# Maritime Piracy: Changes in U.S. Law Needed to Combat This Critical National Security Concern

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### I. INTRODUCTION

At approximately 7:15 a.m. on April 8, 2009, four pirates in a fastmoving skiff used grappling irons and a torrent of firepower to board an unarmed 508-foot U.S.-flagged vessel, the *Maersk Alabama*.<sup>1</sup> The *Alabama* was traversing the Gulf of Aden, between Yemen and Somalia, in order to provide food aid to Kenya.<sup>2</sup> The attack marked the first time that pirates had boarded an American merchant vessel since the early 1800s.<sup>3</sup> 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.<sup>4</sup> With the pirate's skiff having been sunk during the melee, and the *Alabama* completely inoperable, the *Alabama's* captain convinced the pirates to retreat

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<sup>1.</sup> Richard Norton-Taylor, *Maersk Alabama: Why U.S. Special Forces Are Unlikely to Launch Raid*, GUARDIAN (Apr. 8, 2009), http://www.guardian.co.uk/world/2009/apr/08/hijack-response-attack-maersk-alabama; James Bone, *Maersk Alabama Crew Return to US to Tell of Somali Pirate Ordeal*, TIMES, Apr. 18, 2009, http://www.timesonline.co.uk/tol/news/world/africa/article 6115871.ece.

<sup>2.</sup> Norton-Taylor, supra note 1.

<sup>3.</sup> Bone, supra note 1.

<sup>4.</sup> Mark Mazzetti & Sharon Otterman, U.S. Captain is Hostage of Pirates; Navy Ship Arrives, N.Y. TIMES, Apr. 8, 2009, http://www.nytimes.com/2009/04/09/world/africa/09pirates.html; Bone, *supra* note 1.

into the *Alabama*'s lifeboat.<sup>5</sup> The pirates took the captain as their prisoner, hoping to ransom him for a reported \$2–3 million.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup> On board the destroyer were three snipers from Navy Seal Team 6, one of America's top military operations units that would subsequently lead the successful raid of Osama Bin Laden's compound in Pakistan.9 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.<sup>10</sup> The captain, amazingly, was unhurt in the exchange.<sup>11</sup> 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.<sup>12</sup> Pleading guilty to all counts except the count of piracy, this fourth pirate was sentenced to more than thirty years in prison.<sup>13</sup>

Ask most Americans to list the major national security concerns and the response inevitably will include issues such as terrorism, peace in the Middle East, and possibly even counter-proliferation and counternarcotics. Unlikely to make the list, however, is maritime piracy. Those familiar with the problem of maritime piracy, including 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.<sup>14</sup>

<sup>5.</sup> Bone, supra note 1.

<sup>6.</sup> Robert D. McFadden & Scott Shane, *In Rescue of Captain, Navy Kills 3 Pirates*, N.Y. TIMES, Apr. 12, 2009, http://www.nytimes.com/2009/04/13/world/africa/13pirates.html; Bone, *supra* note 1.

<sup>7.</sup> McFadden & Shane, *supra* note 6.

<sup>8.</sup> Id.

<sup>9.</sup> Elizabeth Bumiller, *In Bin Laden's Compound, Seals' All-Star Team*, N.Y. TIMES, May 4, 2011, http://www.nytimes.com/2011/05/05/world/middleeast/05seals.html.

<sup>10.</sup> McFadden & Shane, *supra* note 6.

<sup>11.</sup> *Id*.

<sup>12.</sup> Benjamin Weiser, Somali Who Hijacked Ship Receives 33 Years in Prison, N.Y. TIMES, Feb. 17, 2011, at A14; McFadden & Shane, supra note 6.

<sup>13.</sup> Weiser, supra note 12.

<sup>14.</sup> See, e.g., Lawrence Azubuike, International Law Regime Against Piracy, 15 ANN. SURV. INT'L & COMP. L. 43 (2009); Leticia Diaz & Barry Hart Dubner, On the Problem of Utilizing Unilateral Action to Prevent Acts of Sea Piracy and Terrorism: A Proactive Approach to the Evolution of International Law, 32 SYRACUSE J. INT'L L. & COM. 1 (2004); George D. Gabel, Jr., Smoother Seas Ahead: The Draft Guidelines as an International Solution to Modern-Day Piracy, 81 TUL. L. REV. 1433 (2007); H.E. Jose Luis Jesus, Protection of Foreign Ships Against Piracy and Terrorism at Sea: Legal Aspects, 18 INT'L J. MARINE & COASTAL L. 363 (2003); James Kraska & Brian Wil-

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 a minor international economic problem, given its impact on the global transportation of goods.<sup>15</sup>

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. George F. Kennan famously defined the term "national security" in 1948 as "the continued ability of this country to pursue its internal life without serious interference, or threat of interference, from foreign powers."<sup>16</sup> Under this definition, maritime piracy poses a clear national security threat to the United States.<sup>17</sup>

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 the Horn of Africa 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, including the hijacking of a cruise ship (and murder of a Jewish passenger), the ramming of a boat into a U.S. destroyer (killing seventeen U.S. sailors), and attacks on numerous other maritime vessels. Other piraterrorist 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 as the national security threat that it actually is. Aviation hijacking was not considered a significant national security concern until

son, The Pirates of the Gulf of Aden: The Coalition Is the Strategy, 45 STAN. J. INT'L L. 243 (2009); Gal Luft & Anne Korin, Terrorism Goes to Sea, 83 FOREIGN AFF. 61 (Nov./Dec. 2004); Mike Madden, Trading the Shield of Sovereignty for the Scales of Justice: A Proposal for Reform of International Sea Piracy Laws, 21 U.S.F. MAR. L.J. 139 (2008–2009); Michael H. Passman, Protections Afforded to Captured Pirates Under the Law of War and International Law, 33 TUL. MAR. L.J. 1 (2008); John I. Winn & Kevin H. Govern, Maritime Pirates, Sea Robbers, and Terrorists: New Approaches to Emerging Threats, 2 HOMELAND SECURITY REV. 131 (2008).

