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Maritime Piracy: Changes in U.S. Law Needed to Combat this Exceptional Threat to National Security

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Many articles have recently been written on maritime piracy. Most of these articles focus on the problem through the prism of the international community and international law. The few articles that view the matter through U.S. eyes tend to examine it as a distant economic or geo-political concern. Yet, for the United States, the true threat posed by piracy is not to our economy or geo-politics; it is to our national security. Just as terrorists exploited aviation hijacking in the 9/11 attacks, a similar terrorist threat looms via piracy. This article therefore seeks to explore the parameters offered by U.S. law to permit the United States to combat this national security problem. It concludes that international and U.S. law offer numerous, wide-ranging authorities for the U.S. government to attack pirates, seize their vessels, and prosecute the offenders under a plethora of charges both in the United States and abroad. Yet much more should to be done if we are to seriously stave off this threat. Changes to U.S. statutes and regulations are desperately needed to allow U.S. vessels to defend themselves from maritime pirates, the U.S. military to capture such marauders, and the U.S. justice system to prosecute such criminals.

I. Introduction

At approximately 7:15 a.m. on April 8, 2009, four pirates in a fast-moving skiff used grappling irons and a torrent of firepower to board an unarmed 508-foot U.S. flagged vessel, the Maersk Alabama.1 The Alabama was traversing the Gulf of Aden, between Yemen and Somalia, in order to provide food aid to Kenya.2 The attack marked the first time that an American merchant vessel had been boarded by pirates since the early 1800s.3 Once the pirates were on the vessel, the Alabama’s captain and three other sailors distracted the armed pirates on deck, while the rest of the crew disabled the ship and then hid in safe rooms below.4 With the pirate’s skiff having been sunk during the melee, and the Alabama completely inoperable, the Alabama’s captain convinced the

2 Norton-Taylor, supra note 1.
3 Bone, supra note 1.
The pirates took the captain as their prisoner, hoping to ransom him for a reported $2-3 million. Events did not work out as the pirates had hoped. A U.S. destroyer trailed the lifeboat while negotiations for the captain’s release dragged on. After five days of futile discussions, the United States came to the conclusion that the pirates intended imminent harm to the captain. Deeply concerned for the captain’s safety, and operating pursuant to authority provided by President Obama, the U.S. destroyer slowly came alongside the lifeboat. On board the destroyer were three snipers from Navy Seal Team 6, one of America’s top military operations units and the unit that just recently killed Osama Bin Laden. The three snipers, calibrating the rollicking of both the destroyer and the lifeboat, simultaneously fired one shot each, killing the three pirates aboard the lifeboat. The captain, amazingly, was unhurt in the exchange. The fourth pirate, who had earlier surrendered to U.S. authorities, was brought to the United States to stand trial on counts of piracy, hijacking, hostage-taking, kidnapping and conspiracy. Pleading guilty to all counts except the count of piracy, this fourth pirate was sentenced to more than 33 years in prison.

Ask most Americans to list the major national security concerns of the United States and the response inevitably will include issues such as terrorism, Middle East peace, and possibly even counter-proliferation and counter-narcotics. Unlike to make the list, however, is maritime piracy. Those familiar with the problem of maritime piracy, to include most authors who have written on the subject, typically categorize it as a law enforcement matter that impacts a small number of mostly non-Americans. Some go so far as to consider it a regional political concern primarily impacting Somalia and other nations in the Gulf of Aden, or perhaps even a minor international economic problem, given its impact on the global transportation of goods.

While all of these descriptions may be accurate, the Alabama incident and others demonstrate that the true threat posed by piracy, especially for the United States, is to our national security. The term “national security” was famously defined by George F. Kennan in 1948 as “the continued ability of this country to pursue its internal life without serious interference, or threat of interference, from foreign powers.” Under this definition, maritime piracy poses a clear national security threat to the United States.

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5 Bone, supra note 1.
7 McFadden & Shane, supra note 6.
8 Id.
10 McFadden & Shane, supra note 6.
11 Id.
12 Benjamin Weiser, Somali Who Hijacked Ship Receives 33 Years in Prison, N.Y. TIMES, Feb. 17, 2011, at A14; McFadden & Shane, supra note 6.
13 Weiser, supra note 12.
15 George F. Kennan, “Comments on the General Trend of U.S. Foreign Policy” (George F. Kennan Papers, Princeton University, Aug. 20, 1948). Recent Presidential pronouncements have echoed this concept. See
Piracy threatens, and has taken, the lives of American crews and civilians. It poses an enormous economic threat, both in terms of ransom payments and impact on global commerce. It enhances political instability in significant regions of the world, such as Somalia and the Straits of Malacca. Most critically, though, maritime piracy offers an easy and tempting conduit for terrorism. Terrorists have already used maritime options to advance their cause in several dramatic attacks, to include hijacking of a cruise ship (and murdering a Jewish passenger), ramming a boat into a U.S. destroyer (killing 17 U.S. sailors), and attacking numerous other maritime vessels. Other pira-terrorist attacks have been thwarted, while many more appear to be in the planning stages. Therefore, it is now time, indeed well past time, to consider piracy for the national security threat that it actually is. Aviation hijacking was not considered a significant national security concern until al-Qaeda used hijacked airplanes to bring down buildings on 9/11. We cannot wait for a brutal terrorist attack at sea to occur before we realize the same risk that maritime piracy poses to our country.

This article therefore articulates what international and U.S. law permits and limits the United States to do to combat the U.S. national security threat posed by piracy, to include the ability of the United States to militarily attack pirates, seize their vessels, prosecute them in the United States, and have them prosecuted somewhere. It then provides suggestions as to how to augment these laws to better confront the threat. In so doing, this article takes a different tack from the other law review articles that have been written recently on piracy. Rather than concentrate on what the international community is or should be permitted to do to combat piracy, and rather than look at the matter as a primarily economic or regionally-focused geo-political issue, this article focuses on piracy as a U.S. national security matter and evaluates what United States statutes and regulations can and should permit the United States to do with regard to this threat.

To this end, Part II of this article provides a background on piracy. It begins by offering a working definition for the often elusive term. It then proceeds to outline the history of piracy, before finally examining the current threat to national security that piracy poses. Part III then assesses what international law permits the United States to do to combat piracy. As piracy is considered a “universal” crime impacting all nations, and as piracy typically takes place outside U.S. territorial waters, international law plays a significant role in the American ability to thwart piratical attacks. Part IV then builds on the international law regime to describe the laws the United States currently has in place to use force against pirates. Part V continues the review of current U.S. law on piracy by evaluating the availability of the courts to prosecute pirates.

Finally, Part VI offers almost a dozen concrete and viable proposals for augmenting the United States’ ability to combat this national security scourge. Focusing on the need to deter piracy, as well as capture and prosecute those who engage in such
acts, the suggested solutions include: passing legislation to allow for prosecution of those who materially assist pirates, as already exists in the fight against terrorism; expanding the rules of the International Criminal Court to allow for the inclusion of piracy claims; establishing bi-lateral agreements with various coastal nations to augment the ability of the U.S. to pursue pirates into other nations’ territorial waters; and revising current U.S. regulations to better permit U.S. vessels to carry weapons and armed guards to combat pirate attacks. While these may appear to be simple and -- hopefully by the end of this article -- obvious solutions to the problem, they nonetheless have yet to be implemented by the United States, and offer significant, pragmatic means in the immediate future to try to combat the threat.

II. Background on Piracy

A. Definition of Piracy

Anyone who has seen a recent Johnny Depp film has a clear sense of what constitutes a “pirate” – parrot on the shoulder, eye patch, bad accent, and a general disregard for bathing. Unfortunately, finding a uniform legal definition for the term has proven much trickier. As many commentators have noted, there is no universally-accepted definition for the term “piracy.”

However, a close evaluation of the scholarship and case law in this area reveals three key facets to piracy, which together suggest an appropriate definition. First, there must be an intent to rob or plunder. Or as U.S. courts have colorfully described it, there must be a “piratical or felonious intent, or for the purpose of wanton plunder, or malicious destruction of property.” Thus, there is no piracy if the activity is due to “mistake, or in necessary self-defence, or to repel a supposed meditated attack by pirates.” Second, the act must take place at sea or in a sea port; otherwise, the matter involves merely a common robbery or burglary. Combining these first two criteria, the traditional definition of piracy has been expressed as “robbery, or forcible deprivations upon the sea,” with depredation defined as the “act of plundering, robbing or pillaging.”

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18 Azubuike, supra note 17, at 48.
19 The Marianna Flora, 24 U.S. (Wheaton) 1, 39 (1825).
20 Id. at 41 (holding that an attack by a Portuguese ship on a U.S. ship was not piracy as it was based on a mistake of fact “under the notion of just self-defence”).
21 United States v. Smith, 18 U.S. (Wheaton) 153, 161 (1820); see also United States v. Shi, 525 F.3d 709, 721 (9th Cir. 2008) (citing the definition in Smith as the traditional definition of “piracy”); The Ambrose Light, 25 F. 408, 416 (1885).
22 BLACK’S LAW DICTIONARY 397 (8th ed. 1999); see also Shi, 525 F.3d at 721 (citing to Black’s Law Dictionary to define “depredation” in the context of piracy).
However, this traditional definition, though benefitting from brevity, misses the third major component of piracy; i.e. that it be performed by stateless actors. After all, if a ship operating under the flag or at the direction of a sovereign nation robs or plunders another sovereign nation’s ship, such activity is not piracy, but more likely an act of war.

Indeed, it is the statelessness of the act that makes piracy so reprehensible, as described by the Federal District Court of New York in 1885 in the now-famous *Ambrose Light* case. As the court explained, all nations are entitled to engage in maritime commerce in peace. Only a sovereign can upset this passivity, either through the declaration of a lawful war or via the just restrictions such a sovereign chooses to impose on his or her territorial sea or port. Otherwise, anarchy ensues. Warfare on the water committed by stateless actors is therefore unlawful, and those who make such violent attacks against others have no legal rights, unless they are recognized as lawful belligerents. Of course, only a sovereign nation can recognize lawful belligerent status. Thus, as the court forcefully concluded:

[In the absence of recognition by any government of their belligerent rights, insurgents that send out vessels of war are, in legal contemplation, merely combinations of private persons engaged in unlawful depredations on the high seas; that they are civilly and criminally responsible in the tribunals for all their acts of violence; ... that such acts are therefore piratical, and entitle the ships and tribunals of every nation whose interests are attacked or menaced, to suppress, at their discretion, such unauthorized warfare by the seizure and confiscation of the vessels engaged in it. The right of seizure by other nations arises in such cases, *ex necessitate*, from the very nature of the case. There is no other remedy except open war; and nations are not required to declare war against individual rebels whom they are unwilling and are not required to recognize as a belligerent power.... By the right of self-defense, they may simply seize such law-breakers as come in their way and menace them with injury. Without this right, insurgents, though recognition were rightly refused them, and however insignificant their cause, or unworthy their conduct, might violate the rights of all other nations, harass their commerce, and capture or sink their ships with impunity.]

Putting these three components together then, “piracy” as we shall use it in this article is *the act of seeking to rob, plunder, or engage in some other depredating act against a ship on the sea where the attackers are without affiliation with or authorization*.

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23 See, e.g., *The Ambrose Light*, 25 F. 408, 412 (1885) (noting that a key question in determining whether an act was piratical is whether the attackers “had or had not obtained any previous recognition of belligerent rights, either from their own government or from the political or executive department of any other nation; and that, in the absence of recognition by any government whatever, the tribunals or other nations must hold such expeditions ... to be technically piratical.”); Azubuike, *supra* note 17, at 47 (noting that, for any action to constitute piracy, it cannot be attributable to any state).


25 *Id.* at 412-13 (finding the ship there would have been piratical if the Colombian rebels manning it were not recognized as belligerents by any nation, but holding that the United States had implicitly recognized the rebels as lawful belligerents, and therefore the rebels’ acts were not to be considered piratical).
by any sovereign nation. The United States Government and its courts have generally accepted a definition of piracy along these lines.  

B. History of Piracy

Piracy is considered the oldest recognized international crime, and appears to have existed since humankind began adventuring into the sea. As one author describes it, “[t]he very first time something valuable was known to be leaving a beach on a raft the first pirate was around to steal it.” Piracy was a significant issue in ancient Greece and Rome. Indeed, a young Julius Caesar was allegedly captured by pirates in 78 B.C. and released only after a significant reward was paid to his captors. Interestingly, at its inception, piracy was not only tolerated, but early nations often hired pirates to attack the state’s enemies. Certain types of pirates (known as “privateers”) were even supported by nations in order to augment the nation’s coffers, as pirates in cahoots with a given government would split the proceeds of their booty with the crown. The early history of the United States is replete with attacks on U.S. vessels by pirates. In the late 1700s, Barbary pirates operating out of North Africa ravaged first European and then, after independence, American vessels. The piracy ended only after President Thomas Jefferson sent a military squadron to the area, eventually forcing the Barbary States to relent. During the Civil War, the Union often referred to Confederate

26 President George W. Bush, Policy for the Repression of Piracy and Other Criminal Acts of Violence at Sea (June 14, 2007), http://georgewbush-whitehouse.archives.gov/news/releases/2007/06/20070614-3.html ("Piracy is any illegal act of violence, detention, or depredation committed for private ends by the crew, or the passengers, of a private ship and directed against a ship, aircraft, persons, or property on the high seas or in any other place outside the jurisdiction of any state."). The Ambrose Light, 25 F. 408, 412 (1885) (noting that Wheaton defines the term as "the offense of depredating on the high seas without being authorized by any sovereign state."); Id. at 416 (noting other scholars and courts which employ a similar definition); United States v. Steinmetz, 973 F.2d 212, 219 (3d Cir. 1992) (defining piracy as the "depredation on or near the sea without authority from any prince or state." (quoting United States v. Smith, 27 F.Cas 1134, 1135 (C.C.E.D.Pa. 1861) (No. 16318))).


29 Jesus, supra note 28, at 364; Swanson, supra note 17, at 205-06.

30 Jesus, supra note 28, at 364; Madden, supra note 28, at 139.

31 Azubuike, supra note 17, at 45.

32 Madden, supra note 28, at 143; Jeffrey Gettleman, Lessons from the Barbary Pirate Wars, N.Y. TIMES, Apr. 11, 2009, at A10 (noting various Barbary state rules commissioned pirates “to rob and pillage and kidnap, and the rulers got a cut”).


34 Hitchens, supra note 33.
vessels as “pirates.”

In truth though, “all of the historical evidence [of the Civil War] suggests that the references to piracy were more rhetorical than legal.”

Rather than lawless and stateless pirates, the Union and the courts generally recognized the Confederacy and its vessels as lawful belligerents.

After peaking in the 17th and 18th centuries, acts of piracy around the world and against the United States diminished so significantly that, by the middle of the 20th century, piracy was considered almost completely eradicated.

The 1964 edition of the Encyclopedia Britannica went so far as to declare that “[t]he end of piracy, after centuries, was brought about by public feeling, backed up by the steam engine and telegraph.”

Paraphrasing Mark Twain, however, the rumors of the death of piracy were greatly exaggerated. There was an outbreak of pirate attacks in the 1970s and 1980s.

The threat, however, began to reach critical mass only in the current millennium, and has grown worse in recent years. 2010 was a record year, with a reported 445 pirate attacks, and 53 ships seized.

The number of hostages taken by pirates rose from an estimated 188 in 2006 to 1,181 in 2010.

The numbers dropped slightly in 2011, with a reported 439 attacks worldwide, resulting in the seizure of 45 vessels and 802 hostages.

