piracy Repression, Partnering and the Law*, 40 J. Mar. L. & Com. 43, 56 (2009). (Maritime piracy is a violation of international law and a universal crime that imposes a duty on all states to take action.).

57 U.S. Const. art. I, § 8.

58 4 Stat. 118.

59 *U.S. v. Baker*, 24 F. Cas. 962, 963 (S.D.N.Y. 1861).

jurisdiction was the basis for extending the Southern District of New York jurisdiction over pirates despite the fact that the defendants in that case were transferred to a second boat in the Eastern District of Virginia on the way to trial in New York.

In 1962, the Supreme Court addressed the failure of the 1820 anti-piracy act expressly to limit federal jurisdiction over offenses committed within the jurisdiction of a State.⁶⁰ The first count of the indictment charged that the defendant “piratically, feloniously, and violently did assault one John F. Leete, the master of the vessel, putting him in bodily fear, and did feloniously &c., seize, take, and carry away thirty pieces of gold coin...”⁶¹ The jury issued a special verdict finding the location of the vessel at the time of the offense. This location was determined by the District Court judge to be within the jurisdiction of New York. The Supreme Court held that the special verdict issued by the jury did not furnish the grounds for the lower court to determine whether the offense was committed within the jurisdiction of a State. The Court set aside the special verdict and certified the Circuit Court to review the question and grant a new trial.⁶²

In 1882 the District Court for the District of Virginia held that piratical acts on ferries operating on the Potomac river were not covered by the federal statute governing piracy on tidal waters because the acts occurred within the territorial waters of the State of Virginia and the District of Columbia.⁶³ At that time, federal admiralty jurisdiction did not extend to the rivers in a state. The prisoners were ordered released.

The Southern District of New York revisited the question of jurisdiction in 1990 when passengers of the ill-fated Italian passenger liner ACHILLE LAURO brought suit against the Palestine Liberation Organization for the seizure of the vessel. The court found both subject matter and personal jurisdiction in the face of the PLO’s motion for dismissal.⁶⁴

In 2003 the District Court for the District of Hawaii held that jurisdiction existed over a Chinese citizen working on a Taiwanese vessel registered in the Seychelles for murders committed in international waters.⁶⁵ The court’s decision concentrated on the 1995 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (“SUA Convention”) ratified following the incident on the ACHILLE LAURO. The Convention was passed with the goal of developing cooperation between nations to combat illegal acts against maritime navigation and to punish those responsible when such acts do occur.⁶⁶

60 *U.S. v. Jackalow*, 66 U.S. 484 (1862).

61 *Id.* at 485.

62 *Id.* at 488.

63 *Ex parte Ballinger*, 88 F. 781 (D. Va. 1882).

64 *Klinghoffer v. PLO*, 739 F.Supp. 854 (SDNY 1990).

65 *U.S. v. Lei Shi*, 396 F. Supp.2d 1132 (D. Haw. 2003).

66 *Id.* at 1134.

B. Statutory Prohibitions Against Piracy

The current anti-piracy statute, 18 U.S.C. § 1651,⁶⁷ prohibits acts of piracy as defined by the Law of Nations.⁶⁸ The United States statutes extend broad jurisdiction to federal courts over pirates.

In *United States v. Palmer*, the Supreme Court held that Congress could not classify acts as piracy that were not considered piracy under the Law of Nations for the purposes of giving the courts jurisdiction over those acts.⁶⁹ Many courts have also struggled with the question of whether robbery, which is not a capital offense, on land constitutes piracy (which is a capital offense) when committed on the high seas. In *United States v. Jones* the Circuit Court for the District of Pennsylvania found that “the felonious taking of goods from the person of another, or in his presence, on the high seas, by violence, or by putting him in fear, and against his will, is piracy by the law of the United States, and punishable with death.”⁷⁰

The legal definition of piracy has remained static over the past two centuries, and the phrase “outside the jurisdiction of any state” is usually included when offering a definition of piracy. This presents problems when the acts are committed in the territorial waters of a State unwilling or unable actively to combat piracy. The 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation discarded jurisdictional requirements in its definition of piracy.⁷¹ The confusions surrounding jurisdiction and diplomatic concerns are often cited as reasons for the low prosecution rate of individuals committing piracy.