<sup>15.</sup> See, e.g., Press Release, U.S. Att'y's Office for the E. Dist. of Va., *Five Somalis Convicted of Piracy, First Such Conviction Since 1820*, Nov. 24, 2010, http://www.fbi.gov/norfolk/press-releases/2010/nf112410.htm (noting in describing the conviction of pirates that "[m]odern-day pirates not only threaten human lives but also disrupt international commerce").

<sup>16.</sup> George F. Kennan, Comments on the General Trend of U.S. Foreign Policy, *in* GEORGE F. KENNAN PAPERS (1948). Recent Presidential pronouncements have echoed this concept. *See* President Barack Obama, National Security Strategy 4 (May 2010) ("Just as our national security is focused on renewing our leadership for the long term, it is also facilitating immediate action on top priorities. This Administration has no greater responsibility than the safety and security of the American People."); President George W. Bush, National Security Strategy, intro. (March 2006) (noting that his National Security Strategy "reflects our most solemn obligation: to protect the security of the American people").

<sup>17.</sup> This presumes that the reference to "foreign powers" in Kennan's definition encompasses more than just nation-states and would also apply to nonstate actors such as pirates and terrorists.

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 authorizes the United States to do and precludes the United States from doing to combat the national security threat posed by piracy, including the ability of the United States to militarily attack pirates, seize their vessels, prosecute them in the United States, and have them prosecuted outside the United States. 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 recently authored on the topic.<sup>18</sup> Rather than concentrating on what the international community is or should be permitted to do to combat piracy, and rather than looking at the matter as a primarily economic or regional geopolitical issue, this Article focuses on piracy as a U.S. national security matter and evaluates what U.S. 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 law on piracy by evaluating the availability of the courts to prosecute pirates.

Finally, Part VI offers more than a dozen concrete and viable proposals for augmenting the U.S. 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 the following: 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 bilateral agreements with various coastal nations to augment the ability of the United States to pursue pi-

<sup>18.</sup> See James Thuo Gathii, Jurisdiction to Prosecute Non-National Pirates Captured by Third States Under Kenyan and International Law, 31 LOY. L.A. INT'L & COMP. L. REV. 363 (2009); see also sources cited supra note 14.

rates 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 proposals appear to be simple and—hopefully by the end of this Article—obvious solutions to the problem, the United States nonetheless has yet to implement any of them even though they offer significant, pragmatic means to combat the threat in the immediate future.

#### II. BACKGROUND ON 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. Beyond this colloquial understanding, however, an examination of the elusive legal definition and long history of piracy is necessary to understand the national security threat now posed by piratical activities.

### A. Definition of Piracy

As many commentators have noted, there is no universally accepted definition for the term "piracy."<sup>19</sup> A close evaluation of the scholarship and case law in this area, though, reveals three key facets of piracy, which together suggest an appropriate definition.

First, there must be an intent to rob or plunder.<sup>20</sup> Or, as U.S. courts have colorfully stated, there must be a "piratical or felonious intent, or for the purpose of wanton plunder, or malicious destruction of property."<sup>21</sup> 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."<sup>22</sup> Second, the act must take place at sea or in a seaport; otherwise, the matter involves merely a common robbery or burglary. Thus, the traditional definition of piracy, which combines these first two criteria, is "robbery,

<sup>19.</sup> See, e.g., Azubuike, supra note 14, at 46 (stating that there is no "authoritative definition of the term" piracy, making defining the term "[t]he single most controversial aspect of customary international law on piracy"); Gabel, supra note 14, at 1434 ("Customary international law provides no authoritative definition of 'piracy."); Steven R. Swanson, *Terrorism, Piracy, and the Alien Tort Statute*, 40 RUTGERS L.J. 159, 204 (2008) ("In truth, the piracy definition has never been clear.").

<sup>20.</sup> Azubuike, supra note 14, at 48.

<sup>21.</sup> The Marianna Flora, 24 U.S. (11 Wheat.) 1, 39 (1826).

<sup>22.</sup> *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").

or forcible depredations upon the sea,<sup>23</sup> with depredation defined as the "act of plundering, robbing or pillaging."<sup>24</sup>

This traditional definition, though benefitting from brevity, misses the third major component of piracy, namely, that it is performed by stateless actors.<sup>25</sup> 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.<sup>26</sup> 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, the court forcefully concluded:

[I]n 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

<sup>23.</sup> United States v. Smith, 18 U.S. (5 Wheat.) 153, 161 (1820); *see also* United States v. Lei 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).

<sup>24.</sup> BLACK'S LAW DICTIONARY 397 (8th ed. 1999); see also Lei Shi, 525 F.3d at 721 (citing to Black's Law Dictionary to define "depredation" in the context of piracy).

<sup>25.</sup> See, e.g., The Ambrose Light, 25 F. at 412 (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 14, at 47 (noting that, for any action to constitute piracy, it cannot be attributable to any state).

<sup>26.</sup> The Ambrose Light, 25 F. at 412.

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.<sup>27</sup>

Putting these three components together, "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 authorization from or affiliation with any sovereign nation. The U.S. government and its courts have generally accepted a definition of piracy along these lines.<sup>28</sup>

### *B. History of Piracy*

Piracy is considered the oldest recognized international crime,<sup>29</sup> and it appears to have existed since humankind began adventuring into the sea. As one author stated, "[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."<sup>30</sup> Piracy was a significant issue in ancient Greece and Rome.<sup>31</sup> 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.<sup>32</sup> Interestingly, at its inception, piracy was not merely tolerated–early nations

<sup>27.</sup> *Id.* at 412–13 (finding that the ship 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).

<sup>28.</sup> 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."); *see also* 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)); *The Ambrose Light*, 25 F. at 412, 416 (noting that Wheaton defines the term as "the offense of depredating on the high seas without being authorized by any sovereign state" and noting other scholars and courts which employ a similar definition).

<sup>29.</sup> Eugene Kontorovich, International Legal Responses to Piracy off the Coast of Somalia, ASIL INSIGHTS (Feb. 6, 2009), http://www.asil.org/insights090206.cfm.

<sup>30.</sup> J.A. GOTTSCHALK & B.P. FLANAGAN, JOLLY ROGER WITH AN UZI: THE RISE AND THREAT OF MODERN PIRACY 11 (2000); *see also* Jesus, *supra* note 14, at 364 (quoting Gottschalk & Flanagan); Madden, *supra* note 14, at 140 (noting that the "phenomenon of piracy has plagued sailors ever since man first started navigating the seas").