The vast majority of recent pirate attacks have taken place in or around the territorial waters of Somalia, due to that nation’s impoverished populace and long-time political instability. However, Somalia is not the sole hotbed of piracy. Large numbers of attacks take place every year in the waters around Indonesia and Malaysia. Benin and Nigeria have recently become rife with piracy attacks.

Other piratical attacks have been recorded in areas as diverse as Bangladesh, and off the coast of Sweden.

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36 Id. (holding that the Confederate ship the ALABAMA was not a piratical vessel).
37 Id. at 219.
40 Jesus, supra note 28, at 364.
42 Piracy Worse than Ever, supra note 41, at 15.
43 World Sea Piracy Drops in 2011, Somali Attacks Up, supra note 41.
46 World Sea Piracy Drops in 2011, Somali Attacks Up, supra note 41; World Briefing: Nigeria: Piracy Rises Off West Africa, N.Y. TIMES, Aug. 12, 2011, at A06 (noting that pirate attacks off the coasts of Nigeria and Benin have increased to levels that approximate Somalia).
47 Michael Schwirtz, Russia: Ship’s Hijackers Are Convicted of Piracy, N.Y. TIMES, Mar. 25, 2011, at A6 (noting that a Russian court sentenced six men to sentences of 7 to 12 years for committing piracy against a
There are numerous reasons for the recent increase in pirate attacks. Certainly, the poverty of some coastal populations is a tremendous contributing factor. For example, in Somalia, piracy is considered one of the few money-making industries in that impoverished nation. A single seizure can earn a Somali pirate $150,000 in ransom, which is a truly staggering sum in a country with a per capita GDP of around $600. Not only do such large ransoms encourage piracy, but pirate organizations also use their illicit proceeds to acquire more sophisticated equipment to greater augment their likelihood of success and allow them to attack bigger and more valuable vessels, creating a vicious cycle. Thus, pirates now use satellite phones, GPS systems, and powerful weapons in their attacks. They also often transform captured vessels of lower ransom value, such as a fishing boat or cargo dhow, into “mother ships” from which they can launch attacks on more lucrative targets.

Combined with the large financial incentive of piracy is the overall minimal enforcement, creating a high benefit-to-risk scenario. Poverty-stricken countries, such as Somalia, have few resources to thwart piracy, and little incentive to spend those limited finances to protect commercial ships that are usually just passing by on the way to enhancing the financial interests of other states. Such impoverished nations also tend to have ineffective courts and prosecutors, and weak central governments that prove unable or unwilling to enact or enforce anti-piracy laws. In addition, most acts of piracy take

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Russian ship off the coast of Sweden); Goodman, supra note 44 (noting pirate attacks in 2010 in Nigeria, Bangladesh and Indonesia).
49 Jeffrey Gettleman, News Analysis: Somalia Tests Limits of Aid, N.Y. TIMES, Nov. 2, 2011, at F1. Beyond money collected from ransoms, the piracy trade also leads to significant indirect jobs, such as local cooks and food suppliers for the pirates and the hostages. It is estimated that up to 100 people are needed to support each hijacked vessel. Katrina Manson, Piracy Boosts Somalia, Says Report, FINANCIAL TIMES, Jan. 13, 2012.
50 Kontorovich ASIL Article, supra note 27. Overall, Somali pirates received approximately $75-85 million in ransom payments in 2010. Shapiro, supra note 48.
54 Winn & Govern, supra note 48, at 136; Gabel, supra note 17, at 1453-54.
place in international waters and therefore outside the jurisdiction of any one state. Thus, as one author has noted, “[a]s the oceans are used by all and controlled by no one, a regulatory vacuum exists with respect to laws guiding state responses to piratical acts.”

Nations whose ships are attacked, aka “flag states,” also often have limited interest or ability to deter piracy against their vessels. Until fairly recently, most ships operated under the flags of only a few, generally powerful, nations. Starting in the 1980s, however, several smaller nations noticed the financial benefit of being a flag state and became what are known as “flag-of-convenience” states. While this has led to a general decrease in shipping costs, such flag-of-convenience states often lack the naval power to protect their ships, or the ability to arrest or prosecute pirates. After all, ships fly under these flags due to the reduced cost (as well as the reduced regulation), not because of the flag-nation’s ability to thwart piracy.

Even the stronger nations of the world, which are tend to be most concerned about protecting international commerce as a general premise, often lack the incentive or ability to prosecute pirates. Many countries, such as Denmark, simply have weak or insufficient laws to prosecute pirates. The jurisdictional reach of the criminal laws of other countries do not extend past their territorial waters. Other nations are concerned about the legal consequences of capturing pirates. The United Kingdom, for example, has advised its navy to avoid detaining pirates of certain nationalities for fear that the pirate would invoke a claim of asylum under British law if the UK sought to return them to their homes and the pirate could claim that their home country would torture or execute them as punishment for piracy. Finally, criminal trials of pirates are usually quite expensive, which has also served to reduce the will of western powers to try pirates for their crimes.

The result has been that, rather than capture and prosecute such marauders, “the standard procedure thus far has been to chase off the pirates without apprehending them, or to promptly release those that have been picked up.” In one study, for example, European ships caught 275 pirates during a two month period in 2010, and released 235 of them. Of course, the United States was hardly much better, catching 39 pirates not having effective means to stop piracy); Jesus, supra note 28, at 365, 372-73; Azubuike, supra note 17, at 51, 58.

57 Gabel, supra note 17, at 1439-40; Shapiro, supra note 48.
58 Gabel, supra note 17, at 1439.
59 Id.
60 Id. at 1439-40.
62 Kraska & Wilson, supra note 38, at 268.
63 Winn & Govern, supra note 48, at 141; Kraska & Wilson, supra note 38, at 269.
64 Kontorovich ASIL Article, supra note 27.
66 Stephanie Hanson, 5 Ways to Stop a Pirate, GLOBAL POST (June 24, 2010), http://www.globalpost.com/dispatch/worldview/100623/piracy-anti-piracy; Craig Whitlock, Lack of
during that period and releasing just about half of them.\textsuperscript{67} The problem has become so exacerbated that, rather than capture and prosecute pirates, some European countries have gone so far as to give the pirates a lift back to port if the pirates’ ship has become disabled.\textsuperscript{68} It is widely noted that this “catch and release” policy has proven exceptionally ineffective at stopping piracy.\textsuperscript{69} As the United Nations Security Council has noted, this “has led to pirates being released without facing justice, regardless of whether there is sufficient evidence to support prosecution.”\textsuperscript{70}

Overall, the potentially large benefit, and lack of enforcement or other risk, provides a clear incentive to engage in piracy.\textsuperscript{71} As the head of the International Maritime Bureau observed, “there are hardly any cases where these attackers are arrested and brought to trial. Piracy is a high-profit, low-risk activity.”\textsuperscript{72} This combination creates the possibility of matters getting far worse before they will get better, with serious and significant worldwide consequences if not repulsed.\textsuperscript{73}

\section*{C. Piracy as a U.S. National Security Threat}

For decades, if not centuries, the United States viewed maritime piracy as the subject of history books and Disneyland rides. Yet events in the past decade have amply demonstrated that piracy poses a very significant national security threat in a variety of ways. The United States has made some tepid recognition of this threat. In 2007, then President Bush issued the first uniform U.S. policy on the topic since the 1800s.\textsuperscript{74} Though the actual policy, formally entitled the U.S. Policy for the Repression of Piracy and Other Criminal Acts of Violence at Sea, offered only minor solutions to the problem, it at least recognized the national security threat posed by piracy:

“Piracy threatens U.S. national security interests and the freedom and safety of maritime navigation throughout the world, undermines economic security, and contributes to the destabilization of weak or failed state governance. The combination of illicit activity and violence at sea might also be associated with other maritime challenges, including illegal, unlawful, and unregulated fishing, international smuggling, and terrorism.”\textsuperscript{75}

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Yet such a generalized statement misses several critical factors and, in any case, hardly captures the overall national security threat posed by piracy, which we now turn to below.

1. Threats to the Lives of U.S. Travelers

In just the past few years, pirates have attacked U.S. vessels on several occasions. The attack on the Alabama described in the introduction is just one example. Other examples include two separate pirate attacks on U.S. military vessels in 2010 near Somalia, where the pirates in both cases apparently believed the vessels to be merchant ships. Fortunately, neither attack was successful as the U.S. military in both situations not only repelled the attack, but also managed to capture large numbers of the pirates.

More tragic, however, is the fate that befell a civilian vessel, the Quest, in February 2011, which was travelling the world distributing bibles. In that case, pirates boarded the private yacht while it sailed off the coast of Oman, and took hostage of the four American civilians on board. After several days of failed negotiations, the pirates shot and killed all four hostages, for reasons that remain unclear. The four Americans are believed to be the first U.S. citizens killed by pirates in modern times. A U.S. naval ship, which had been tracking the Quest, immediately boarded the vessel upon hearing gunfire and proceeded to kill two of the pirates and capture the remaining fourteen. Those fourteen captured pirates are now being indicted in the United States for piracy, conspiracy to commit kidnapping, and use of a firearm during a crime of violence. Several of the pirates have pled guilty and received life sentences.

the seas is one that should concern every nation-state”); Kraska & Wilson, supra note 38, at 251 (noting that Piracy interferes with freedom of navigation, impacts global commerce, and undermines regional stability).

76 See supra text accompanying notes 1-13.


80 Pirates Slay U.S. Citizens, supra note 79, at 14; Straziuso & Muhumed, supra note 79; Straziuso & Guled, supra note 79.

81 Pirates Slay U.S. Citizens, supra note 79, at 14; Straziuso & Muhumed, supra note 79; Straziuso & Guled, supra note 79.


2. Devastating Impact on U.S. and World Trade

Most Americans likely believe that the transportation of most of the world’s commerce takes place primarily by plane or truck. In fact, however, the vast majority of world trade is conducted by ship. Indeed, it is estimated that ninety-five percent of international trade is done through sea transportation, with approximately 21,000 ships for example travelling in or near Somalia’s waters every year. Of critical import, nearly fifty percent of the world’s oil supply is transported via ship, and about 12% of that supply travels right past Somalia, through the nearby Gulf of Aden.

Piracy constitutes the greatest criminal threat to this maritime commerce. The estimated cost of pirate attacks ranges from $12 billion up to $25 billion per year. And these figures are likely drastically understated, as large numbers of pirate attacks are never reported for a variety of reasons. Further, the cost numbers do not include indirect costs, such as increased insurance premiums to shipping companies, or increased fees that such shipping companies pass to customers to cover the heightened cost and risk.

The types of vessels being attacked range from small yachts (such as the Quest) to major shipping vessels (like the Alabama). Of particular concern to world trade, however, is the fact that pirates are expanding their targets beyond standard commercial vessels and now seize ships with greater economic impact, in particular vessels transporting oil. In 2008, pirates seized a Saudi tanker carrying more than $100 million in crude oil. In January 2009, the owners of the oil tanker M/V Sirius Star, which had been captured by pirates, reportedly paid $3 million in ransom to have their vessel released. In February 2011, pirates seized a Greek-flagged supertanker, the Irene SL, carrying a cargo of 266,000 tons of crude oil, off the coast of Oman. That same week, Somali pirates hijacked an Italian-flagged tanker in the Indian Ocean that was carrying

85 Jesus, supra note 28, at 369 n.25.
86 Prada & Roth, supra note 61.
88 NATIONAL SECURITY COUNCIL, supra note 53 at 4.
89 L. Stephen Cox, Sources of American Maritime Criminal Law, 26 TUL. MAR. L.J. 146, 158 (2001) (“[P]iracy is perhaps the most widely recognized crime against a vessel.”); Azubuike, supra note 17, at 49 (“Today, piracy is the most frequently occurring international incident.”).
90 Piracy Worse than Ever, supra note 41 (estimating $12 billion in annual costs due to piracy); Passman, supra note 52, at 5; Winn & Govern, supra note 48, at 133; Madden, supra note 28, at 154; Bento, supra note 38, at 406-07.
91 Kraska & Wilson, supra note 38, at 257; Madden, supra note 28, at 154 (suggesting the number of under-reported pirate attacks could be even higher than 50%). Pirate attacks are often not reported because reporting pirate attacks can cause expensive delays, as ships must often remain idle while the incident is investigated. In addition, like car accidents, reports of pirate attacks on vessels can increase insurance premiums. Kraska & Wilson, supra note 38, at 257.
92 Passman, supra note 52, at 7.
93 Prada & Roth, supra note 61.
94 Madden, supra note 28, at 140.
oil from Sudan to Malaysia. In 2011, pirates committed 19 attacks against maritime vessels in the Gulf of Guinea, outside of Benin; all of the attacks were against fuel tankers.

3. Undermines Political and Regional Stability

Far from merely affecting a solitary ship and its crew, piracy can significantly impact the political stability of coastal states. As one commentator has noted, piracy may be only a “marginal problem in itself, but the connections between organized piracy and wider criminal networks and corruption on land make it an element of a phenomenon that can have a weakening effect on states and a destabilizing one on the regions in which it is found.” Somalia is a perfect example of this crippling impact. Somalia has lacked a real federal government since 1991. Such anarchy has reduced the nation’s ability to effectively patrol its own waters, leading the area to become rife with piracy. The piracy in turn has aided in the nation’s political instability, as Somali regional warlords have begun organizing pirates and pirate attacks as a mechanism for gaining notoriety, political advantage, and of course funding to perpetuate their individual fiefdoms. The United Nations Security Council has noted that the piracy epidemic in Somalia has not only undermined the stability of that nation, but indeed “constitute[s] a threat to international peace and security in the region.” Piracy also harms nearby nations and their citizens who rely on maritime transportation for their livelihood and/or food. For example, it is estimated that Kenya has lost revenues of close to $140 million due to piratical acts in the nearby Somali region. So concerned is the United Nations Security Council with the problem that it has become seized with the issue and, in the past few years, has passed numerous resolutions on the topic.

4. Potential Ecological Harm

Pirates, by expanding attacks to include oil tankers, as discussed above, increase the risk of environmental damage that could occur if such vessels are run aground or damaged during or after a pirate attack, perhaps deliberately. As the Exxon Valdez incident, and similar scenarios, have amply demonstrated, damaged oil tankers

96 Id.
98 Winn & Govern, supra note 48, at 132-33 (quoting MARTIN N. MURPHY, CONTEMPORARY PIRACY AND MARITIME TERRORISM (2008)).
99 Madden, supra note 28, at 152.
100 Id.; Passman, supra note 52, at 7; Kontorovich ASIL Article, supra note 27.
101 Madden, supra note 28, at 153.
103 Passman, supra note 52, at 7.
104 Id.; Bento, supra note 38, at 407.
105 See infra Part III(F). Of course, this may also reflect the international unanimity with regard to the problem – rare in the United Nations -- regarding the threat that piracy poses, which portends hope that an international solution can be forged.
106 See supra text accompanying notes 93-97.
can cause extensive environmental harm. Yet oil is not the most dangerous item carried by ships, which also haul deadly chemicals and highly explosive gases such as liquefied natural gas. In 2003, for example, pirates made three separate attacks on different chemical tankers in the Straits of Malacca. In 2007, pirates hijacked the Japanese tanker the Golden Nori, carrying 40,000 tons of benzene, a highly explosive chemical, and held it for ransom. In a more recent example, in January 2011, Somali pirates seized an 11,500 ton South Korean chemical carrier. South Korean Special Forces, however, raided the last hijacked freighter and recaptured the ship, killing eight pirates and seizing five others in the process (no hostages were killed).

Fortunately, so far, none of these pirate attacks has resulted in any spillage of toxic chemicals. Yet there are still significant ecological worries that a ship carrying hazardous cargo or oil, run aground by pirates, could cause serious damage to the marine environment and/or nearby coastal states.