67 The United States Code contains statutes prohibiting (i) individuals from committing acts of piracy and seeking refuge in the United States, (ii) committing any act of piracy, murder or robbery against the United States or any citizen thereof on the high seas, (iii) prohibits aliens from committing pirates against the United States, (iv) prevents privateers and (v) the assault on a commanding officer by crew members. 18 U.S.C. §§ 1651-1661. The general maritime law defines piracy as follows:

A pirate is one who acts solely on his own authority, without any commission or authority from a sovereign state, seizing by force and appropriating to himself, without discrimination, every vessel he meets with.

Davison v. Seal-Skins, 7 Fed. Cas., 192 (C.C. Conn. 1835).

68 United Nations Convention on the Law of the Sea art. 101, Nov. 16, 1994.

69 *U.S. v. Palmer*, 16 U.S. 610, 642 (1818).

70 *U.S. v. Jones*, 26 F. Cas. 653, 656 (D. Pa. 1813).

71 Phillip A. Buhler, *New Struggle with an Old Menace: Towards a Revised Definition of Maritime Piracy*, 8 Currents Int'l Trade L.J. 61, 67 (1999).

C. The M/V MAERSK ALABAMA

1. The M/V MAERSK ALABAMA Hijacking

On April 8, 2009, pirates seized the M/V MAERSK ALABAMA, a commercial vessel. The ship's captain, Richard Phillips, was taken hostage and held with the vessel for ransom. A military rescue was performed when the government determined that Phillips' life was in danger. Three of Phillips' Somali captors were killed during the rescue and a fourth was taken into custody. This incident prompted several Somali pirates to vow revenge for the death of their brethren and made U.S. flagged vessels a prime target.⁷² Though there had been many incidents involving piracy off the coast of Somalia in the years leading up to the hijacking of the M/V MAERSK ALABAMA, such attacks had garnered little press. The attack on the M/V MAERSK ALABAMA ignited a media firestorm.

2. Indictment of Abduwali Abdukhadir Muse in the Southern District of New York

Following the military rescue of Captain Phillips on the M/V MAERSK ALABAMA, Muse was arrested and transported to the Southern District of New York where he was charged with piracy, seizing a ship by force, kidnapping, possession of a machinegun during kidnapping, hostage taking, violence against maritime navigation, and conspiracy to commit the aforementioned crimes. The grand jury returned an indictment on all ten counts. The majority of the charges against Muse carry a maximum sentence of life in prison, though piracy carries a mandatory life sentence. 18 U.S.C. § 1651 reads: "[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life."⁷³ The offenses classified as violence against maritime navigation are listed in 18 U.S.C. § 2280(a). Muse is charged with violating 2280(a)(1), seizing or exercising force over a ship by force, threat of force, or intimidation.⁷⁴

72 Congressional Research Service, *Piracy Off the Horn of Africa*, April 20, 2009, R40528

73 18 U.S.C. § 1651.

74 18 U.S.C. § 2280(a)(1).

D. Reports to Congress and House Committee on Transportation Hearing

The Congressional Research Service authored a report to Congress on Piracy Off the Horn of Africa. The report detailed the background of the piracy problem, explained the policies of the United States and the international maritime community, and advised several issues Congress should address.⁷⁵ The report recommended that Congress examine the impact of additional military presence in the Gulf of Aden region and the ability of the military to perform missions in other parts of the world. The research reflected that it may require as many as sixty warships adequately to secure the Gulf of Aden. It was also suggested that the United States consider signing and ratifying UNCLOS. The report also warns against the arming of merchant ships because of the crew's lack of weapon's training, the possibility for lives to be lost in the cross-fire, and the increased likelihood that pirates will kill crew members in a failed resistance. The report states that until the situation in Somalia is stabilized, piracy will continue to be a problem. The report concludes that the most effective manner to combat piracy is to address the underlying cause of piracy.⁷⁶

On May 19, 2009 the House Committee on Transportation conducted a hearing regarding piracy. The hearing addressed the impact of piracy on commercial shipping and also on the ability of humanitarian aid agencies to get relief to areas in the Horn of Africa region that are desperately in need of assistance. The Committee also discussed the issue of arming merchant ships and the recent Department of State Announcement on Counter-Piracy Initiatives in which Secretary of State Clinton announced the State Department's intention to send an envoy to an international meeting on peacekeeping in Somalia. The Committee concluded by discussing \$70 million allocation to the African Union Mission to Somalia to help combat piracy and another \$10 million for the Economic Support Fund to assist Somalia with economic growth and governance programs.⁷⁷

⁷⁵ Congressional Research Service. It has been reported that over 60 pirates have been sent to Yemen to face charges and another 150 pirates have been sent to the courts in Kenya for prosecution.