<sup>31.</sup> Jesus, supra note 14, at 364; Swanson, supra note 19, at 205-06.

<sup>32.</sup> Jesus, *supra* note 14, at 364; Madden, *supra* note 14, at 139.

often hired pirates to attack the state's enemies.<sup>33</sup> Some nations supported certain types of pirates (known as "privateers") to augment the nation's coffers because pirates in cahoots with a given government would split the proceeds of their booty with the crown.<sup>34</sup>

The early history of the United States is replete with pirate attacks on U.S. vessels including the infamous attacks by Barbary pirates in the late 1700s.<sup>35</sup> After peaking in the seventeenth and eighteenth centuries, though, acts of piracy around the world and against the United States diminished so significantly that, by the middle of the twentieth century, piracy was considered almost completely eradicated.<sup>36</sup> 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."<sup>37</sup>

Paraphrasing Mark Twain, however, the rumors of the death of piracy were greatly exaggerated. After an outbreak of pirate attacks in the 1970s and 1980s,<sup>38</sup> the threat reached critical mass in the current millennium and has grown worse in recent years. Indeed, 2010 was a record year, with 445 reported pirate attacks and fifty-three ships seized.<sup>39</sup> The number of hostages taken by pirates rose from an estimated 188 in 2006 to 1,181 in 2010.<sup>40</sup> The numbers dropped only slightly in 2011, with 439 reported attacks worldwide, which resulted in the seizure of forty-five vessels and 802 hostages.<sup>41</sup>

The vast majority of recent pirate attacks have taken place in or around the territorial waters of Somalia, due to that nation's impover-

<sup>33.</sup> Azubuike, *supra* note 14, at 45.

<sup>34.</sup> Madden, *supra* note 14, at 143; Jeffrey Gettleman, *Lessons from the Barbary Pirate Wars*, N.Y. TIMES, Apr. 11, 2009, at A10 (noting that various Barbary state rulers commissioned pirates "to rob and pillage and kidnap, and the rulers got a cut").

<sup>35.</sup> Gettleman, *supra* note 34; Christopher Hitchens, *Thomas Jefferson: The Pirate War: To the Shores of Tripoli*, TIME.COM (July 5, 2004), http://www.time.com/time/magazine/article/0,9171,994 562,00.html; *Barbary Wars Have Lessons for Today's Libya*, NPR.ORG (Mar. 10, 2011), http://www.npr.org/2011/03/10/134414421/Barbary-Wars-Have-Lessons-for-Today's-Libya.

<sup>36.</sup> Azubuike, *supra* note 14, at 44; Jesus, *supra* note 14, at 364; Kraska & Wilson, *supra* note 14, at 249; Kontorovich, *supra* note 29; Lucas Bento, *Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish*, 29 BERKELEY J. INT'L L. 399, 404–05 (2011) (quoting various scholars who assessed that, by the beginning of the twentieth century, piracy was no longer a threat).

<sup>37.</sup> Philip Gosse, *Pirates and Piracy, in* 17 ENCYCLOPEDIA BRITANNICA 951, 952 (32d ed. 1964).

<sup>38.</sup> Jesus, supra note 14, at 364.

<sup>39.</sup> Harriet Barovick et al., *The World*, TIME, Jan. 31, 2011, at 15; *World Sea Piracy Drops in 2011, Somali Attacks Up*, ASSOCIATED PRESS, Jan. 19, 2012.

<sup>40.</sup> Barovick et al., *supra* note 39, at 15.

<sup>41.</sup> World Sea Piracy Drops in 2011, Somali Attacks Up, supra note 39.

ished populace and long-time political instability.<sup>42</sup> But Somalia is not the sole hotbed of piracy. Large numbers of attacks take place every year in the waters around Indonesia and Malaysia.<sup>43</sup> Benin and Nigeria have recently become rife with piracy attacks.<sup>44</sup> Other piratical attacks have been recorded in areas as diverse as Bangladesh and waters near Sweden.<sup>45</sup>

There are numerous reasons for the recent increase in pirate attacks. Certainly, the poverty of some coastal populations is a tremendous contributing factor.<sup>46</sup> For example, in Somalia, piracy is considered one of the few money-making industries in that impoverished nation.<sup>47</sup> A single seizure can earn a Somali pirate \$150,000 in ransom,<sup>48</sup> which is a truly staggering sum in a country with a per capita GDP of around \$600.<sup>49</sup> 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 big-ger and more valuable vessels, creating a vicious cycle. Thus, pirates now use satellite phones, GPS systems, and powerful weapons in their

<sup>42.</sup> J. David Goodman, *Piracy Reached Record Level in 2010, Monitors Say*, N.Y. TIMES, Jan. 19, 2011, at A7.

<sup>43.</sup> DOUGLAS GUILFOYLE, TREATY JURISDICTION OVER PIRATES: A COMPILATION OF LEGAL TEXTS WITH INTRODUCTORY NOTES, 72–73 (2009), *available at* http://ucl.academia.edu/DouglasGui lfoyle/Papers/116803/Treaty\_Jurisdiction\_over\_Pirates\_A\_Compilation\_of\_Legal\_Texts\_with\_Intro ductory Notes; Madden, *supra* note 14, at 164.

<sup>44.</sup> World Sea Piracy Drops in 2011, Somali Attacks Up, supra note 39; Piracy Rises Off West Africa, N.Y. TIMES, Aug. 12, 2011, at A6 (noting that pirate attacks off the coasts of Nigeria and Benin have increased to levels of piracy comparable to the level of piracy in Somalia).

<sup>45.</sup> 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 seven to twelve years for committing piracy against a Russian ship off the coast of Sweden); Goodman, *supra* note 42 (noting pirate attacks in 2010 in Nigeria, Bangladesh, and Indonesia).