5. Terrorism

The greatest national security threat posed by piracy is with regard to terrorism. Indeed, there are striking similarities between pirates and terrorists. Both rely upon violence and fear to achieve their goals; both operate outside of and often against society, especially world powers; both usually originate out of impoverished communities that offer little hope of upward mobility; both live with few boundaries and are generally considered pariahs; and both defy traditional legal methods of control and punishment. With such similarities, it is perhaps not surprising that pirates and terrorists might unite, or at least temporarily work together for a common cause.

Such concerns are not theoretical. In 1985, Palestinian pirates posing as passengers hijacked the Achilles Lauro, an Italian cruise ship, off the coast of Egypt and eventually killed one handicapped Jewish American before surrendering. In early 2000, al Qaeda terrorists attempted to ram a boat with explosives into the USS Sullivans in the waters off Yemen. They failed only because the explosives were too heavy and...
the boat sank before it could complete its mission. Unfortunately, the terrorist group learned from its mistakes and later that year al Qaeda operatives in Yemen successfully sailed a small dingy packed with explosives into the U.S.S. Cole; the resultant explosion blew a hole in the U.S. warship and killed 17 American sailors aboard.

More maritime terrorist attacks have taken place since the Cole bombing. In October 2001, Tamil Tiger separatists used five boats to engage in a suicide attack on an oil tanker off of Northern Sri Lanka. In 2002, the Moroccan government arrested several al Qaeda operatives who were plotting attacks against American and British ships travelling through the Strait of Gibraltar. Later that year, alleged Al-Qaeda operatives detonated a small boat filled with explosives alongside a French Supertanker, the Limburg, in the waters off of Yemen, resulting in the release of almost 100,000 barrels of crude oil. In the spring of 2010, radical Islamists took over Xarardheere, which is considered one of the prime pirate coves in the Central Somali coast.

Further, it appears that the Somali militant group al-Shabaab has been using proceeds from piracy ransoms to purchase weapons and explosives from Al Qaida. While al-Shabaab has traditionally focused its efforts on overthrowing the transitional government in Somalia, it has allegedly branched into terrorist attacks outside of Somalia, and there is evidence that the group now seeks to become an affiliate of Al Qaida. In addition, senior members of Jemaah Islamiyah, an Indonesian terrorist organization linked to al Qaeda, have acknowledged plans to attack vessels traversing the waters surrounding Indonesia. An Indonesia separatist group, the Free Aceh Movement, has long engaged in pirate attacks to raise money via ransoms for their cause. Other terrorist groups -- to include Hizbollah, the Popular Front for the Liberation of Palestine-General Command, and the Tamil Tigers -- have plotted piratical attacks. Osama Bin Laden’s personal documents, recovered as part of the raid that ended his life, included a plan to hijack oil tankers in order to explode them in key shipping lanes. Overall, then, as one set of commentators has noted, “[t]he ease with which Somali pirates are capturing a huge range of vessels . . . illustrates the high level of risk that terrorist attacks may pose to global shipping.”

120 Id.
122 Luft & Korin, supra note 117, at 65.
123 Id. at 64.
124 Heather Timmons, Got Oil? Now Try to Find Tankers to Carry It, N.Y. TIMES, June 9, 2004, at C1; Gable, supra note 17, at 1437-38.
128 Luft & Korin, supra note 117, at 63.
129 Id.
130 Id. at 64.
131 Sullivan & Apuzzo, supra note 87.
132 Kraska & Wilson, supra note 38, at 260.
Yet these attacks, as devastating as they may have been, are merely the tip of
the potential iceberg of the terrorist threat posed by piracy. Without seeking to give
a blueprint to terrorists, there are numerous, horrific pira-terrorist attacks that could be
fairly easily accomplished and would have devastating effect on the United States and the
world. Expanding on lessons learned from the Achilles Lauro incident, pirates could
hijack one of any of the dozen mega-size cruise ships that traverse the Caribbean on any
given day. Instead of killing one passenger, though, they could hold hostage over or even
kill hundreds if not thousands. Alternatively, terrorists could scuttle a large bulk vessel
or a supertanker in a strategic shipping lane to devastating effect on U.S. and world
commerce.133 Pirates could use a hijacked a ship as a platform for detonating a dirty
bomb or even a nuclear weapon in a populous port.134 Pira-terrorists could also seek to
capture a maritime vessel transporting weapons, to be used for future terrorist attacks.
Indeed, in 2008, pirates seized a Ukrainian freighter holding tanks, antiaircraft guns and
weaponry.135 The pirates there did not appear to have terrorism on their minds, however,
as they released the ship after the payment of a $3.2 million ransom,136 but the potential
for misuse of the weapons aboard the ship was clearly present.

Most concerning, perhaps, just as al Qaida terrorists used airplanes in 9/11 to
attack the World Trade Center in New York, so too could a maritime vessel be used to
attack a coastal or off coastal target, such as an oil platform, a cruise ship, or a U.S. naval
ship, as was done with the U.S.S. Cole. As a U.S. Transportation Security
Administration (TSA) official recently noted, “it would not take much of a leap to show
that a ship could become the bomb, particularly a ship with volatile cargo.”137 There is
evidence that plans for using sea vessels in such a manner are indeed underway. Most
dramatic of these plans are the examples of pira-terrorists hijacking tankers for the
apparent sole purpose of practicing steering them through crowded sea lanes.138 Other
examples abound of pirates questioning captured maritime crews about how to operate
ships without any interest in how to dock them.139

In many ways, maritime vessels offer an easier mechanism for terrorism than
aircraft. This stems primarily from the fact that terrorist attacks on or using aircraft
almost always have a single choke point – the place of embarkation. Terrorists can really
only board, emplace explosive devices on, or attack an aircraft at or near an airport. This
allows prevention of aviation attacks to focus almost exclusively on airports, and
therefore tends to dramatically limit the window of opportunity for aviation attacks, the
number of terrorists who can be involved, and the weaponry that can be used.

Such limitations in opportunity, numbers, and weaponry do not exist with regard
to piracy. As the examples throughout this article amply demonstrate, a maritime vessel,
though certainly susceptible to attack at a port, can and often is more easily attacked
while in transit in the open seas. This dramatically increases the timeframe during which

133 Luft & Korin, supra note 117, at 66-67; Sullivan & Apuzzo, supra note 87.
134 Editorial, Piracy and Terrorism, N.Y. TIMES, Apr. 10, 2004, at A14 (noting concern about Al-Qaeda
planning such a disaster).
135 Prada & Roth, supra note 61; Piracy at Sea, supra note 125.
136 Piracy at Sea, supra note 125.
137 Ed Kittel, Chief, Explosives Division for the TSA, Maritime TV Video News Report, Sept. 14, 2004,
138 Luft & Korin, supra note 117, at 67.
139 Id.
an attack on a maritime vessel can take place – amounting to days, weeks or months, as opposed to the few hours available against an aircraft before take-off. Pirates can also arm their ships with as much personnel and weaponry as their vessels will carry. And, whereas airplane hijackers must generally circumvent heavy airport security to mount an attack, assaults on ships can and do occur in open waters, where there is little protection and nowhere to hide. Overall, this makes piracy-terrorism as much, if not more, a concern than aviation-based terrorism.

III. What International Law Permits

In order to combat the substantial threat posed by piracy, the international community has formulated an extensive array of laws. These range from customary international law to international conventions to United Nations Security Council resolutions. We will consider each in turn.

A. Customary International Law

For centuries, customary international law has held that every state has “universal jurisdiction” with regard to piracy, i.e. the ability to prosecute a pirate “irrespective of the connection between the pirate, their victims or the vessel attacked and the prosecuting State.” This stems from the base belief that pirates are enemies of all mankind, as they indiscriminately attack ships of any country and have no national loyalties. Thus, all states have an interest in countering piracy given that any nation’s ship could be attacked, and given the deleterious impact piracy has on global commerce.

Indeed, the world community has so vilified piracy that not only was it the original crime of universal jurisdiction, but for centuries it was considered the sole crime of universal jurisdiction. Recently, however, other crimes, such as slavery and genocide, have been added to the list of universal jurisdiction crimes.

One main problem with universal jurisdiction is that it competes with other jurisdictional claims. Customary international law provides that the countries of the pirate, the victim, and the flag state of the vessel attacked all have valid claims of jurisdiction over the pirate. Thus, a number of states may have legitimate claims to

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140 Id. at 66.
141 The international law treaties covered in this Part reflect the four major conventions in place. Other conventions exist that could touch on piracy, but they tend to have been enacted by only a limited number of states, are not legally binding, are proposals not in force, do not offer serious options against piracy, or some combination thereof. See Guilfoyle, supra note 45, at 34-75.
142 Id. at 5; Azubuike, supra note 17, at 54 (“One of the fairly undisputed aspects of the international law on piracy is that is it subject to universal jurisdiction.”)
144 Kontorovich ASIL Article, supra note 27.
145 Id.
146 Madden, supra note 28, at 141; Kontorovich ASIL Article, supra note 27.
147 Kontorovich ASIL Article, supra note 27.
148 Id. (noting that these other crimes include torture, war crimes, and crimes against humanity).
149 Guilfoyle, supra note 45, at 6.
prosecute a given pirate, and international law imposes no rule of priority from among these potentially competing jurisdictions.\textsuperscript{150} Of course, like the rules of property, possession is 90\% of the law – thus, the state that has custody over a particular pirate usually has the initial right of prosecution, or can decide to transfer the pirate to another nation for punishment.\textsuperscript{151}

B. UNCLOS III

The High Seas Convention (HSC),\textsuperscript{152} established in 1958, was the first instrument to codify international rules on piracy.\textsuperscript{153} The United Nations Convention on the Law of the Sea III (UNCLOS III),\textsuperscript{154} established in 1982, was intended to supersede the HSC.\textsuperscript{155} Indeed, the overall purpose of the portion of UNCLOS III related to piracy was to “provide the legal framework for the repression of piracy under international law.”\textsuperscript{156} However, while the United States signed and ratified the HSC, it has never formally become a party to UNCLOS III.\textsuperscript{157} Therefore, the U.S. still technically operates under the provisions of the HSC, along with seven other states and the Holy See.\textsuperscript{158} Nonetheless, the United States has officially pronounced its acceptance of virtually all of the precepts of UNCLOS III, to include those related to piracy, and now considers such provisions to be customary international law.\textsuperscript{159} I will therefore focus my discussion on the provisions of UNCLOS III, not the HSC it was intended to replace, though the key provisions on piracy in both conventions are virtually identical.\textsuperscript{160}

The provisions of UNCLOS III that relate to piracy assert that “[a]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in

\textsuperscript{150}Id.
\textsuperscript{151}Id.
\textsuperscript{153}Jesus, supra note 28, at 373.
\textsuperscript{155}Guilfoyle, supra note 45, at 1.
\textsuperscript{156}Id.
\textsuperscript{157}Id.
\textsuperscript{158}Id. The others are Afghanistan, Cambodia, Iran, Israel, Malawi, Thailand and Venezuela. Id. at 1, n.1
\textsuperscript{159}Ronald Reagan, President United States Oceans Policy, Statement by the President, Mar. 10, 1983 (acknowledging that though the United States will not sign UNCLOS III, it nonetheless accepts it provisions, with the exception of those parts related to deep seabed mining); Bush, supra note 26, at 4 n.2 (citing to the anti-piracy provisions of UNCLOS III in support of the premise that piracy is a universal crime); Senator Richard G. Lugar, Opening Statement for Hearing on Law of the Sea, Sept. 27, 2007, http://lugar.senate.gov/news/record (asserting that “the United States has been abiding by all but one provision of the Treaty since President Reagan’s 1983 Statement of Oceans Policy”); David D. Caron & Harry N. Scheiber, The United States and the 1982 Law of Sea Treaty, 11 AM. SOC’Y OF INT’L L. INSIGHTS (June 11, 2007), http://www.asil.org/insights070611.cfm (noting that the United States accepts the piracy provisions of UNCLOS III); Kontorovich ASIL Article, supra note 27 (stating that though the United States is not a party to UNCLOS III, “it ratified an earlier incarnation [the HSC] with identical piracy provisions”); Rice, supra note 71 (noting that the provisions of piracy in UNCLOS III constitute international law followed by the United States).
\textsuperscript{160}Kontorovich ASIL Article, supra note 27.
any other place outside the jurisdiction of any State.” Most critically, the convention permits any state to “seize a pirate ship..., and arrest the persons and seize the property on board.” The seizing nation can then decide what penalties to impose on the pirates, and what action should be taken with regard to the seized property.

While seemingly broad on its face, UNCLOS III has several, well-noted limitations. To begin with, its provisions apply only on the high seas, and cannot be utilized within the territorial waters of any sovereign nation. This means that, under UNCLOS III, nations cannot seize pirates who are found in the territorial waters of another country, nor pursue a pirate into those territorial waters, absent the consent of the coastal state, or a reciprocity agreement between the two countries involved. This limitation stems from a historical belief that while acts of piracy on the high seas interfered with international shipping and therefore was a global problem, pirate attacks within a nation’s territorial waters were more of an internal affair to be dealt with by the relevant state through its navy and domestic courts. Nonetheless, this represents an enormous loophole exploited by pirates, who often quickly retreat to territorial waters, such as that of dysfunctional states like Somalia, in order to avoid attack or seizure.

The UNCLOS III provisions also contain a “two-ship” requirement; i.e. they apply only to attacks committed by one private vessel against another. This limitation is based on a sense that acts committed on-board a ship, without outside influence, were believed to concern only that ship, and therefore only that ship’s flag state, not the international community. Regardless of the basis or rationale, however, this limitation has the practical effect of excluding from UNCLOS III’s provisions any situation in which a vessel is seized by its passengers or crew. This would therefore exclude terrorist attacks such as that on the Achilles Lauro, discussed above, which involved terrorists coming on board a ship as passengers and then engaging in an attack on the

161 UNCLOS III, supra note 154, art. 100. Article 14 of the HSC uses identical language. HSC, supra note 152, art. 14.
162 UNCLOS III, supra note 154, art. 105; see also HSC, supra note 152, art. 19.
163 UNCLOS III, supra note 154, art. 105; see also HSC, supra note 152, art. 19.
164 UNCLOS III, supra note 154, art. 101; see also HSC, supra note 152, art. 15. The convention later makes it clear that the term “high seas” includes nations’ Exclusive Economic Zones (EEZ). UNCLOS III, supra note 154, art. 58(2); see also Guilfoyle, supra note 45, at 2; Stiles, supra note 55, at 308; Jesus, supra note 28, at 379. The EEZ of any nation covers 200 nautical miles from the nation’s shore. UNCLOS III, supra note 154, art. 57.
165 Jesus, supra note 28, at 379; Passman, supra note 52, at 13; Azubuike, supra note 17, at 51. UNCLOS III provides that a nation’s territorial waters extend to 12 nautical miles from the nation’s shore. UNCLOS III, supra note 154, art. 3.
166 Guilfoyle, supra note 45, at 5; Azubuike, supra note 17, at 53; Madden, supra note 28, at 146.
167 Jesus, supra note 28, at 383. Such reciprocity agreements are described in Article 113(3) of UNCLOS III.
168 Madden, supra note 28, at 146.
169 Gabel, supra note 17, at 1442.
170 Jesus, supra note 28, at 376-77; Passman, supra note 52, at 12-13; Azubuike, supra note 17, at 53; Madden, supra note 28, at 147.
171 Madden, supra note 28, at 147
172 Guilfoyle, supra at 3; Jesus, supra note 28, at 388; Madden, supra note 28, at 147.
173 Madden, supra note 28, at 148-49.
vessel. The two-ship requirement also serves to exclude attacks on ships made from land.