⁷⁶ *Id.*

⁷⁷ *U.S. House of Representatives Committee on Transportation and Infrastructure*, 111 Cong. May 19, 2009.

E. Coast Guard Guidelines For United States Vessels Operating In High-Risk Waters

On May 22, 2009, the United States Coast Guard published Maritime Security (“MARSEC”) Directive 104-6 (Rev. 2), Guidelines for U.S. Vessels Operating in High-Risk Waters. The Directive is applicable to both owners and operators of United States vessels for protective measures against security threats.

The Port Security Advisory recommends that Vessel Security Plans (“VSP”) for vessels operating in high-risk waters must contain security protocols for armed robbery, piracy, and terrorism against ships. The Vessel Security Plan must contain communication procedures through use of the ship’s security alert system and the use of surveillance equipment. Vessels either anchored or berthed in high-risk waters are required to utilize measures to conform with MARSEC Level 2. Mariners are warned that pirates frequently changed tactics and are now attacking vessels at greater distances from shore.⁷⁸

The Port Security Advisory recommends a protocol prior to entering high-risk waters. The protocol includes an anti-piracy plan and vulnerability assessment of the vessel based upon current intelligence. Ships transiting the Gulf of Aden are required to utilize plans for the International Recommended Transit Corridor (“IRTC”) following the Gulf of Aden group transits. Crews must be well-prepared, well-briefed and trained in anti-piracy proceedings and all side ports located below the main deck must be reinforced or covered to prevent unauthorized access to the vessel. Loud acoustical devices and high energy light beams are also recommended to ward off terrorists. Modification of access to the wheelhouse is also recommended to prevent unauthorized access. Long Range Identification & Tracking (“LRIT”) systems must be installed in vessels that operate in the Gulf of Aden or the Horn of Africa region prior to July 1, 2009.

78 The Port Security Advisory (2 09) states:

Security Officers are encouraged to review current information provided on websites maintained by the U.S. Office of Naval Intelligence (ONI), ICC Commercial Crime Services, Maritime Security Center-Horn of Africa (MSCHOA), the U.K. Maritime Trade Operations (UKMTO), the U.S. Maritime Liaison Officer (MARLO), the Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia (ReCAAP), and the U.S. Maritime Administration (MARAD) website. These reports will help security Officers determine where recent incidents involving terrorism, piracy, and armed robbery against ships have occurred. These reports may be accessed at the following web sites:

<http://www.nga.mil/portal/site/maritime> (ONI)

<http://www.icc-ccs.org> (ICC) (IMB PRC)

<http://www.mschoa.eu> (MSC HOA)

<http://www.rncom.mod.uk/templates/MaritimeOperations.cfm?id=902> (UKMTO)

<http://www.cusnc.navy.mil/marlo/> (MARLO)

http://www.recaap.org/index_home.html (ReCAAP)

http://www.marad.dot.gov/news_room_landing_page/horn_of_africa_piracy/horn_of_africa_piracy.htm (MARAD)

The Port Security Advisory also contains recommendations during transit of the high-risk area. These recommendations include sending position reports regularly to regional operational centers, compliance with International COLLREGS, maintaining a vigilant anti-piracy watch, and activation of supplemental security team watches. Masters of vessels are directed to contact appropriate regional operation centers to receive help from on-scene military forces in the event that a piracy threat is imminent. The use of fire pumps and fire hoses is recommended, which has successfully deterred other attacks. Anchoring or drifting in high-risk waters is strongly discouraged, and navigation lights should not be extinguished at night.

In the event that a ship is attacked or boarded, the Coast Guard mandates that the anti-piracy organization for the region should be notified. It is recommended that all crew other than the bridge team should remain together in a pre-planned location. The advisory recommends that masters should consider heavy wheel movements to ride off crafts as they approach. Post-incident, notification of the appropriate anti-piracy agency is recommended.

VII. CONCLUSION

Piracy is a continuing threat to the safety of seafarers and the maritime shipping industry. Within the past few years, maritime nations have become increasingly aware of the necessity for concerted endeavors to uniformly combat terrorism and piracy in maritime trade. As a result, the global community is becoming more organized in the multilateral effort to ensure the safety of commercial vessels transiting high-risk waters.