<sup>46.</sup> Jesus, *supra* note 14, at 365; Madden, *supra* note 14, at 146; Winn & Govern, *supra* note 14, at 136; Andrew J. Shapiro, Assistant Secretary, U.S. Dept. of State, Bureau of Political-Military Affairs, Remarks to International Institute for Strategic Studies (Mar. 30, 2011), http://www.state.gov/t/pm/rls/rm/159419.htm ("The increase in attacks over the last year is a direct result of the enormous amounts of ransom now being paid to pirates."); *see also* S.C. Res. 1846, ¶ 2, U.N. Doc. S/RES/1846 (Dec. 2, 2008) ("*Expresses* its concern over the finding contained in the 20 November 2008 report of the Monitoring Group on Somalia that escalating ransom payments are fuelling the growth of piracy off the coast of Somalia.").

<sup>47.</sup> 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.

<sup>48.</sup> Kontorovich, *supra* note 29. Overall, Somali pirates received approximately \$75–85 million in ransom payments in 2010. Shapiro, *supra* note 46.

<sup>49.</sup> Cent. Intelligence Agency, *The World Factbook*,, https://www.cia.gov/library/publications/ the-world-factbook/geos/so.html (last updated July 31, 2012).

attacks.<sup>50</sup> They also often transform captured vessels of lower ransom value, such as fishing boats or cargo dhows,<sup>51</sup> into "mother ships" from which they can launch attacks on more lucrative targets.<sup>52</sup>

Combined with the large financial incentive of piracy, minimal enforcement creates a high benefit-to-risk scenario. Poverty-stricken countries, such as Somalia, have few resources to thwart piracy and little incentive to spend their limited finances on protecting commercial ships that are usually just passing by on the way to enhancing the financial interests of other states.<sup>53</sup> 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.<sup>54</sup> In addition, most acts of piracy take 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."<sup>55</sup>

Nations that register and license ships, which are known as "flag states," also often have limited interest or ability to deter piracy against their vessels.<sup>56</sup> Until fairly recently, most ships operated under the flags of only a few, generally powerful, nations.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup>

<sup>50.</sup> Passman, supra note 14, at 5-6.

<sup>51.</sup> A "dhow" is a "small lateen-rigged vessel used for coastwise trade in the Indian Ocean." THE NEW SCRIBNER-BANTAM ENGLISH DICTIONARY 248 (1991).

<sup>52.</sup> NATIONAL SECURITY COUNCIL, COUNTERING POLICY OFF THE HORN OF AFRICA: PARTNERSHIP & ACTION PLAN 4 (2008), http://www.marad.dot.gov/documents/Countering\_Piracy\_ Off The Horn of Africa - Partnership Action Plan.pdf.

<sup>53.</sup> Winn & Govern, supra note 14, at 136; Gabel, supra note 14, at 1453-54.

<sup>54.</sup> S.C. Res. 1851, pmbl., U.N. Doc. S/RES/1851 (Dec. 16, 2008) (noting the "lack of capacity of the [Somali government] to interdict, or upon interdiction to prosecute pirates or to patrol and secure the waters off the coast of Somalia"); Azubuike, *supra* note 14, at 51, 58; Jesus, *supra* note 14, at 365, 372–73; Ethan C. Stiles, Note, *Reforming Current International Law to Combat Modern Sea Piracy*, 27 SUFFOLK TRANSNAT'L L. REV. 299, 303–04 (2004) (stating that Indonesia has admitted to not having effective means to stop piracy).

<sup>55.</sup> Gabel, supra note 14, at 1433.

<sup>56.</sup> Id. at 1439-40; Shapiro, supra note 46.

<sup>57.</sup> Gabel, *supra* note 14, at 1439.

<sup>58.</sup> Id.

<sup>59.</sup> Id. at 1439-40.

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Even the stronger nations of the world, which 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.<sup>60</sup> The jurisdictional reach of the criminal laws of other countries do not extend past their territorial waters.<sup>61</sup> 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 United Kingdom sought to return them to their homes and the pirates claimed that their home country would torture or execute them as punishment for piracy.<sup>62</sup> Finally, criminal trials of pirates are usually quite expensive, which has also reduced the will of western powers to try pirates for their crimes.<sup>63</sup>

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."<sup>64</sup> In one study, for example, European ships caught 275 pirates during a two-month period in 2010 and released 235 of them.<sup>65</sup> Of course, the United States was hardly much better, catching 39 pirates during that period and releasing just about half of them.<sup>66</sup> The problem has become so exacerbated that, rather than capture and prosecute pirates, some European countries give the pirates a lift back to port if the pirates' ship has become disabled.<sup>67</sup> It is widely noted that this "catch and release" policy has proven exceptionally ineffective at stopping piracy.<sup>68</sup> As the United Nations Security Council has noted, this "has led to

<sup>60.</sup> Kraska & Wilson, *supra* note 14, at 268; Jeffrey Gettleman & Eric Schmitt, U.S. Forces Take Ship from Somali Pirates, N.Y. TIMES, Sept. 9, 2010, at A4; Paulo Prada & Alex Roth, On the Lawless Seas, It's Not Easy Putting Somali Pirates in the Dock, WALL ST. J., Dec. 12, 2008, http://online.wsj.com/article/SB122903542171799663.html.

<sup>61.</sup> Kraska & Wilson, supra note 14, at 268.

<sup>62.</sup> Id. at 269; Winn & Govern, supra note 14, at 141.

<sup>63.</sup> Kontorovich, supra note 29.

<sup>64.</sup> Eugene Kontorovich, Introductory Note to Exchange of Letters Between the European Union and the Government of Kenya on the Conditions and Modalities for the Transfer of Persons Suspected of Having Committed Acts of Piracy, 48 I.L.M. 747, 747 (2009).

<sup>65.</sup> Stephanie Hanson, 5 Ways to Stop a Pirate, GLOBAL POST, June 24, 2010, http://www.globalpost.com/dispatch/worldview/100623/piracy-anti-piracy-somali-maritime; Craig Whitlock, Lack of Prosecution Poses Challenge for Foreign Navies that Catch Somali Pirates, WASH. POST, May 24, 2010, at A8.

<sup>66.</sup> Hanson, supra note 65.

<sup>67.</sup> Kontorovich, supra note 64, at 747.