A further possible limitation stems from UNCLOS III’s requirement that it applies only to acts undertaken for “private ends.” Some argue that this precludes any acts committed for “political,” as opposed to “personal,” means. Under this interpretation, terrorist acts for example would not be considered acts of piracy prohibited by UNCLOS III, nor would attacks on ships by environmentally-focused organizations such as Greenpeace, as both types of attacks are done for political purposes, vice pure financial enrichment. The majority view, however, relies on the drafting history of the provision to argue that the term “private ends” refers to the difference between “private” and “public” acts; i.e. that the act must be committed by a private entity rather than by or on behalf of a government. As noted above, historically, some states used pirates for political ends. Thus, proponents of this interpretation assert that the requirement of “private ends” is meant to reflect this historical background by distinguishing between acts committed by a ship on behalf of a government (which would not be piracy prohibited by UNCLOS III) versus acts committed by ships which are unconnected to any state. This majority view comports with the common base understanding that pirates do not act on behalf of any state.

Finally, and perhaps most critically, UNCLOS III does not provide any guidance or requirements for the punishment of pirates. UNCLOS III not only leaves it up to each state to decide how to punish pirates, but indeed does not even require that nations actually punish captured pirates. This obviously leads to inconsistencies amongst nations as to whether and the degree to which pirates are punished, and also undoubtedly encourages pirates to operate in territories in which the host nation is uninterested or unable to mount piracy prosecutions.

C. SUA Convention


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174 See supra note 118.
175 Guilfoyle, supra note 45, at 3.
176 Id. at 3 (describing the two interpretations); Stiles, supra note 55, at 323-25 (asserting that the term differentiates between private and political ends); Diaz & Dubner, supra note 114, at 535 (same); Jesus, supra note 28, at 377-79; Passman, supra note 52, at 12; Gabel, supra note 17, at 1442.
177 Guilfoyle, supra note 45, at 3; Diaz & Dubner, supra note 114, at 539-40; Jesus, supra note 28, at 377-79; Passman, supra note 52, at 12.
178 Jesus, supra note 28, at 379; Gabel, supra note 17, at 1442.
179 Guilfoyle, supra note 45, at 3-4; Madden, supra note 28, at 144; Azubuike, supra note 17, at 52.
180 See supra notes 31-32.
181 Azubuike, supra note 17, at 52.
182 See supra text accompanying note 26, defining the term “piracy.”
183 Jesus, supra note 28, at 374-75; Azubuike, supra note 17, at 53.
185 Guilfoyle, supra note 45, at 12; Kraska & Wilson, supra note 38, at 282.
Article 3 of the SUA provides that “any person commits an offence if that person unlawfully and intentionally . . . seizes or exercises control over a ship by force or threat thereof or any other form of intimidation.”\textsuperscript{188} Attempting, abetting or threatening such an offense is also a crime.\textsuperscript{189} Such a broad statement means that, unlike in UNCLOS III, the piratical act need not be on the high seas, but can also be within the territorial waters of another sovereign nation,\textsuperscript{190} so long as that nation is a party to the SUA.\textsuperscript{191} There is also no two-ship requirement, and no requirement that the act be for “personal gain.”\textsuperscript{192} Indeed, the only scenario in which the SUA Convention would not apply would be where all facets of the piratical act take place within a nation’s sovereign territory, i.e. the pirate attack is committed entirely within a state’s territorial waters, the vessel was not scheduled to leave those territorial waters, and the pirate was seized within those territorial waters.\textsuperscript{193} Such a limitation is negligible, as most pirate attacks originally take place outside a nation’s waters, or at least involve a ship that is leaving or transgressing those waters.\textsuperscript{194}

Enforcement of the Article 3 provisions is left to individual nations. However, the SUA sought to resolve the ambiguous enforcement provisions of UNCLOS III by requiring all parties to the SUA Convention to enact domestic legislation to make the offenses in Article 3 a national crime if the act is committed against or on board the nation’s flag vessel, within the nation’s territory (to include territorial waters), or by one of its nationals.\textsuperscript{195} Nations are also encouraged, but not required, to extend their criminal jurisdiction to encompass acts of piracy committed against one of their nationals, as well as in other circumstances.\textsuperscript{196} Finally, the SUA requires that a party to the treaty either prosecute a pirate who is present in the state’s territory, or extradite that pirate to another state that has criminal jurisdiction over the pirate.\textsuperscript{197} Thus, again unlike UNCLOS III, pirates are at least theoretically not safe from prosecution by hiding in the territorial waters of a SUA nation that is uninterested or incapable of prosecuting them.

Based on these provisions, many individuals have argued that the SUA constitutes a very strong international treaty with regard to piracy. As Admiral Thad Allen, then Commandant of the U.S. Coast Guard, claimed: “‘Leveraging states’ SUA obligations in conjunction with existing international law against piracy provides an effective legal

\textsuperscript{186} Kraska & Wilson, supra note 38, at 282.
\textsuperscript{187} Id. at 253 n.47; see also Guilfoyle, supra note 45 at 75.
\textsuperscript{188} SUA Convention, supra note 184, art. 3(1)(a).
\textsuperscript{189} Id. art. 3(2).
\textsuperscript{190} Guilfoyle, supra note 45, at 13; Stiles, supra note 55, at 311; Winn & Govern, supra note 48, at 138.
\textsuperscript{191} Gabel, supra note 17, at 144-45. It should be noted that a large majority of nations are parties to the SUA. See Guilfoyle, supra note 45, at 71-75 (listing all the nations who are parties to the SUA Convention).
\textsuperscript{192} Guilfoyle, supra note 45, at 13.
\textsuperscript{193} SUA Convention, supra note 184, art. 4; see also Guilfoyle, supra note 45, at 13.
\textsuperscript{194} Guilfoyle, supra note 45, at 13.
\textsuperscript{195} SUA Convention, supra note 184, art. 6(1).
\textsuperscript{196} Id. art. 6(2).
\textsuperscript{197} Id. art. 6(4). Some commentators have asserted that this is the most significant aspect of the SUA. See, e.g., Jesus, supra note 28, at 391.
framework to deliver an ‘endgame.’“198 The main shortcoming of SUA, however, is that a number of critical nations have not ratified the SUA, to include Indonesia, Malaysia, and Somalia.199 Further, even nations which have ratified the agreement have often failed to fulfill its provisions and have not enacted forceful domestic criminal statutes related to piracy.200 So pronounced is this problem that the United Nations Security Council has repeatedly passed resolutions urging nations not only to ratify the SUA, but also to adopt domestic legislation to conform to the SUA’s provisions.201 Overall then, while the SUA appears wide-ranging in its application and scope, the reality is that domestic statutes enacted pursuant to its provisions have only been used as the basis for a single reported criminal case worldwide.202

D. International Convention Against the Taking of Hostages

The International Convention against the Taking of Hostages (“Hostage Taking Convention”)203 entered into force in 1983.204 The United States became a party to the convention in 1985,205 and most nations in the world have now ratified it.206 The convention declares that “[a]ny person who detains and threatens to kill, to injure or to continue to detain another person . . . in order to compel a third party . . . to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages...”207 There are no territorial limitations.208 However, similar to the SUA, the Hostage Taking Convention does not cover situations in which all facets of the act occur with a sovereign nation; i.e., the offense is committed within a State, the hostage and alleged offender are nationals of that State, and the offended is found in that State.209 Also similar to the SUA, the Hostage Taking Convention seeks to enforce its provisions by requiring parties to the convention to pass domestic laws establishing “appropriate penalties” for such offenses.210

199 Madden, supra note 28, at 164; Guilfoyle, supra note 45, at 72-74; Sterio, supra note 69, at 392 n.143.
200 Prada & Roth, supra note 61 (noting that while almost 150 nations have signed the SUA, “few signatories have enacted national legislation empowering their courts to prosecute foreigners for [illegal acts at sea] outside their territory”).
202 Kontorovich ASIL Article, supra note 27 (describing the case of United States v. Shi, 525 F.3d 709 (9th Cir. 2008) ).
205 Id.
206 Guilfoyle, supra note 45, at 71-75.
207 Hostage Taking Convention, supra note 203, art. 1.
208 Id. art. 5; Guilfoyle, supra note 45, at 27.
209 Hostage Taking Convention, supra note 203, art. 13.
210 Id. art. 2.
Overall, then, the Hostage Taking Convention covers acts of piracy in which the crew or passengers are held for ransom, but contains the same limitations as the SUA. Further, it is widely accepted that, at least with regard to acts related to piracy, the Hostage Taking Convention adds virtually nothing that is not already covered by the SUA Convention, except perhaps another criminal charge to levy against the pirate.

E. Rome Statute of the International Criminal Court

The Rome Statute established the International Criminal Court (ICC), entering into force in 2002. The purpose of the ICC is to ensure that “the most serious crimes of concern to the international community as a whole [do] not go unpunished.” However, the court’s jurisdiction is limited to only those “most serious crimes of concern,” which the statute delineates as: genocide, war crimes, crimes of aggression, and crimes against humanity.

It does not appear that piracy falls within any of those four sets of crimes. Clearly, the first two – genocide and war crimes – would not typically cover acts of piracy. The third set of crimes, i.e. crimes of aggression, is defined as the planning or execution of the “use of an armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.” As piracy, by definition, does not involve actions by one state against another, but rather activities perpetrated by non-State actors, piracy would not constitute a “crime of aggression.”

The last set of crimes that fall within the ICC’s jurisdiction is crimes against humanity. This encompasses any of eleven enumerated crimes, to include murder, extermination, enslavement, rape and “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” Piracy is not specifically enumerated, and it would not appear that it would fall within any of the eleven listed categories. Even the last, catch-all provision would not appear to apply as piracy, though clearly a heinous crime, is generally treated more as an economic crime than one of physical bodily harm (though of course the latter can certainly be an outcome of piracy).

Thus, as many commentators have noted, while the ICC may one day provide a mechanism for prosecutions of pirates, that day is not yet here. Further, it should be

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211 Guilfoyle, supra note 45, at 27.
212 Id. at 28.
214 Id. Preamble.
215 Id. art. 5(1).
217 See supra notes 23-26 and accompanying text (defining the term “piracy”).
218 Rome Statute, supra note 213, art. 7.
219 Madden, supra note 28, at 161; Azubuike, supra note 17, at 55 (“It is a gaping omission that the Statute of the International Criminal Court did not deal with piracy.”).
mentioned that the United States has not ratified the Rome Statute and therefore is not a member of the court.\textsuperscript{220}

\section*{F. United Nations Charter and Resolutions}

The United Nations, its Charter and various U.N. resolutions play a significant role in the area of maritime piracy. Article 2, paragraph 4 of the U.N. Charter precludes “the threat or use of force against the territorial integrity or political independence of any state.”\textsuperscript{221} This provision therefore precludes nations from advancing into the territorial waters of another nation in order to chase pirates or to prevent a piratical act from occurring in such waters. Indeed, this restriction constitutes the basis for the geographic limitations of UNCLOS III, whereby states cannot take action against piracy within a nation’s territorial waters.\textsuperscript{222}

Exceptions to the general provision exist, of course. One such exception is the right to individual or collective self-defense.\textsuperscript{223} Thus, a country can always defend itself from a pirate attack. A nation may also consent to allow another nation to breach its territorial waters. A last exception, captured in Chapter VII of the U.N. Charter, permits the United Nations Security Council to “determine the existence of any threat to the peace, breach of the peace, or act of aggression” and to “decide what measures shall be taken ... to maintain or restore international peace and security,”\textsuperscript{224} which can include violation of the territorial integrity of a particular nation normally protected by Article 2(4), as well as the use of armed force.\textsuperscript{225} The United Nations Charter requires all members to abide by the resolutions issued by the Security Council under Chapter VII.\textsuperscript{226} As virtually every country in the world is a member of the United Nations,\textsuperscript{227} Security Council resolutions can have near universal impact.

The United Nations Security Council became seized with the issue of piracy in Somalia beginning in 2008. Utilizing its Chapter VII powers, the Council passed five separate resolutions on the topic that year, more than on any other issue.\textsuperscript{228} The most relevant of the resolutions, passed in June 2008, permits foreign nations to enter Somalia’s territorial waters in order to repress piracy, and authorizes the use of “all necessary means” to achieve that goal.\textsuperscript{229} However, such actions must comply with
international law, to include international human rights laws,230 and nations must “cooperat[e]” with the Somali government in their actions,231 though it is unclear whether that requires approval from the Somali government every time an action is taken.232 While the June 2008 resolution, by its terms, applied only for a six month period, subsequent Security Council resolutions not only have continued to authorize such activity up to the present day,233 but have even expanded the scope of military options to include actions on land in Somalia.234 The United States even takes the position that these Security Council resolutions permit action against piracy in Somali airspace.235

The Security Council, however, took pains to note repeatedly in these resolutions that the legal basis for the above actions stems from requests by the putative Somali government to the United Nations Security Council for assistance in thwarting piracy in Somalia’s territorial waters, and the Somali government’s continued support for the Security Council’s resolutions on this issue.236 The Security Council Resolution further affirms that:

[T]he authorization provided in this resolution applies only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of member states under international law, including any rights or obligations under the Convention, with respect to any other situation, and underscores in particular that it shall not be considered as establishing customary international law, and affirms further that this authorization has been provided only following receipt of the letter from the Permanent Representative of the Somalia Republic to the United Nations to the President of the Security Council dated 27 February 2008 conveying the consent of the [Somalia government].237

231 Id. ¶ 7 (providing that “States cooperating with the [Somali government] in the fight against piracy” may employ all necessary means to thwart piracy in Somalia’s territorial waters).
232 Though the plain language of the resolution merely requires nations “cooperat[e]” with the Somali government in their actions, some commentators assert the language requires that the actions be pre-approved by the Somali government. See, e.g., Madden, supra note 28, at 162 (arguing that “all anti-piracy actions taken on authority of the [UN Resolutions] require the consent of the [Somali government]” and that the resolutions “require that any action in Somali territory be approved by that nation’s provisional government”).
235 Kontorovich ASIL Article, supra note 27.
Therefore, the Security Council resolutions explicitly provide that the right to pursue, capture and use force against pirates within the territorial waters of Somalia is based on the consent of the nation at issue and does not create a precedent to engage in such actions within the territorial waters of other nations. Nonetheless, some commentators argue that a customary international law rule already exists to permit foreign governments to combat piracy in the territorial waters of another nation, so long as that nation is considered a failed state. The theory is that if a country is unable to perform its duty to the international community, such as preventing piracy or human rights violations within its territorial waters, then it no longer has a basis to assert sovereignty over its territorial waters. As such, there is no violation of the failed nation’s territorial integrity if other states enter its supposed territorial waters in order to pursue or thwart piracy. There is no indication as yet, however, that the United States government has accepted this theory.

IV. U.S. Law on Piracy

The above-mentioned international law provisions offer a wide scope of options with regard to thwarting piracy. However, they do not define the full range of options available to the United States with regard to this threat. This is because, while international law provides the general authority for nations to combat piracy, actual enforcement mechanisms are decided on a nation-by-nation basis, as the above discussion on the SUA illustrates. As one commentator has noted, “[p]iracy has always been an international crime enforced by national laws, the exact terms of which have varied between jurisdictions.” Thus, while the international conventions in force provide the parameters for American action, the real ability of the United States to thwart piracy stems from its own domestic laws.

The authority for the United States to take action against pirates does not arise from some obscure statutory provision, but rather stems from an explicit provision in the United States Constitution, which is an indication of the extent to which piracy concerned our nation’s founding fathers. In what has come to be known as the Offense Clause, the Constitution specifically provides that “Congress shall have Power ... [t]o define and punish Piracies and Felonies committed on the high Seas and Offenses against the Law of Nations.” This constitutional provision stemmed from the long-held belief that piracy constituted a violation of the laws of all countries. As the U.S. Supreme Court emphatically pronounced in 1826: “Pirates may, without doubt, be lawfully captured on


238 Azubuike, supra note 17, at 52; Madden, supra note 28, at 150-51.

239 Azubuike, supra note 17, at 52; Madden, supra note 28, at 150-51.

240 See supra text accompanying note 195.

241 Guilfoyle, supra note 45, at 3; see also Passman, supra note 52, at 10 (noting that pirates “are punished under the municipal laws of any state, instead of an international court” (footnotes omitted)).