<sup>68.</sup> Id.; Shapiro, supra note 46; Milena Sterio, Fighting Piracy in Somalia (and Elsewhere): Why More Is Needed, 33 FORDHAM INT'L L.J. 372, 372 (2010).

pirates being released without facing justice, regardless of whether there is sufficient evidence to support prosecution."<sup>69</sup>

Overall, the potentially large benefit, and the lack of enforcement or other risk, provides a clear incentive to engage in piracy.<sup>70</sup> 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."<sup>71</sup> This combination creates the possibility of matters getting far worse before they get better, with serious and significant worldwide consequences if not repulsed.<sup>72</sup>

### 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 tepidly recognized this threat. In 2007, then-President Bush issued the first uniform U.S. policy on the topic since the 1800s.<sup>73</sup> 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.<sup>74</sup>

Yet this generalized statement misses several critical factors and, in any case, hardly captures the overall national security threat. Piracy threatens

<sup>69.</sup> S.C. Res. 1897, pmbl., U.N. Doc. S/RES/1897 (Nov. 30, 2009).

<sup>70.</sup> Azubuike, *supra* note 14, at 58; Madden, *supra* note 14, at 152–53; Condoleezza Rice, U.S. Sec'y of State, Combating the Scourge of Piracy, Statement to the United Nations Security Council (Dec. 16, 2008), http://2001-2009.state.gov/secretary/rm/2008/12/113269.htm ("Piracy currently pays. But worse, pirates pay few costs for their criminality.").

<sup>71.</sup> Winn & Govern, supra note 14, at 141.

<sup>72.</sup> Jesus, *supra* note 14, at 366 ("The situation, though not yet out of control, seems to have the potential to get worse if effective measures are not put in place.").

<sup>73.</sup> Kraska & Wilson, supra note 14, at 254.

<sup>74.</sup> Bush, *supra* note 28; *see also* Rice, *supra* note 70 (noting that "the outbreak of piracy and the increasing threat to commerce, to security, and perhaps most importantly, to the principle of freedom of navigation of the seas is one that should concern every nation-state"); Kraska & Wilson, *supra* note 14, at 251 (noting that piracy interferes with freedom of navigation, impacts global commerce, and undermines regional stability).

the lives of Americans abroad, undermines world commerce, augments instability in politically fragile regions, endangers the natural resources of the sea, and provides a potentially devastating weapon to terrorists.

### 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.<sup>75</sup> Other examples include two separate pirate attacks on U.S. military vessels in 2010 near Somalia, where the pirates in both cases believed the vessels to be merchant ships.<sup>76</sup> 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.<sup>77</sup>

More tragic, however, is the fate that befell a civilian vessel, the *Quest*, which was travelling the world distributing bibles in February 2011. In that case, pirates boarded the private yacht while it sailed off the coast of Oman and took the four American civilians on board hostage.<sup>78</sup> After several days of failed negotiations and for reasons that remain unclear, the pirates eventually shot and killed all four hostages.<sup>79</sup> The four Americans are believed to be the first U.S. citizens killed by pirates in modern times.<sup>80</sup> 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.<sup>81</sup> Those fourteen captured pirates were indicted in the United States for piracy, conspiracy to commit kidnapping, and use of a firearm during a crime of violence.<sup>82</sup> Several of the pirates pled guilty and received life sentences.<sup>83</sup>

<sup>75.</sup> See supra text accompanying notes 1-13.

<sup>76.</sup> See, e.g., United States v. Hasan, 747 F. Supp. 2d 559 (E.D. Va. 2010) (describing an attempted attack by pirates on the USS *Nicholas*); United States v. Said, 757 F. Supp. 2d 554 (E.D. Va. 2010), *vacated and remanded*, 680 F.3d 374 (2012) (discussing an attempted attack by pirates on the USS *Ashland*).

<sup>77.</sup> See Hasan, 747 F. Supp. 2d at 601; Said, 757 F. Supp. 2d. at 557.

<sup>78.</sup> Pirates Slay U.S. Citizens, TIME, Mar. 7, 2011, at 14; 4 American Hostages Killed by Pirates, US Says, USATODAY.COM, Feb. 22, 2011, http://www.usatoday.com/news/world/2011-02-22pirates-kill-hostages\_N.htm ; Jason Straziuso & Abdi Guled, Pirates: Warship Shadowing Hijacked American Yacht, SEATTLE TIMES, Feb. 20, 2011, http://seattletimes.nwsource.com/html/localnews/2 014285337 apafpiracycapturedyacht2ndld.html.

<sup>79.</sup> See sources cited supra note 78.

<sup>80.</sup> See sources cited supra note 78.

<sup>81.</sup> See sources cited supra note 78; Indictment, United States v. Salad, No. 2:11-cr-00034-MSD-DEM, 2011 WL 814962 (E.D. Va. Mar. 8, 2011).

<sup>82.</sup> Indictment, Salad, 2011 WL 814962.

<sup>83.</sup> Press Release, U.S. Att'y's Office for the E. Dist. of Va., Somalis Sentenced to Life in Prison on Charges Relating to Piracy of the S/V Quest (Dec. 15, 2011), http://www.fbi.gov/norfolk/ press-releases/2011/somalis-sentenced-to-life-in-prison-on-charges-relating-to-piracy-of-the-s-v-

### 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, the vast majority of world trade is conducted by ship. Indeed, it is estimated that ninety-five percent of international trade is conducted through sea transportation,<sup>84</sup> with approximately 21,000 ships travelling in or near Somalia's waters every year.<sup>85</sup> Of critical import, nearly fifty percent of the world's oil supply is transported via ship,<sup>86</sup> and about twelve percent of that supply travels right past Somalia, through the nearby Gulf of Aden.<sup>87</sup>

Piracy constitutes the greatest criminal threat to this maritime commerce.<sup>88</sup> The estimated cost of pirate attacks ranges from \$12 billion to \$25 billion per year.<sup>89</sup> And these figures are likely drastically understated, as large numbers of pirate attacks are never reported for a variety of reasons.<sup>90</sup> Further, these 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.<sup>91</sup>

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 seizing ships with greater economic impact, especially vessels transporting oil. In 2008, pirates seized a Saudi tanker carrying more than \$100 million in crude

quest; Press Release, U.S. Att'y's Office for the E. Dist. of Va., Yemeni Man Sentenced for Acts of Piracy Under the Law of Nations (Oct. 21, 2011), http://www.fbi.gov/norfolk/press-releases/2011/yemeni-man-sentenced-for-acts-of-piracy-under-the-law-of-nations.