242 United States v. Shi, 525 F.3d 709, 720 (9th Cir. 2008).


the ocean by the public or private ships of every nation; for they are, in truth, the
common enemies of all mankind, and, as such, as liable to the extreme rights of war."245
Based upon the Offense Clause, it has been long settled that the United States Congress
has the authority to pass a wide range of statutes to protect the nation against pirates,246
and Congress has utilized such authority extensively over the centuries.

A. Use of U.S. Military to Kill or Capture Pirates

Pursuant to the Offense Clause, Congress passed legislation in the early 1800s
authorizing the President to employ military vessels to protect U.S. merchant vessels
from pirate attacks.247 In 2006, President Bush, utilizing this authority in conjunction
with the international conventions and Security Council resolutions described in Part III
above, placed navy ships in and around Somalia to protect vessels against pirates, and
directed the navy to take military action against piratical attacks in that area, to include
firing upon pirates, seizing their vessels, and capturing pirates for prosecution.248 This
was the first authorized engagement of U.S. warships against pirates in 150 years.249
Together with military ships of other NATO countries, the United States navy now
patrols those waters as part of NATO's Combined Task Force 151.250

U.S. military activity against pirates in and around Somalia, however, is not open-
ended. The ability of the United States to patrol and engage pirates in Somalia’s
territorial waters is conducted pursuant to the United Nations Security Council
resolutions described above, and the willingness of the Somali “government” to permit
such actions to continue. Not only does this mean that such activities could cease at any
moment, but also that the United States must ensure that its activities comply with the
limitations contained in those resolutions. Unexpectedly, the requirement in the
resolutions that all nations abide by international humanitarian law251 has proven to place
a significant limitation on U.S. action. Under international law, pirates are not
considered combatants, but instead are deemed civilians, and international humanitarian
law precludes targeting civilians except in situations of self-defense.252 Based on this,
U.S. military action has been primarily defensive in nature.253

Outside of Somalia, the ability of the U.S. military to engage pirates is even more
limited. Certainly, pursuant to the Offense Clause and statutory authority, the United
States military can defend U.S. merchant ships from pirate attacks. However, under
UNCLOS III and the United Nations Charter, any such actions cannot occur within the
territorial waters of any other nation, absent Security Council authorization and/or
consent from the host nation. Further, even if a pirate attack takes place on the high seas,

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245 The Marianna Flora, 24 U.S. (Wheaton) 1, 40 (1825).
246 United States v. Smith, 18 U.S. (Wheaton) 153, 162 (1820); United States v. Shi, 525 F.3d 709, 720-21
(9th Cir. 2008).
§ 381 ,Historical and Statutory Notes.
248 Kraska & Wilson, supra note 38, at 247.
249 Id.
250 Kontorovich, supra note 65, at 747; Azubuike, supra note 17, at 57; Shapiro, supra note 48.
251 See supra note 230.
252 Kontorovich ASIL Article, supra note 65; Sterio, supra note 69, at 390.
253 Kontorovich ASIL Article, supra note 65.
the United States cannot chase the pirates into the territorial sovereignty of another nation (again, unless consent by the nation is provided). 254

Nonetheless, even with these restrictions, the U.S. military has taken several active steps to combat pirates. The most dramatic, of course, was the sniper attack against the pirates holding the captain of the Alabama, described in the introduction. 255 In another example, in April 2010, the USS Ashland destroyed a skiff in the Gulf of Yemen that was carrying pirates who were intent on trying to board the Ashland; the Ashland ended up capturing many of the pirates. 256 That same month, in the high seas between Somalia and Seychelles, the USS Nicolas returned fire on two small assault boats attempting to attack the U.S. frigate, believing her to be a merchant ship. 257 When the boats broke off the attack and fled, the Nicolas followed and eventually captured several of the pirates. 258 In September 2010, marines conducted a pre-dawn raid against a ship in the Gulf of Aden that had been previously captured by pirates. 259 The marines were able to retake the ship, and arrest the nine pirates on board, without firing a single shot. 260 In January 2012, a U.S. Navy destroyer even rescued an Iranian fishing boat outside the Persian Gulf which had been held captive by pirates for more than 40 days, despite concurrent threats by Iran for American military vessels to cease patrolling that area. 261 Together, the U.S. Navy has captured hundreds of pirates and thwarted numerous pirate attacks. 262 The success rate of piracy attacks in the regions of U.S. naval patrols has dropped precipitously – from 63 percent in 2007 to 34 percent in 2008 to 21 percent in 2009. 263 Overall attacks fell 43 percent in 2011, due mainly to the military presence. 264

There is some question, however, as to the overall efficacy of U.S. military action against piracy. While U.S. efforts have tended to deter many piratical acts along the Somalia coastline, the pirates have responded by moving their operations further and further from that shore, up to 1,000 miles from the Somali coastline. 265 This has had the ironic effect of dramatically increasing the area under patrol by the U.S. Navy by almost one million square miles since 2009. 266 Naval commanders have acknowledged that the resultant area under patrol – more than 2.5 million nautical miles-- 267 is much too large an area to police effectively. 268 Further, as noted previously, though the United States

254 See supra notes 166-67.
255 See supra text accompanying notes 1-13.
258 Id.
259 Id.
260 Id.
262 Kontorovich, supra note 65, at 747; Madden, supra note 28, at 163.
263 Bento, supra note 38, at 410.
264 World Sea Piracy Drops in 2011, Somali Attacks Up, supra note 41.
265 Straziuso, supra note 95 (noting that Somali pirates have launched attacks more than 1,000 miles from Somalia); David Von Drehle, The Arabia Sea, TIME, Feb. 28, 2011, at 13 (noting that the Somali pirates “have extended their range as far south as Madagascar and as far east as the islands off India”).
266 Shapiro, supra note 48.
267 Id.
captures a number of pirates, it allows a large number (close to 50%) to go free.\textsuperscript{269} Together, these limitations raise questions about the overall deterrence value of such patrols.\textsuperscript{270}

Further, there is an overarching question as to whether, in a time of U.S. budgetary crisis, it makes sense to spend significant sums of U.S. funds to patrol far away oceans. Many have noted that the cost of paying ransoms, even the seemingly astronomical ransoms outlined above, is cumulatively a much lower amount than the cost of supporting U.S. naval efforts around Somalia.\textsuperscript{271} As one commentator recently noted, it is valid to question whether it makes sense to “send $1 billion destroyers, with crews of 300 each, to handle five Somali pirates in a fiberglass skiff.”\textsuperscript{272}

B. Seizure of Piratical Vessels

Not only can pirate ships be attacked and pirates themselves captured, but Congress has also permitted the seizure of their ships. Specifically, pursuant to the Offense Clause, Congress has authorized the President by statute to direct the U.S. military to “subdue, seize, take, and send into any port of the United States” any vessel which attempts or commits a piratical attack against any U.S. vessel or citizen, or indeed against any vessel at all.\textsuperscript{273} The Coast Guard has similar authority to seize ships on the high seas or any waters over which the United States has jurisdiction, if the vessel is believed to have violated U.S. law, to include piracy.\textsuperscript{274}

U.S. courts have continuously upheld the right of the United States to engage in such seizures.\textsuperscript{275} The knowledge of the ship’s owner that the vessel would be used in piratical activity is not relevant.\textsuperscript{276} An open question, however, exists as to whether the United States can seize ships that have been stolen or have mutinied, and are subsequently used for piracy.\textsuperscript{277} Finally, it should be noted that while the ship may be confiscated, any innocent cargo aboard the ship usually cannot be seized by the United States, unless the owners of that cargo either cooperated in or authorized the act of piracy.\textsuperscript{278}
C. Covert Action

Covert Action is “an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly....”\(^{279}\) It therefore involves an attempt by the U.S. government to create an impact overseas, while hiding the U.S. government hand. By statute, the President may authorize a U.S. government agency to engage in covert action operations if the President “determines such an action is necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States.”\(^{280}\) The U.S. government agency typically involved in covert action is my agency, the Central Intelligence Agency (CIA).

Pursuant to this authority, a U.S. President could legally authorize a U.S. agency to engage in covert action operations against pirates, to include directing a U.S. government agency to help defend commercial vessels from pirate attacks, or even to engage in lethal or non-lethal action against the pirates themselves or the nations or individuals who support them. By statute, such covert action would have to comply with U.S. law and the U.S. constitution,\(^{281}\) to include compliance with international conventions such as the SUA and UNCLOS III, both of which the U.S. has adopted into U.S. law.\(^{282}\) It should be noted, however, that I have found no indication in any open source literature or public statement that any President has ever authorized any U.S. government agency to engage in any covert action operations against any pirates.

D. Arresting Pirates

As discussed in Part V below, piracy and numerous acts related to piracy are prohibited under U.S. law. In order to uphold these anti-piracy statutes, different U.S. government agencies have authority to engage in the capture and arrest of individuals involved in piratical attacks. The Coast Guard can arrest individuals in U.S. waters, as well as on the high seas for violations of U.S. law or to prevent a future violation of U.S. law.\(^{283}\) This applies both to U.S.-flagged vessels and foreign-flagged vessels,\(^{284}\) as well as both U.S. and non-U.S. citizens.\(^{285}\) The FBI can make arrests worldwide if they have reasonable grounds to believe there has been a felony in violation of U.S. law.\(^{286}\) Such arrests, however, when conducted outside of U.S. territorial waters, must comply with


\(^{280}\) Id. § 413b(a).

\(^{281}\) Id. § 413b(a)(5).

\(^{282}\) See supra notes 159, 187.

\(^{283}\) 14 U.S.C. § 89(a) (2008)(“The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States.”); Peltz & Kaye, supra note 274, at 226-27.


\(^{285}\) May May, 470 F.Supp. at 396-97.

\(^{286}\) 18 U.S.C. § 3052 (2008); Peltz & Kaye, supra note 274, at 227-28; United States v. Digilio, 538 F.2d 972, 984 (3d Cir. 1976) (noting that under 18 U.S.C. § 3052, FBI agents have the authority to arrest someone without a warrant if reasonable cause exists to believe the individual has committed a felony).
international law, and specifically with the limitations imposed by UNCLOS III and the U.N. Charter.\(^{287}\) Finally, as noted above, the President has the authority to direct the United States military to capture pirates for prosecution.\(^{288}\) As indicated in part IV(a) above, Presidents have directed the U.S. navy to engage in such capture operations in the waters surrounding Somalia.\(^{289}\)

**E. Extradition and Rendition**

If the United States is unable to capture a pirate, but discovers the pirate in a third country, the United States has several legal mechanisms to bring the individual to justice in the United States. One such mechanism would be to seek extradition of that individual through the foreign country’s court system. However, as I have noted elsewhere, many of the bi-lateral extradition treaties that the United States has entered into explicitly preclude the extradition of any national of the foreign country.\(^{290}\) This can create obvious limitations to seeking extradition of pirates, unless the pirate is a national of the United States or a third country. Further, extradition can be a slow process, often hampered by a lack of political will of the foreign nation, slow court systems, and ineffective or corrupt judiciaries or prosecutors.\(^{291}\) In the case of Somalia, for example, a lack of a working government and working court system certainly hampers any attempt to extradite pirates from that country.\(^{292}\)

The United States also has the option of turning to rendition in instances where extradition proves unworkable.\(^{293}\) A rendition is the “forcible movement of an individual from one country to another, without use of a formal legal process, such as an extradition mechanism.”\(^{294}\) Used by the United States government for centuries, rendition operations are less expensive than extraditions, do not require use of a foreign nation’s (sometime corrupt or unworkable) court system, and often permit the host nation to have plausible deniability.\(^{295}\) Of course, they are also much more controversial than formal extradition processes.\(^{296}\) Though there is no indication that the United States has rendered any pirates to the United States, U.S. courts have nonetheless indicated that the rendition of a pirate to the United States would not undermine the ability of the U.S. to prosecute such an individual.\(^{297}\)

\(^{287}\) United States v. Hensel, 699 F.2d 18, 27-28 (1st Cir. 1983) (holding that the Coast Guard cannot violate international law or international conventions).

\(^{288}\) See supra note 247.

\(^{289}\) See supra notes 248-50.


\(^{291}\) Id. at 531-32.

\(^{292}\) See supra note 55.


\(^{294}\) Pines, *supra* note 290, at 525.

\(^{295}\) Id. at 526, 530-33.

\(^{296}\) Id. at 526-27.

\(^{297}\) United States v. Shi, 525 F.3d 709, 724-25 (9th Cir. 2008) (relying on Supreme Court precedent in rendition cases to uphold the “well-established” principle that jurisdiction over a pirate “is not impaired by the fact that he was brought within the jurisdictional territory of the court against his will”).
F. Self-Help

In addition to the above options, U.S. laws originally enacted in 1819 permit U.S. flagged vessels to defend themselves from attack. Specifically, the commander and crew of any U.S. flagged vessel can “oppose and defend against any aggression, search, restraint, depredation, or seizure” by any vessel as long as the aggressor vessel is not operated by the United States government or any “nation in amity with the United States.” The U.S. flagged vessel may also subdue and capture the attacking vessel.

However, U.S. regulations and laws put into effect to preclude weapons trafficking make it very difficult for U.S. flagged-vessels to arm themselves in order to engage in such self-help/self-defense mechanisms. These regulations prohibit U.S. flag ships from carrying virtually any armament, ammunition or “implement of war” absent special license or exception. Violators are subject to fine or imprisonment. Further, any vessel equipping itself with weapons in or from the United States would likely find itself in violation of U.S. arms export statutes, absent acquisition of another license, which appears to be a fairly difficult process. Violators of those statutes are subject to fines of up to $1 million, and imprisonment of up to 10 years.

V. U.S. Options for Prosecuting Pirates

In November 2010, a federal jury in Norfolk, Virginia found five Somalis guilty of piracy and other offenses. They were convicted for opening fire on what they thought was a merchant vessel, but turned out to be the USS Nicholas, which as described above was a U.S. guided missile frigate that apparently resembled a cargo ship. Navy gunners returned fire, captured the pirates, and brought them to the U.S. to face trial. The five pirates involved in the attack received life sentences plus 80 years. While certainly a triumph for the American judicial system, this prosecution outlined one sobering fact: it was the first U.S. jury conviction for piracy in almost 200 years.

299 Id.
300 United States v. Yakou, 393 F.3d 231, 234-35 (D.C. Cir. 2005) (discussing how the rules were implemented to preclude American citizens from exporting U.S. armaments that could be inconsistent with U.S. policy objectives)
301 44 C.F.R. §§ 401.1, 401.2 (2010)
302 Id. § 401.6
307 See supra note 77.
309 Id.
310 Shapiro, supra note 48.
311 FBI Press Release, supra note 306; Drogin, supra note 308.
Overall, there have only been a handful of prosecutions, of less than 30 pirates altogether, in U.S. courts. Aside from the Nicholas pirates, the remaining pirate from the Maersk Alabama attack pled guilty to piracy and received an almost 34 year sentence. The Ashland pirates have been indicted for piracy and other charges. In April 2011, a district court in D.C. sentenced a Somali pirate to 25 years in prison for attacking a Danish ship off the coast of Somalia. The pirate had pled guilty to conspiracy to commit piracy and conspiracy to use a firearm during a violent crime. Finally, the pirates involved in the Quest massacre are currently being indicted on charges of piracy, conspiracy to commit kidnapping, and use of a firearm during a crime of violence; several of those pirates have pled and received life sentences.

Nonetheless, this seems a small number of U.S. prosecutions in view of the numerous recent attacks on U.S. ships and the capture by the U.S. navy of hundreds of pirates. Much of the problem is expense; transporting pirates and witnesses to the U.S., as well as actual prosecuting pirates in U.S. courts, is extremely expensive, and can run into the millions of dollars. In addition, piracy prosecutions are not simple tasks. The piratical acts may have occurred in or near one country’s territorial waters, by pirates from a second country, against crews and passengers from a third country, aboard a flag ship of a fourth country, owned by nationals of a fifth country. Not to mention, the seizure of the pirates may have been made by the government of a sixth country, while those pirates were actually located in a seventh country or in international waters. In other words, the real life facts can quickly turn into a made-for-law-school-exam scenario. As the chief of the U.S. Coast Guard’s operations law group recently stated, this complexity makes prosecuting difficult “because the effort often exceeds the benefit. You get flags from one country, witnesses from another, suspects from another—how do you put that all together in court?”

Despite the dearth of prosecutions, as well as the difficulties of trial, numerous legal options nonetheless exist for the United States to seek to convict pirates and those who assist them, whether through the U.S. Anti-Piracy Statute, other U.S. criminal laws that can be applied against pirates, or by the U.S. inducing other nations to try pirates in their courts.

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313 See supra note 13.


315 Malatesta, supra note 312.

316 Id.

317 See supra notes 83-84.

318 See supra notes 76-84.

319 See supra note 262.

320 Winn & Govern, supra note 48, at 141; Sterio, supra note 69, at 394.

321 Prada & Roth, supra note 61 (quoting Brad Kieserman).
A. The U.S. Anti-Piracy Statute

As noted above, the Offense Clause of the U.S. Constitution permits Congress to pass statutes to “punish Piracies and Felonies committed on the high Seas and Offenses against the Law of Nations.” Pursuant to this, Congress enacted the Anti-Piracy Statute in the late 1700s. Amended nominally since that time, the statute simply provides: “Whoever, 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.” While it is unclear exactly what the “law of nations” on piracy actually was or is, U.S. courts have long used this statute to convict individuals for acts of piracy based upon a definition generally on par with that discussed in Part II(A). In addition, the U.S. criminal code enumerates other actions that constitute violations of the Anti-Piracy Statute, to include: U.S. citizens acting under the color of another nation who commit an act of hostility against the United States or any U.S. citizen on the high seas; foreign nationals “cruising” against the United States or its citizens on the sea in violation of a treaty; U.S. citizens who arm, serve on, or purchase an interest in any private vessel with the intention to commit hostilities against U.S. citizens or their property; assault by a seaman on his/her commander in order to prevent the commander’s ability to defend the vessel; and acts of robbery on shore by members of a piratical vessel.

During the first few decades of the nation’s existence, when piracy was more prevalent, the United States utilized the Anti-Piracy Statute on numerous occasions. Indeed, between 1815 and 1823, piracy convictions were some of the most reviewed cases by the U.S. Supreme Court. Through these early decisions, which included the famous Marianna Flora and Ambrose Light cases, the courts established some broad legal parameters for the Anti-Piracy Statute. While the Statute by its express terms only covers attacks on the “high seas,” the courts have found that the term “high seas” should be interpreted in its popular and natural sense to mean any waters beyond the low-water mark, and therefore would include territorial waters. Further, the nationality of the pirates, the attacked individuals, the vessel sailed and/or the vessel attacked are all deemed irrelevant.

Also irrelevant is the rationale for the pirate attack. U.S. courts have noted that the key issue is whether the “aggression is unauthorized by the law of nations, hostile in its character, wanton and criminal in its commission, and utterly without any sanction from any public authority of sovereign.” It is therefore irrelevant whether the act was committed “for purposes of plunder, or for purposes of hatred, revenge, or wanton abuse of power.” In the eyes of U.S. courts, a stateless individual should not be able to avoid the penalty of piracy due to the reason for the attack. The only “intent” necessary is the intent to attack the maritime vessel; the underlying basis for the attack does not matter.

The Anti-Piracy Statute also enjoys exceptional jurisdictional reach. The Statute applies to activities committed in U.S. territorial waters, as well crimes by or against Americans on the high seas. It also applies to crimes committed by or against Americans in foreign territorial waters if the ship is going to or from the United States.

Further, the Statute protects U.S. flag ships wherever they may sail. It is well-established in U.S. courts that vessels bearing the flag of the United States are considered an extension of the territory of the United States. Under the “Territorial Extension Doctrine,” aka the “Flag State Rule,” maritime nations are considered under international law to have the inherent authority to take active measures to protect their vessels, and punish activity which may disrupt the nation’s shipping interests related to its vessels. Pursuant to this concept, U.S. courts have held that the Anti-Piracy Statute protects U.S. ships and crews wherever they may operate, whether on the high seas or in foreign territorial waters, as well as in U.S. territorial waters or any other waters within the admiralty and maritime jurisdiction of the United States. This jurisdiction therefore applies to an offense committed anywhere a U.S. ship operates, regardless of the nationality of the perpetrator or the victim. In fact, the courts have held that where the perpetrator is a U.S. national, and the activity involves a U.S.-flag ship, the United States not only can prosecute the offender, but indeed has an obligation to do so.

Yet the jurisdictional reach of the U.S. Anti-Piracy Statute goes even beyond U.S. territories, U.S. persons and U.S. ships. Pursuant to a concept known as the Protective Principle, “protective jurisdiction [over an individual] is proper if the activity threatens...”

339 Id.
340 The Ambrose Light, 25 F. 408, 422-23 (1885).
341 Id. at 427.
342 United States v. Flores, 289 U.S. 137, 155-56 (1933); United States v. Shi, 525 F.3d 709, 720-21 (9th Cir. 2008).
343 Peltz & Kaye, supra note 274, at 201.
344 Id.
345 Cox, supra note 89, at 156.
346 Id.
347 United States v. Flores, 289 U.S. 137, 149-50 (1933); Cox, supra note 89, at 156-57.
348 Miller v. United States, 88 F.2d 102, 104 (9th Cir. 1937); 18 U.S.C. § 7 (2006).
349 Peltz & Kaye, supra note 274, at 201.
350 United States v. Flores, 289 U.S. 137, 159 (1933) (holding that, absent any controlling treaty, or any assertion of jurisdiction by the territorial sovereign, “it is the duty of the courts of the United States to apply offenses committed by its citizens on vessels flying its flag”).
The activity need not take place in U.S. territory, the individuals involved need not be Americans, and indeed there is no requirement that the United States prove an actual or even intended effect on the United States. Rather, the Principle applies if the conduct at issue “has a potentially adverse effect and is generally recognized as a crime by nations that have reasonably developed legal systems.”

The United States has long employed the Protective Principle in U.S. criminal maritime law, especially with regard to foreign vessels on the high seas, so long as the activity of the vessel is viewed as threatening U.S. national security or governmental functions. For example, the U.S. has utilized, and U.S. courts have upheld, the Protective Principle to authorize the U.S. Coast Guard to stop, board and seize ships believed to be involved in the transportation of drugs, due to the threat that drug trafficking poses to the United States, even if there is no indication that the vessels were bound for the United States. The Principle has also been applied with regard to other illicit trade and smuggling. While no court case appears to have explicitly applied the principle to piracy, given the adverse impact that piracy has on U.S. national security, as well as the clear approbation of piratical activities by virtually all nations, it seems highly likely that courts would permit the Protective Principle to be used with regard to the Anti-Piracy Statute.

Even beyond the Protective Principle is the concept of Universal Jurisdiction. As the Ninth Circuit recently stated, “Universal jurisdiction is based on the premise that offenses against all states may be punished by any state where the offender is found.” It therefore permits a state to have jurisdiction over an offender “even if the offender’s acts occurred outside its boundaries and even if the offender has no connection to the state.” This concept does not violate an individual’s due process rights because “the universal condemnation of the offender’s conduct puts him on notice that his acts will be prosecuted by any state where he is found.” As noted in Part III(A), piracy is considered a universal jurisdiction crime under customary international law. As the Ninth Circuit stated, piracy constituted the “original rationale for creating universal

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351 U.S. v. Peterson, 812 F.2d 486, 493 (9th Cir. 1987); see also United States v. Romero-Galue, 757 F.2d 1147, 1154 (11th Cir. 1985) (“The protective principle permits a nation to assert jurisdiction over a person whose conduct outside the nation’s territory threatens the nation’s security or could potentially interfere with the operation of its governmental functions.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 (1986) (recognizing the Protective Principle as a valid jurisdictional basis).
352 U.S. v. Peterson, 812 F.2d 486, 494 (9th Cir. 1987); United States v. Marino-Garcia, 679 F.2d 1373, 1380 (11th Cir. 1982); Peltz & Kaye, supra note 274, at 205.
353 United States v. Gonzalez, 776 F.2d 931, 939 (11th Cir. 1985).
354 Id. (“Reliance on the protective principle is not a novel idea in American law.”); Cox, supra note 89, at 147 (noting that the protective principle “is a widely recognized source of U.S. maritime criminal law authority”).
355 United States v. Marino-Garcia, 679 F.2d 1373, 1380 (11th Cir. 1982); Peterson, 812 F.2d at 494.
356 Peterson, 812 F.2d at 494; United States v. Romero-Galue, 757 F.2d 1147, 1154 (11th Cir. 1985).
357 Gonzalez, 776 F.2d at 939.
358 United States v. Shi, 525 F.3d 709, 722 (9th Cir. 2008).
359 Id. at 722-23.
360 Id. at 723.
jurisdiction” and therefore the United States could utilize universal jurisdiction to prosecute a pirate regardless of the pirate’s complete lack of any nexus to the U.S.\textsuperscript{361}

Overall, then the Anti-Piracy Statute has an exceptionally broad reach, both in its coverage and its jurisdictional application. Indeed, the only major limitation to the Statute may be whether or not the attack was actually successful. Two district court cases in Norfolk recently came out on different sides of the question. In these two cases -- the attacks on the Ashland and on the Nicholas, discussed above\textsuperscript{362} -- Somali pirates attacked U.S. military vessels, apparently believing them to be merchant vessels. In both cases, the pirates were thwarted in their attempts, captured and brought to the U.S. for prosecution. The Norfolk courts that prosecuted them, however, came to diametrically opposed (and quite lengthy) opinions about whether the mere attempt to commit a piratical attack triggered the provisions of the Anti-Piracy Statute. Relying upon differing interpretations of the legislative history and 18\textsuperscript{th} century case law on the topic, one district court found that the Anti-Piracy Statute did cover attempted acts,\textsuperscript{363} while the other district court ruled it did not.\textsuperscript{364} The better argument appears to be that the Anti-Piracy Statute does not cover mere attempts, as the actual language of the statute applies only to someone who “commits the crime of piracy,”\textsuperscript{365} and does not include “attempt” language. However, the issue is currently under review with the Fourth Circuit.\textsuperscript{366}

B. Other U.S. Criminal Sanctions

In addition to the Anti-Piracy Statute, numerous other U.S. criminal statutes could be utilized to prosecute pirates. Such statutes may be useful in situations where a court determines that the Anti-Piracy Statute is inapplicable, or for plea bargaining purposes. For example, robbery or burglary at sea is punishable by imprisonment of up to fifteen years.\textsuperscript{367} It is also a federal crime to commit assault on the high seas, with penalties ranging from six months for simple assault, to upwards of twenty years for assault with a deadly weapon.\textsuperscript{368} It is a felony, with imprisonment of up to ten years, for a captain of a vessel to “piratically or feloniously” run away with such vessel, or yield such vessel to pirates,\textsuperscript{369} for anyone to attempt to corrupt a captain to run away with a vessel or to furnish a pirate with ammunition or provisions;\textsuperscript{370} for anyone to plunder a distressed vessel, preclude the escape of someone from a distressed vessel, or use a false light for the purpose of shipwrecking a vessel;\textsuperscript{371} for anyone to attack a vessel in order to plunder it;\textsuperscript{372} or for anyone to knowingly receive pirated property.\textsuperscript{373} Knowingly damaging or

\textsuperscript{361} Id.
\textsuperscript{362} See supra text accompanying notes 256-58.
\textsuperscript{363} United States v. Said, No. 2:10cr57, 2010 WL 3893761 (E.D. Va Aug. 17, 2010).
\textsuperscript{367} 18 U.S.C. § 2111 (2008); Kraska & Wilson, supra note 38, at 253.
\textsuperscript{368} 18 U.S.C. § 113 (2008); Kraska & Wilson, supra note 38, at 253.
\textsuperscript{370} Id. § 1657.
\textsuperscript{371} Id. § 1658.
\textsuperscript{372} Id. § 1659.
\textsuperscript{373} Id. § 1660.
destroying vessels carries a penalty of up to twenty years’ imprisonment. Extra criminal sanctions can be added on top of these charges if the attackers carried, brandished or discharged a firearm in furtherance of the crime.

In addition, Congress has passed statutes that adopt several of the international conventions described above in Part III. Congress’ authority to pass such legislation stems from two Constitutional provisions. The first is the Offense Clause, described above, which authorizes Congress to “punish piracies.” In addition, the Necessary and Proper Clause of the Constitution authorizes Congress “to make all Laws which shall be necessary and proper for carrying into execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” These “Powers” include the President’s Treaty Power under Article II of the Constitution. This permits Congress not only to codify international anti-piracy conventions into the U.S. criminal code, but also provides Congress the authority to extend jurisdiction over such acts beyond U.S. borders.

Based upon both the Offense Clause and the Necessary and Proper Clause, the United States has implemented the provisions of the SUA into U.S. criminal law. The resultant U.S. statute precludes the unlawful and intentional seizure of a ship by force or intimidation, any act of violence against a person on board a ship if the violence will endanger the ship’s safe navigation, destruction of a ship, or conspiracy to do any of these activities. Violators can be fined and imprisoned for up to 20 years. The mere threat to take most of these actions is also punishable by fine or imprisonment. Life imprisonment and even the death penalty are available sanctions if the death of any person results from the activity.

Like the Anti-Piracy Statute, and pursuant to the Necessary and Proper Clause, the SUA statute enacted by the United States has far reaching jurisdiction. The statute applies to activities committed by a U.S. national in U.S. territorial waters, as well as to acts committed against or on board a U.S. flag ship located anywhere in the world. Jurisdiction also extends to any situation worldwide where a U.S. national is seized, threatened, injured or killed, as well as situations in which the offender is later found in the United States. The last option is particularly relevant because it applies not only to persons who voluntarily find themselves in the United States, but also to persons who are extradited or rendered to the U.S. Jurisdiction also extends to attacks on any vessel

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374 Id. § 2291.
375 Id. § 924(c).
376 See supra text accompanying notes 242-43.
377 U.S. CONST. art. I, § 8, cl. 18.
379 Shi, 525 F.3d at 721; see also United States v. Ferreira, 275 F.3d 1020, 1027-28 (11th Cir. 2001) (holding that Congress had the power to establish a federal statute to implement the Hostage Taking Convention, pursuant to the Necessary and Proper Clause).
380 Shi, 525 F.3d at 719.
382 Id.
383 Id. § 2280(a)(2).
384 Id.
385 Id. § 2280(b)(1).
386 Id. § 2280(b)(1).
387 United States v. Shi, 525 F.3d 709, 725 (9th Cir. 2008).
where the activity is undertaken to attempt to compel the United States to do or abstain from doing any act, which is directed towards hostage-taking or acts of terrorism. Unfortunately, despite the overall wide sweep of this statute, it appears to have been used only once in U.S. courts, though resulting in a successful conviction.