<sup>84.</sup> Jesus, supra note 14, at 369 n.25.

<sup>85.</sup> Prada & Roth, supra note 60.

<sup>86.</sup> Eileen Sullivan & Matt Apuzzo, *Al-Qaida Eyed Oil Tankers as Bombing Targets*, NBCNews.com, May 20, 2011, http://msnbc.msn.com/id/43115189/ns/us\_news-security/t/al-qaida-eyed-oil-tankers-bombing-targets/#.T-vkTpG8hhw.

<sup>87.</sup> NATIONAL SECURITY COUNCIL, *supra* note 52, at 4.

<sup>88.</sup> Azubuike, *supra* note 14, at 49 ("Today, piracy is the most frequently occurring international incident."); L. Stephen Cox, *Sources of American Maritime Criminal Law*, 26 TUL. MAR. L.J. 145, 158 (2001) ("[P]iracy is perhaps the most widely recognized crime against a vessel.").

<sup>89.</sup> Barovick et al., *supra* note 39 (estimating \$12 billion in annual costs due to piracy); Madden, *supra* note 14, at 154; Passman, *supra* note 14, at 5; Winn & Govern, *supra* note 14, at 133; Bento, *supra* note 36, at 406–07.

<sup>90.</sup> Kraska & Wilson, *supra* note 14, at 257; Madden, *supra* note 14, at 154 (suggesting that the number of underreported pirate attacks could be even higher than fifty percent). 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 14, at 257.

<sup>91.</sup> Passman, supra note 14, at 7.

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oil.<sup>92</sup> In January 2009, the owners of the oil tanker MV *Sirius Star*, which had been captured by pirates, reportedly paid \$3 million in ransom to have their vessel released.<sup>93</sup> 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.<sup>94</sup> That same week, Somali pirates hijacked an Italian-flagged tanker in the Indian Ocean that was carrying oil from Sudan to Malaysia.<sup>95</sup> In 2011, pirates committed nineteen attacks against maritime vessels in the Gulf of Guinea, outside of Benin; all of the attacks were against fuel tankers.<sup>96</sup>

### 3. Political and Regional Destabilization

Far from merely affecting a solitary ship and its crew, piracy can significantly impact the political stability of coastal states. As one commentator noted, piracy may only be 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."<sup>97</sup> The situation in Somalia is a perfect example of this. Somalia has lacked a real federal government since 1991.<sup>98</sup> Such anarchy has reduced the nation's ability to effectively patrol its own waters, leading the area to become rife with piracy.<sup>99</sup> The piracy in turn has added to the nation's political instability, as regional warlords have begun organizing pirates and pirate attacks as a mechanism for gaining notoriety, political advantage, and funds to perpetuate their individual fiefdoms.<sup>100</sup>

The United Nations Security Council has noted that the piracy epidemic in Somalia has not only undermined the stability of that nation, but also "constitute[s] a threat to international peace and security in the region."<sup>101</sup> Piracy also harms nearby nations and their citizens who rely on maritime transportation for their livelihood and for food.<sup>102</sup> For exam-

99. Id.; Passman, supra note 14, at 7; see also Kontorovich, supra note 29.

<sup>92.</sup> Prada & Roth, supra note 60.

<sup>93.</sup> Madden, supra note 14, at 140.

<sup>94.</sup> Jason Straziuso, *Somali Pirates Free South Korean Ship and 43 Crew*, UTSANDIEGO.COM Feb. 9, 2011, http://www.utsandiego.com/news/2011/feb/09/somali-pirates-free-south-korean-ship-and-43-crew.

<sup>95.</sup> Id.

<sup>96.</sup> Rick Gladstone, Armed Pirates Hijack a Fuel Tanker Off Benin and Take 23 Crew Members Hostage, N.Y. TIMES, Sept. 15, 2011, at A10.

<sup>97.</sup> Winn & Govern, *supra* note 14, at 132–33 (quoting MARTIN N. MURPHY, CONTEMPORARY PIRACY AND MARITIME TERRORISM (2007)).

<sup>98.</sup> Madden, supra note 14, at 152.

<sup>100.</sup> Madden, supra note 14, at 153.

<sup>101.</sup> S.C. Res. 1950, pmbl., U.N. Doc. S/RES/1950 (Nov. 23, 2010).

<sup>102.</sup> Passman, supra note 14, at 7.

ple, it is estimated that Kenya has lost revenues of close to \$140 million due to piratical acts in the nearby Somali region.<sup>103</sup> 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.<sup>104</sup>

### 4. Potential Ecological Harm

As discussed above, pirates have expanded their attacks to include oil tankers.<sup>105</sup> Pirates' focus on oil tankers increases 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 can cause extensive environmental harm.<sup>106</sup> 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.<sup>107</sup> In 2003, for example, pirates made three separate attacks on different chemical tankers in the Straits of Malacca.<sup>108</sup> In 2007, pirates hijacked the Japanese tanker Golden Nori, carrying 40,000 tons of benzene, a highly explosive chemical, and held it for ransom.<sup>109</sup> More recently, in January 2011, Somali pirates seized an 11,500-ton South Korean chemical carrier.<sup>110</sup> South Korean Special Forces eventually raided the carrier and recaptured it, killing eight pirates and seizing five others in the process (no hostages were killed).<sup>111</sup>

Fortunately, so far, none of these pirate attacks have resulted in any spillage of toxic chemicals.<sup>112</sup> Yet there are still significant ecological worries that a ship carrying hazardous cargo or oil, run aground by pi-

<sup>103.</sup> Id.; see also Bento, supra note 36, at 407.

<sup>104.</sup> See infra Part III.F. Of course, this may also reflect the international unanimity—rare in the United Nations—regarding the threat that piracy poses, which portends hope that an international solution can be forged.

<sup>105.</sup> See supra text accompanying notes 93-97.