The United States has similarly implemented the key provisions of the Hostage Taking Convention into U.S. law. The resultant statute deems hostage taking to be a criminal offense punishable with a life sentence, or by death if a hostage is killed. Relevant to the world of piracy, the prohibition extends to hostage-taking occurring outside the United States if the hostage or the hostage takers are U.S. nationals, the offenders are found in the U.S., or the hostage takers are seeking to compel action by the United States government.

It should be noted, however, that all of these alternate statutes differ significantly from the Anti-Piracy Statute in one key way. While the above statutes provide the United States with considerable jurisdictional reach, only the crime of Piracy has universal jurisdiction. Thus, unless the Anti-Piracy Act applies to a given situation, the United States might not be able to prosecute individuals engaging in piratical activities if such activities lack sufficient nexus to the United States. Fortunately, the Ninth Circuit has held that actions in violation of the SUA at least are considered forms of piracy, and that therefore the United States can utilize universal jurisdiction to convict individuals of violations of the U.S. statute enacting the SUA.

C. Prosecution Outside the United States

Between the Anti-Piracy Statute and other criminal provisions, the United States government has an impressive arsenal of legal options, and an extensive jurisdictional reach, that can be levied against pirates. As noted above, however, the United States often refrains from employing these tools, for reasons that include cost, time delays, court congestion, and lack of proximity of witnesses. Fortunately, the United States is rarely the sole nation with jurisdiction over a crime of piracy, as the attacked vessel may be flying under another nation’s flag, or the attack may have taken place within the sovereign waters of another country. In such cases, both the flag country and the country with territorial sovereignty are said to have concurrent jurisdiction. If there is a dispute over which nation has priority, the U.S. Supreme Court has held that the “jurisdiction asserted by the sovereignty of the port must prevail over that of the vessel.” Of course, there may also be competing claims of jurisdiction from the nation of the attackers and the nation of the victims, as well as any nation seeking to assert universal jurisdiction.

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389 Kontorovich ASIL Article, supra note 27.
390 Shi, 525 F.3d 709.
391 United States v. Ferreira, 275 F.3d 1020, 1027 (11th Cir. 2001).
393 Id. § 1203(b)(1).
394 See supra text accompanying notes 358-61.
395 United States v. Shi, 525 F.3d 709, 722-24 (9th Cir. 2008).
396 See supra text accompanying notes 320-21.
397 United States v. Flores, 289 U.S. 137, 157 (1933)
398 Id. at 158.
As might be expected, however, the problem is rarely that too many nations seek jurisdiction to prosecute a given pirate, but rather the overall lack of prosecutorial interest by any nation. Still, just as the United States has increased its prosecution of pirates in the past few years, so too have other nations. In June 2010, a Dutch court sentenced five Somali men to five years in prison for trying to hijack a Dutch Antilles-flagged cargo ship in the Gulf of Aden. It is said to have been the first modern piracy trial in Europe. In May 2010, a Yemen court sentenced six Somali pirates to death, and six others to ten-year jail sentences, for hijacking a Yemeni oil tanker. Seychelles sentenced eleven Somali pirates to 10 years in prison in July 2010 for attempting to hijack a Seychelles coastguard ship. In February 2011, South Korea indicted five Somalis for attempted murder, hostage taking and robbery related to the pirates’ seizure of the South Korean-operated Samho Jewelry. The captured pirates received sentences ranging from 12 years to life imprisonment. Nations as diverse as Germany, Mauritius, France, Somalia, Russia and Spain have also prosecuted suspected pirates. Overall, almost 20 countries have recently initiated prosecutions against almost 950 pirates.

The United States and other nations have gone a step further, and have sought to induce nations proximate to Somalia to assert universal jurisdiction to prosecute pirates captured by U.S. and European forces, even though such third countries have absolutely no connection to the act, attackers, or victims. Such prosecutions in local courts demonstrate a regional commitment to thwart the problem of piracy, as well as the ability of states to cooperate to address the issue. They also greatly reduce the prosecutorial costs and manpower on U.S. and European courts. The first such case took place in 2007. That case stemmed from the January 2006 assault against an Indian dhow, the Safina Al Bisarat. Using rocket-propelled grenades and AK 47 assault rifles, ten Somali pirates overtook the dhow in international waters. Fortunately, the USS Winston S. Churchill happened to be in the vicinity and was able to recapture the dhow and detain the Somalis. After discussions among the relevant players, the pirates were transferred to

399 See supra text accompanying notes 61-73.
400 Who They’re Sentencing in Rotterdam, TIME, July 5, 2010, at 15.
401 Id.
406 Andres Cala, Spain Arraigns Somalis Suspected of Piracy, NEW YORK TIMES.COM (Oct. 14, 2009), http://www.nytimes.com/2009/10/14/world/europe/14iht-spain.html; Malatesta, supra note 312.; Schwirtz, supra note 47, at A6 (noting that a Russian court sentenced six men to sentences of 7 to 12 years for committing piracy against a Russian ship off the coast of Sweden).
407 Shapiro, supra note 48.
408 Kraska & Wilson, supra note 38, at 257.
409 Cala, supra note 406.
410 Kraska & Wilson, supra note 38, at 257.
Kenya for trial. Applying universal jurisdiction, the Kenyan court prosecuted the pirates, leading to convictions and seven-year sentences for all of them.\footnote{411} Buoyed by that success, the United States, and other countries subsequently entered into Memoranda of Understanding with Kenya to hand pirates over to the Kenyans for prosecution.\footnote{412} Thus far, more than 100 alleged pirates have been transferred to Kenya.\footnote{413} Of course, Kenya’s willingness to prosecute such pirates is not limitless, given the exceptional expense of such prosecutions as well as internal grumbling about why the relatively-poor nation is expected to do the world’s dirty work.\footnote{414} Indeed, in 2010, Kenya suspended its agreement to prosecute pirates.\footnote{415} It later begrudgingly agreed to reconsider new prosecutions, but only after being reassured of additional financial support.\footnote{416} Following the Kenya example, Seychelles is creating an UN-supported center to prosecute suspected pirates.\footnote{417} Overall, it is expected that donor nations will spend more than $9 million to support piracy trials in Kenya and Seychelles.\footnote{418} Mauritania and Tanzania have also expressed an interest in becoming a destination for piracy trials,\footnote{419} and the United Nations Security Council has urged additional nations to consider the same.\footnote{420}

Of course, the United States and other nations need to be careful about entering into such agreements. The United Nations Convention Against Torture (CAT) precludes nations from turning a pirate over to a nation where it is more likely than not that the pirate would be tortured.\footnote{421} This provision has often deterred European nations, for example, from turning pirates over to the Somali government.\footnote{422} It can also affect the willingness of nations to turn pirates over to other countries whose human rights records are less than impeccable, even if it is unclear whether torture will ensue. It is important to note, however, that United States law with regard to the CAT does not actually prohibit transfer of a pirate to a nation where he or she may be tortured, though U.S. policy currently precludes such transfers.\footnote{423}

There is also a question about whether such transfers of pirates to a third country violate Article 105 of UNCLOS III. That provision permits states to seize pirate ships on the high seas, but provides that prosecution of seized pirates should be carried out by “the courts of the state which carried out the seizure.”\footnote{424} The drafting history of Article 105

\begin{footnotes}
\item[411] Id.; Passman, supra note 52, at 2-3, 14.
\item[414] Kontorovich, supra note 65, at 748; Arce, supra note 403; Gathii, supra note 412, at 137.
\item[416] Arce, supra note 403; Hanson, supra note 66.
\item[417] Arce, supra note 403.
\item[418] Id.
\item[419] Id.; Daniel Richey, Mauritius to Try Accused Somali Pirates, JURIST (June 13, 2010), http://jurist.org/paperchase/2010/06/mauritius-to-try-accused -somali-pirates.php.
\item[421] Passman, supra note 52, at 34; Sterio, supra note 69, at 398.
\item[422] Kontorovich ASIL Article, supra note 27.
\item[423] Id.
\item[424] UNCLOS III, supra note 154, art. 105.
\end{footnotes}
indicates that it was intended to prevent transfers of pirates to third parties for prosecution.\textsuperscript{425} However, such a restriction contradicts pre-UNCLOS III customary international law, which clearly permitted such transfers to third countries.\textsuperscript{426} 

While no court appears to have yet explored whether the transfer of a pirate from a capturing country to a third country actually violates the terms of UNCLOS III,\textsuperscript{427} a variety of nations routinely transfer pirates to third nations.\textsuperscript{428} This indicates an implicit assessment by the international community that either Article 105 does not actually preclude such transfers, or that the pre-existing customary international law permitting such transfers survived Article 105.\textsuperscript{429} This would appear to be an appropriate result. As noted above, pirates are subject to universal jurisdiction.\textsuperscript{430} If any nation can prosecute pirates, why should the capturing nation be the only one permitted to do so. Further, if international law did preclude the transfer of pirates to a third nation, then states might merely respond by having the capturing nation “release” pirates proximate to the prosecuting nation’s port or military vessel, with the latter then “re-capturing” the pirates under universal jurisdiction and proceeding with the prosecution. No legitimate purpose is served by having states engage in such legal contortions.

\textbf{VI. Proposals for Augmenting the U.S. Fight Against Piracy}

As the above sections illustrate, the United States possesses numerous legal options to combat piracy. However, the actual U.S. effort thus far has been fairly limited. True, its naval ships patrol the oceans around Somalia, but the U.S. strategy, as well as that of other nations patrolling such waters, appears to be mostly one of passive deterrence. Pirates may be attacked if they first attack a vessel in the region, but more likely, once the pirates’ plans are thwarted, the pirates are generally allowed to escape without any major ramifications. As a result, there is little financial or other deterrence against piracy, especially compared with the potential financial gain to the local, often impoverished, populace. This has led to a tremendous uptick in pirate attacks, with no resolution in sight. Certainly, the United States has numerous other pressing concerns for its time, focus and funding (e.g. wars in Iraq and Afghanistan, deficit issues, Middle East turbulence, etc.). However, the current U.S. approach to maritime piracy creates the opportunity for disaster – more pirate attacks on U.S. and other nations’ vessels, further deaths, extensive interruption of international trade, potential ecological mayhem, and possibly horrific terrorist acts.

To contend with this national security problem, the United States needs to consider several potential solutions. Possible solutions involving changes in U.S. geopolitics or diplomacy are beyond the scope of this article. However, numerous changes exist on the legal front, as discussed below, which could and should be implemented to thwart the threat posed by piracy.

\textsuperscript{425} Kontorovich ASIL Article, supra note 27; Gathii, supra note 412, at 122.
\textsuperscript{426} Kontorovich, supra note 65, at 748; Gathii, supra note 412, at 125.
\textsuperscript{427} Kontorovich ASIL Article, supra note 27.
\textsuperscript{428} Gathii, supra note 412, at 124-25.
\textsuperscript{429} Id. at 125; Kontorovich, supra note 65, at 748. But see Sterio, supra note 69, at 391 (suggesting that the legality of transferring captured pirates to a third country is “dubious” under Article 105).
\textsuperscript{430} See supra Part III(A).
A. Increase U.S. Prosecutions

Various commentators have asserted that the minimal threat of prosecution contributes to the escalation of piracy.431 As one author has noted, “[p]rosecution is the weakest link in the current international effort to combat piracy.”432 The head of one of Norway’s biggest shipping companies recently suggested that pirate ships should be fired upon and sunk, and captured pirates should be punished by death on the spot.433 As the shipping executive stated, “[w]hen [piracy] implies a great risk of being caught and hanged, and the cost of losing ships and weapons becomes too big, it will decrease and eventually disappear.”434 While such a proposal is a bit over-the-top, to say the least, the concept of deterrence has validity. When the governments of Malaysia, Singapore and Indonesia together began more actively prosecuting pirates, piratical attacks in that region plummeted.435

To emulate that result worldwide, the United States first needs to become much more aggressive in prosecuting pirates. One way to do that would be to devote more prosecutorial resources towards piracy trials. Laws could also be enacted that would expand the scope of cases which can be brought against those who assist pirates. The Patriot Act created a criminal statute precluding material support to terrorism,436 which is interpreted extremely broadly to effectively forbid virtually any support to terrorists.437 It has proven exceptionally helpful to prosecutors.438 Indeed, a 2009 Human Rights First Report found that, since 9/11, the most common charge brought in terrorism cases has been a material support to terrorism charge, and that such charges yielded the most convictions.439 In the piracy realm, the United States government has already issued policy guidance noting the government’s desire to disrupt pirates’ financial backing as

431 Kontorovich ASIL Article, supra note 27.
432 Hanson, supra note 66.
434 Id. (statement of Jacob Stolt-Nielsen).
435 Prada & Roth, supra note 61.
436 18 U.S.C. § 2339A(a) (2006) (making it a criminal offense to “provide[] material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out” a terrorist act).
437 Id. § 2339A(b) (defining “material support or resources” as “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials”).
438 Ben Conery, “Material Support” Ban in Terrorism Law Upheld, WASHINGTONTIMES.COM (June 21, 2010), http://www.washingtontimes.com/news/2010/jun/21/high-court-upholds-material-support-law (describing the Material Support to Terrorism law as “one of the government’s most frequently used tools in the battle against terrorism”); Adam Serwer, Scotus Upholds Material Support for Terrorism Law, TAPPED (June 21, 2010), http://prospect.org/csnc/blogs/tapped_archive (noting that the Supreme Court’s decision to uphold the constitutionality of §2339A “is a big win for the government, because the law’s breadth is one of the big reasons why it has a 91 percent conviction rate in terrorism cases in civilian court”).
well as the suppliers of their fuel, outboard motors, ladders and other supplies. In order to effectuate this goal, the U.S. should enact a material support to piracy statute, which would allow U.S. prosecutors to bring claims against anyone in the chain of piracy, and thus help further deter pirate attacks.

Finally, as noted above, there is some question whether the Anti-Piracy Statute extends to attempted piratical attacks.Regardless of how the Fourth Circuit eventually decides the matter in the specific cases before it, the U.S. should amend the Anti-Piracy Statute to make clear that it encompasses both unsuccessful as well as successful attempts at piracy. Pirates should not be allowed to levy attacks with impunity, subject to the Statute only when they actually succeed. By explicitly bringing attempts within the Statute, prosecutors will not only be allowed to implement the heavy sanctions of the Statute, but also place the imprimatur of “pirate” with all its negative implications on even the attempters. Perhaps most importantly, it will permit prosecutors to use the universal jurisdiction of piracy over the attempters, which is only available through the Anti-Piracy Statute and generally not with regard to other, lesser, piracy-related charges.

B. Increase International Prosecutions

Piracy is an international dilemma and, though it significantly impacts U.S. national security, it is imperative that the United States not be the only nation to step up enforcement of anti-piracy laws. Terrorism is a U.S. national security matter, but is most effectively combatted when the international community realizes the threat it poses to all society and joins forces in the effort. The same is true of piracy.

Certainly one problem is the lack of prosecutions of pirates by foreign nations. As noted above, many nations engage in a capture-and-release policy, rather than a prosecute-and-convict philosophy. Much of this is lack of political will, as well as financial cost. However, part of it, as noted above, stems from the fact that piracy prosecutions are based on national laws and many countries have weak national anti-piracy laws. Therefore, the United States should continue its policy of encouraging key nations, especially those most plagued by piracy, to ratify the SUA. The United States should also push countries that have ratified the SUA to enact stronger anti-piracy statutes, and to then actually prosecute pirates under those laws.

The U.S. can also continue to establish agreements with third countries for their assistance in piracy prosecutions, as has already been done with Kenya and Seychelles. This would allow for prosecutions close to the regions where most pirate attacks occur.

440 Shapiro, supra note 48.
441 While U.S. statutes already prohibit providing ammunition or provisions to pirates (18 U.S.C. § 1657) and knowingly receiving pirated property (18 U.S.C. § 1660), as discussed supra note 370, these provisions are shot-gun approaches to the problem and do not cover as many acts as a material support to piracy statute would.
442 See supra text accompanying notes 363-66.
443 See supra text accompanying notes 394-95.
444 See supra note 65.
445 See supra notes 61-62.
446 See supra note 201.
447 See supra text accompanying notes 406-12.
therefore making it easier to bring the pirates and witnesses before the court. Having the trial proximate to the location of most of the aggressors would also likely increase the deterrence value and, having at least some of the trials conducted by local African courts would help diminish the perception that piracy in the region is mostly an American and European problem.

The U.S. government and others have also recommended the creation of a special tribunal focused exclusively on piracy. However, creation of such a court faces the hurdles of financing, support of nations, and the time needed to create a new tribunal. I would suggest that, rather than create a brand new tribunal, we should employ a perfectly functioning one that already exists. As noted above in Part III(E), the International Criminal Court (ICC) has jurisdiction to hear a number of criminal cases, but does not appear to have jurisdiction to hear piracy claims. Yet, given that piracy is a universal crime – a crime against all humanity – and thus clearly a “serious crime of concern” to the international community, it would appear that the ICC would be the perfect mechanism to handle such claims. The ICC is already an established and well-recognized entity, even if the United States has yet to join it. It already has a physical court, as well as rules of procedure and case law in place. Finally, the ICC would likely benefit by expanding its repertoire to include anti-piracy cases, so as to establish itself as a court that can handle more than just politically-explosive genocide and war crimes claims. Therefore, the ICC’s jurisdiction should be interpreted or expanded to include trials for piracy.

C. Create Better Mechanisms for Hot Pursuit

As noted above, UNCLOS III does not permit the United States or other nations to pursue pirates into another nation’s territorial waters. Pirates often use this limitation to evade capture by darting into territorial waters whenever chased. Indeed, there are numerous examples of pirates operating in the Strait of Malacca, a body of water that stretches between Indonesia and Malaysia, who employ a deliberate tactic of jumping in and out and between Indonesian and Malaysian territorial waters in order to evade pursuit. This limit on hot pursuit obviously greatly restricts the ability of the United States and other nations to capture pirates, prosecute them, and deter others from piratical attacks.

One solution to this problem would obviously be to amend UNCLOS III in order to permit hot pursuit of pirates into a nation’s sovereign territory. However, as noted above, the protection of sovereign territory goes to the very heart of the United Nations Charter, and is quite frankly one of the most basic precepts behind the concept of a

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448 Shapiro, supra note 48; Sterio, supra note 69, at 395-96 (noting several proposals for establishment of an ad hoc tribunal); Bento, supra note 38, at 443; NATIONAL SECURITY COUNCIL, supra note 53, at 14; Andrea Bottorff, UN Considers New International Tribunal for Piracy Trials, JURIST (Aug. 26, 2010), http://jurist.org/paperchase/2010/08/un-considers-new-international-tribunal-for-piracy-trials.php; Kontorovich ASIL Article, supra note 27.

449 Bottorff, supra note 448; Sterio, supra note 69, at 396.

450 See supra text accompanying notes 164-69.

451 Luft & Korin, supra note 117, at 69.

452 Id.

453 See supra note 221.
nation-state. Therefore, it seems unlikely that nations would permit UNCLOS III to be amended in such a manner.

A better solution would be to follow the example of Somalia. In that situation, the United Nations Security Council passed resolutions permitting nations to chase and capture pirates in Somali waters due to the effectively blanket permission of the Somali government.\(^{454}\) Without going through the tedious task of seeking and acquiring Security Council resolutions with regard to other territorial waters, the United States could emulate the Somali model elsewhere by negotiating bi-lateral agreements on hot pursuit protocols with other countries experiencing significant piratical acts in their territorial seas. Such agreements could authorize blanket approvals, though it is unlikely that most nations would accept such wide infringement of their sovereignty. More likely to be successful, the bi-lateral agreements could establish specific and efficient mechanisms for quickly acquiring permission to engage in hot pursuit of pirates into territorial waters on a case-by-case basis, which would seem to be a more realistic goal. Either option, however, would permit more pirates to be apprehended, and invoke a higher level of deterrence as pirates would lose one of their best mechanisms for evading capture.

\section*{D. Allow Ships to Better Protect Themselves}

While prosecution offers one means of deterrence, another and indeed less expensive option is to make commercial vessels less of an easy prey. The United States has already taken some steps to do this. The International Shipping and Port Facility Security Code (ISPS Code), established at the urging of the United States and others, is an international code intended to increase the security of the world’s commercial fleets by requiring ship operators, as well as the owners of large-scale port facilities, to develop useable security plans.\(^{455}\) Through the Maritime Transportation Security Act of 2002 (MTSA),\(^{456}\) the United States implemented the ISPS Code into U.S. law.\(^{457}\) Under the MTSA’s provisions, foreign ports must become certified as meeting certain security requirements before they can be used as a transit for ships destined to the United States.\(^{458}\)

Yet merely increasing port security is not enough. More needs to be done to induce and allow commercial vessels to protect themselves. Some shipping firms, on their own, have implemented on-board security systems by installing fire hoses, electric fences, barbed wire, bright lights, alarm systems, tracking devices, and even devices that emit ear-splitting pulses towards a targeted area.\(^{459}\) Others have gone so far as to place weapons aboard their ships or hire private security companies to emplace armed personnel on vessels to protect the vessel from pirate attacks.\(^{460}\)

\begin{footnotes}
\item[454] See supra notes 229-237.
\item[455] Kraska & Wilson, supra note 38, at 254-55.
\item[457] Kraska & Wilson, supra note 38, at 255.
\item[458] 46 U.S.C. § 70103 (2006); Kraska & Wilson, supra note 38, at 255.
\item[459] Kraska & Wilson, supra note 38, at 263; Winn & Govern, supra note 48, at 144.
\item[460] Kraska & Wilson, supra note 38, at 247; Winn & Govern, supra note 48, at 144-45.
\end{footnotes}
There are clear indications that vessels employing such defense systems have been extremely successful at staving off pirate attacks. Indeed, the Maersk Alabama, the ship described in the Introduction whose captain was saved by American snipers, provides anecdotal proof. Amazingly enough, the Alabama ended up being attacked again by pirates off the Somali coast a mere seven months after the first attack. This time, however, the crew was better prepared, having installed anti-pirate structural features and safety equipment, as well as an armed security force. The latter opened fire on the pirates and repelled the attack. Such success stories, combined with the increased number of pirate attacks and the limited ability/willingness of the world’s navies to fully patrol the areas of danger, makes it almost inevitable that more private vessels will seek to engage in self-defense mechanisms.

In order to encourage such self-help measures, the United States advocates all vessels adopt best management practices to protect themselves from attack – to include engaging additional lookouts on watches and using closed circuit television cameras and razor wire. However, such best management practices do not include arming the crews of vessels. Yet, the United States government has recognized that “not a single ship employing armed guards has been successfully pirated.” In addition, much of the recent decline in piratical attacks has been attributed to the increase in private security personnel on ships. Not only does the United States not advocate arming the crews of maritime vessels but, as noted above in Part IV(F), has implemented laws and regulations which greatly restrict U.S. flag ships from carrying weapons that could be used to defend against pirate attacks.

The United States needs to change its philosophy in this area. Obviously, there are legitimate concerns that untrained armed crews could fire upon innocent civilians, that an arms race could ensue between the vessels and the pirates, or that vessels permitted to bring weapons on board would use such a loophole in arms control laws to engage in arms smuggling. However, as noted above, the use of armed crews and guards have proved effective in deterring pirate attacks. As the world’s navies clearly cannot defend all ships everywhere on the high seas, and as piracy continues to be an extensive threat, vessels must be permitted to engage in sufficient self-help to protect themselves. Therefore, not only should the U.S. augment its best management practices to include arming of crews, but U.S. regulations should also be amended to permit, if not require,

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461 Hanson, supra note 66.
463 Id.
464 Id.
465 Apps, supra note 268.
466 Shapiro, supra note 48; National Security Council, supra note 53, at 9.
467 National Security Council, supra note 53, at 4; Shapiro, supra note 48.
468 Shapiro, supra note 48 (statement of Andrew J. Shapiro, Assistant Secretary, Bureau of Political-Military Affairs, U.S. Dept. of State); see also Apps, supra note 268 (“[N]o vessel carrying armed guards has yet been pirated.”).
469 World Sea Piracy Drops in 2011, Somali Attacks Up, supra note 41.
470 Apps, supra note 268.
471 Id.; Bento, supra note 38, at 452.
U.S. flagged ships and ships using U.S. ports to purchase and maintain armaments for
defensive purposes.\footnote{At least one other set of commentators has suggested amending U.S. legislation to enable officers on civilian ships to be allowed to carry arms. \textit{See} Luft & Korin, supra note 117, at 68.}

Such regulations, however, should not be open-ended. Rather, they should
provide that vessels can possess only a limited number of weapons, to preclude arms
trafficking. In addition, the numbers and types of weapons permitted should be restricted
only to those relevant for defending a ship from pirate attack, and should vary based upon
the type of ship and its planned itinerary. Obviously, cruise ships traveling a relatively
benign path between Florida and the Caribbean would not need the same set of defenses
as an oil tanker traveling through the Gulf of Aden. All vessels should also be required
to maintain a detailed accounting of their weapons at all times to ensure that weapons do
not go “missing.” The weapons would also need to be properly stored and maintained.
Finally, only crew members properly trained on how and when to use the weapons should
be permitted to employ the weapons. Currently, there is no required training for crews or
private security forces on board U.S. ships.\footnote{Apps, supra note 268.} Instituting such regulations, with the
above limitations, will allow U.S. vessel ships to defend themselves from attack, and
equally important give pirates notice that such vessels are likely to carry these weapons,
without undermining the purpose of the original regulations to preclude arms
trafficking.\footnote{See supra note 300. Other exceptions for arms control regulations already exist. \textit{See}, e.g., 22 C.F.R. §§ 123.16 and 123.17 (2010) (listing several exceptions to the requirement).}

By putting such proposals into effect, pirates will be made well aware that U.S.
flag ships, as well as ships using U.S. ports, should not be trifled with. Of course,
providing weapons to crews is not a universal panacea. Pirates might still decide that the
benefit outweighs the risk. Weaponizing crews increases the possibility of mutiny,
accidental discharge, or weapons being confiscated by passengers or the pirates
themselves. Further, there are the complications that other ports or territorial waters used
by our ships may have restrictions on gun ownership, or may believe the ship is engaged
in weapons smuggling.\footnote{Kraska & Wilson, supra note 38, at 264-65; Winn & Govern, supra note 48, at 144; Madden, supra note 28, at 151; Bento, supra note 38, at 452.} Nonetheless, the value of such weapons in deterring piracy -- both as a general matter as well as in specific instances of attack -- appears to outweigh
these potential negatives.

Consideration should also be made to allowing private commercial vessels some
self-help options beyond merely staving off attacks. For example, ship’s crews should be
permitted to capture and seize attacking pirates. Citizen’s arrest rules in the United States
generally permit a private citizen to arrest someone if the citizen has probable cause to
believe that a felony has occurred, or if the citizen witnesses a misdemeanor constituting
a breach of the peace.\footnote{United States v. Atwell, 470 F.Supp.2d 554, 564 (D.Md. 2007) (summarizing the general law of the land
with regard to citizen’s arrests); \textit{see also} Hopkins v. Bonvicino, 573 F.3d 752, 774 (9th Cir. 2009) (noting
that the California penal code permits a citizen’s arrest for any public offense committing to the citizen or
in the citizen’s presence); United States v. Sealed Juvenile 1, 255 F.3d 213, 217 (5th Cir. 2001) (describing
the Texas Penal code as permitting a citizen’s arrest for any felony or breach of the peace witnessed by the
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the Texas Penal code as permitting a citizen’s arrest for any felony or breach of the peace witnessed by the
citizen). Such arrests do not violate the Fourth Amendment of the
Constitution, as the arresting individual is not an employee of the U.S. government.\(^{477}\)

However, the rules governing citizen’s arrests are promulgated on a state-by-state basis.\(^{478}\) It is therefore unclear whether citizen’s arrest rules apply overseas, as well as which state’s rules would be applicable in a given overseas scenario. As such, a federal citizen’s arrest law, particularly in the area of piracy given its universal approbation, would allow for private U.S. flagged ships to capture and detain pirates without having to wait for a passing military vessel. Such vessels would of course be required to promptly transfer captured pirates to the U.S. military or law enforcement personnel, or to an appropriate court of law for prosecution.

Finally, the United States could encourage U.S. flag vessels to bring civil suit against pirates and those that assist them in U.S. courts, under theories of tort, attempted robbery, assault and battery, or any other civil claim. Even non-U.S. flag vessels could be encouraged to bring civil claims in U.S. courts against pirates. The Alien Tort Statute (“ATS”), for example, permits U.S. district courts to have “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”\(^{479}\) The Supreme Court has held that piracy is one of the laws of nations encompassed under the ATS.\(^{480}\) Encouraging such civil suits in U.S. courts against pirates and those who assist them would be another mechanism for deterrence.

VII. Conclusion

Piracy is clearly on the rise. Its actual and potential relationship to terrorism seems unmistakable. Just as this nation laments not taking preventative action with regard to airplane hijacking prior to 9/11, we need to take steps not to make the same mistake in the realm of maritime piracy. The United States already has a number of mechanisms under international and American law to combat the threat, from immediate military and law enforcement action to longer-term prosecution both in the U.S. and abroad. U.S. policy-makers have made additional pledges to engage in even further acts of deterrence.

Yet little will actually be done until the United States government, and the American populace, recognizes piracy for what it truly is – a potentially devastating national security matter. Once accomplished – hopefully before a crippling pira-terrorist attack – the United States will then need to take important steps to resolve the issue. Many such steps fall within the political and military realm, and thus are beyond the scope of this article. However, as identified above, numerous options for improvement exist in the legal area as well, and need to be seriously considered.

Fortunately, piracy is one of the few universal jurisdiction crimes in the world. This is due to the long-held, world-wide repugnance for the act, which negatively impacts

\(^{477}\) Sealed Juvenile 1, 255 F.3d at 216 (noting that citizen’s arrests, even if erroneous, “do not fall under the ambit of the Fourth Amendment”); Whitehead v. Book, 641 F.Supp.2d 549, 556 (M.D. La. 2008) (“It is a settled rule of constitutional law that felony warrantless arrests made in public places, such as citizen’s arrests, do not violate the Fourth Amendment of the U.S. Constitution.”).

\(^{478}\) Hopkins, 573 F.3d at 774 (relying on California law for a citizen’s arrest); Sealed Juvenile 1, 255 F.3d at 217 (relying on Texas law for same); Atwell, 470 F.Supp.2d at 565 (relying on Maryland law for same).


commerce as well as law and order, and threatens the very concept of nationhood. It therefore would appear to be an area not only of considerable threat, but also one of likely bi-partisan support, both inside the United States and internationally. While one person’s terrorist can be considered another’s freedom fighter, it is difficult to envision the same sentiment towards pirates. Building on this, as well as the exceptional threat posed, the United States has a tremendous opportunity to work with the world community to take action now, before a real crisis ensues. Piracy is nearing a tipping point – it, and its association with terrorism, is on the rise but currently containable. The United States therefore should take the steps needed to address this budding national security concern before it becomes a national security disaster. However, we first need to acknowledge the potential extent of the problem and then take concrete actions, such as those proposed in this article, in order to begin to adequately address the impending threat.