<sup>106.</sup> William Yardley, *Recovery Still Incomplete After Valdez Spill*, N.Y. TIMES, May 6, 2010, at A22 (describing the continuing negative ecological impacts of the *Exxon Valdez* spill more than twenty years after the incident took place).

<sup>107.</sup> Keith Bradsher, *Attacks on Chemical Ships in Southeast Asia Seem to Be Piracy, Not Terror*, NYTIMES.COM (Mar. 27, 2003), http://www.nytimes.com/2003/03/27/world/attacks-on-chemical-ships-in-southeast-asia-seem-to-be-piracy-not-terror.html?pagewanted=all&src=pm.

<sup>108.</sup> Id.

<sup>109.</sup> Sullivan & Apuzzo, supra note 86.

<sup>110.</sup> Kim Kwang-Tae, *Risky S. Korean Raid Saves Entire Crew from Pirates*, SALT LAKE TRIBUNE, Jan. 21, 2011, http://www.sltrib.com/sltrib/world/51095259-68/south-pirates-korean-crew.html.csp.

<sup>111.</sup> Id.

<sup>112.</sup> Id.

rates, could cause serious damage to the marine environment and nearby coastal states.<sup>113</sup>

### 5. Terrorism

The greatest national security threat posed by piracy is its potential interplay with 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.<sup>114</sup> With such similarities, it is perhaps unsurprising that pirates and terrorists might unite, or at least temporarily work together for a common cause.<sup>115</sup>

Such concerns are not theoretical.<sup>116</sup> In 1985, Palestinian pirates posing as passengers hijacked the *Achilles Lauro*, an Italian cruise ship, off the coast of Egypt and eventually killed one physically disabled Jewish American before surrendering.<sup>117</sup> In early 2000, al-Qaeda terrorists attempted to ram a boat with explosives into the USS *Sullivans* in the waters off Yemen.<sup>118</sup> They failed only because the explosives were too heavy and the boat sank before it could complete its mission.<sup>119</sup> Unfortunately, the terrorist group learned from its mistakes, and later that year al-Qaeda operatives into the USS *Cole*, blowing a hole in the U.S. warship and killing seventeen American sailors aboard.<sup>120</sup>

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.<sup>121</sup> 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.<sup>122</sup> Later that year, alleged al-Qaeda operatives detonated a small boat filled with explosives alongside a French

<sup>113.</sup> Diaz & Dubner, supra note 14, at 31-37; Jesus, supra note 14, at 367.

<sup>114.</sup> Sterio, supra note 68, at 403-04; Swanson, supra note 19, at 213-14.

<sup>115.</sup> Sterio, supra note 68, at 373.

<sup>116.</sup> Luft & Korin, supra note 14, at 61.

<sup>117.</sup> Madden, supra note 14, at 148-49.

<sup>118.</sup> Luft & Korin, supra note 14, at 64.

<sup>119.</sup> Id.

<sup>120.</sup> Luft & Korin, *supra* note 14, at 64; Neil MacFarquhar, *Two Sentenced to Death in Yemen for Bombing U.S.S. Cole*, NYTIMES.COM (Sept. 29, 2004), http://www.nytimes.com/2004/09/29/inte rnational/middleeast/29CND-COLE.html?hp.

<sup>121.</sup> Luft & Korin, *supra* note 14, at 65.

<sup>122.</sup> Id. at 64.

Supertanker, the *Limburg*, in the waters off of Yemen, resulting in the release of almost 100,000 barrels of crude oil.<sup>123</sup> In the spring of 2010, radical Islamists took over Xarardheere, which is considered one of the prime pirate coves in the central Somali coast.<sup>124</sup>

Further, it appears that the Somali militant group al-Shabaab has been using proceeds from piracy ransoms to purchase weapons and explosives from al-Qaeda.<sup>125</sup> While al-Shabaab has traditionally focused its efforts on overthrowing the transitional government in Somalia, it has recently branched into terrorist attacks outside of Somalia, including suicide bombings in Uganda, and has announced a formal merger with al-Qaeda.<sup>126</sup> 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.<sup>127</sup> An Indonesian separatist group, the Free Aceh Movement, has long engaged in pirate attacks to raise money via ransoms for their cause.<sup>128</sup> Other terrorist groups-including Hizbollah, the Popular Front for the Liberation of Palestine-General Command, and the Tamil Tigers-have plotted piratical attacks.<sup>129</sup> 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.<sup>130</sup> 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."<sup>131</sup>

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 a devastating effect on the United States and the world. Expanding on lessons learned from the *Achilles Lauro* incident, pirates

<sup>123.</sup> Gabel, *supra* note 14, at 1437–38; Heather Timmons, *Got Oil? Now Try to Find Tankers to Carry It*, NYTIMES.COM (June 9, 2004), http://www.nytimes.com/2004/06/09/business/09tankers. html?pagewanted=all.

<sup>124.</sup> *Piracy at Sea*, NYTIMES.COM (May 15, 2012), http://topics.nytimes.com/top/reference/ti mestopics/subjects/p/piracy\_at\_sea/index.html?8qa.

<sup>125.</sup> Brian Bennett, *Al Qaeda's Yemen Branch Has Aided Somalia Militants, U.S. Says*, L.A. TIMES, July 18, 2011, http://articles.latimes.com/2011/jul/18/world/la-fg-bin-laden-somalia-20110718.

<sup>126.</sup> Office of the Spokesperson, *Rewards for Justice – al Shabaab Leaders Reward Offers*, U.S. DEP'T OF STATE (June 7, 2012), http://www.state.gov/r/pa/prs/ps/2012/06/191914.htm.

<sup>127.</sup> Luft & Korin, supra note 14, at 63.

<sup>128.</sup> Id.

<sup>129.</sup> Id. at 64.

<sup>130.</sup> Sullivan & Apuzzo, *supra* note 86.

<sup>131.</sup> Kraska & Wilson, supra note 14, at 260.

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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.<sup>132</sup> Pirates could use a hijacked ship as a platform for detonating a dirty bomb or even a nuclear weapon in a populous port.<sup>133</sup> 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, anti-aircraft guns, and weaponry.<sup>134</sup> 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,<sup>135</sup> but the potential for misuse of the weapons aboard the ship was clearly present.

Most concerning, perhaps, just as al-Qaeda 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 USS *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."<sup>136</sup> There is evidence that plans for using sea vessels in such a manner are indeed underway. The most dramatic indication of these plans are the examples of pira-terrorists hijacking tankers for the apparent sole purpose of practicing steering them through crowded sea lanes.<sup>137</sup> Other examples abound of pirates questioning captured maritime crews about how to operate ships without any interest in how to dock them.<sup>138</sup>

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,

<sup>132.</sup> Luft & Korin, supra note 14, at 66-67; Sullivan & Apuzzo, supra note 86.

<sup>133.</sup> Editorial, *Piracy and Terrorism*, N.Y. TIMES, Apr. 10, 2004, at A14 (noting concern about al-Qaeda planning such a disaster).

<sup>134.</sup> Prada & Roth, supra note 60; Piracy at Sea, supra note 124.

<sup>135.</sup> Piracy at Sea, supra note 124.

<sup>136.</sup> Selection of Internet TV Channel Maritime TV Comes on Heels of Maritime TV's Recent Video Report on Concern About Control of Ships, Cargo in U.S. Ports, TV WORLDWIDE (Sept. 14, 2004), http://www.tvworldwide.com/events/maritimetv/us maritime expo/press.cfm.

<sup>137.</sup> Luft & Korin, supra note 14, at 67.

<sup>138.</sup> Id.

and therefore tends to dramatically limit the window of opportunity for aviation attacks, the number of terrorists that 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 demonstrate, a maritime vessel, though susceptible to attack at a port, can be and often is more easily attacked while in transit in the open seas. This dramatically increases the timeframe during which an attack on a maritime vessel can take place—amounting to days, weeks, or months, as opposed to the few hours available before aircraft takeoff. 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.<sup>139</sup> Overall, this makes pira-terrorism as much, if not more, of a concern than aviation-based terrorism.

### **III. WHAT INTERNATIONAL LAW PERMITS**

To combat the substantial threat posed by piracy, the international community has formulated an extensive array of laws. These laws range from customary international law to international conventions to United Nations Security Council resolutions. We will consider each in turn.<sup>140</sup>

### A. Customary International Law

For centuries, customary international law has held that every state has "universal jurisdiction" with regard to piracy, namely, the ability to prosecute a pirate "irrespective of the connection between the pirate, their victims or the vessel attacked and the prosecuting State."<sup>141</sup> 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.<sup>142</sup> Thus, all states have an interest in countering piracy given

<sup>139.</sup> Id. at 66.

<sup>140.</sup> The international law treaties covered in this part reflect the four current major conventions. Other conventions that touch on piracy exist, but these conventions are less likely to help combat piracy because they suffer from one or a combination of the following problems: they tend to have been enacted by only a limited number of states; they are not legally binding; they are merely proposals not yet in force; or they do not offer serious options addressing piracy. *See* GUILFOYLE, *supra* note 43, at 34–75.

<sup>141.</sup> *Id.* at 5; Azubuike, *supra* note 14, at 54 ("One of the fairly undisputed aspects of the international law on piracy is that it is subject to universal jurisdiction.").

<sup>142.</sup> Azubuike, *supra* note 14, at 54; Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals about the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 115 (2004).

the risk that any nation's ship could be attacked<sup>143</sup> and the deleterious impact piracy has on global commerce.<sup>144</sup>

Indeed, the world community has so vilified piracy that not only was it the original crime of universal jurisdiction,<sup>145</sup> but for centuries it was considered the *sole* crime of universal jurisdiction.<sup>146</sup> Recently, other crimes, such as slavery and genocide, have been added to the list of universal jurisdiction crimes.<sup>147</sup>

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 attacked vessel all have valid claims of jurisdiction over the pirate.<sup>148</sup> Thus, a number of states may have legitimate claims to prosecute a given pirate, and international law imposes no rule of priority among these potentially competing jurisdictions.<sup>149</sup> Of course, like the rules of property, possession is ninety percent of the law—thus, the state that has custody over a particular pirate usually has the initial right of prosecution, or it can decide to transfer the pirate to another nation for punishment.<sup>150</sup>

## B. UNCLOS III

The High Seas Convention (HSC),<sup>151</sup> established in 1958, was the first instrument to codify international rules on piracy.<sup>152</sup> The United Nations Convention on the Law of the Sea III (UNCLOS III),<sup>153</sup> established in 1982, was intended to supersede the HSC.<sup>154</sup> 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."<sup>155</sup> However, while the United States signed and ratified the HSC, it has never formally become a party to UNCLOS III, for reasons unrelated to the anti-piracy provisions of the convention.<sup>156</sup> Therefore, the U.S. still

<sup>143.</sup> Kontorovich, supra note 29.

<sup>144.</sup> Id.

<sup>145.</sup> Madden, supra note 14, at 141; Kontorovich, supra note 29.

<sup>146.</sup> Kontorovich, supra note 29.

<sup>147.</sup> Id. (noting that these other crimes include torture, war crimes, and crimes against humani-

ty).

<sup>148.</sup> GUILFOYLE, supra note 43, at 6.

<sup>149.</sup> Id.

<sup>150.</sup> *Id*.

<sup>151.</sup> United Nations Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 82 [hereinafter HSC].

<sup>152.</sup> Jesus, *supra* note 14, at 373.

<sup>153.</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS III].

<sup>154.</sup> GUILFOYLE, supra note 43, at 1.

<sup>155.</sup> Id.

<sup>156.</sup> Id.

technically operates under the provisions of the HSC, along with seven other states and the Holy See.<sup>157</sup> Nonetheless, the United States has officially pronounced its acceptance of virtually all of the precepts of UNCLOS III, including those related to piracy, and now considers these provisions to be customary international law.<sup>158</sup> 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.<sup>159</sup>

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 any other place outside the jurisdiction of any State."<sup>160</sup> Most critically, the convention permits any state to "seize a pirate ship..., and arrest the persons and seize the property on board."<sup>161</sup> The seizing nation can then decide what penalties to impose on the pirates and what action to take with regard to the seized property.<sup>162</sup>

While seemingly broad on its face, UNCLOS III has several, wellnoted limitations. To begin with, its provisions apply only on the high seas<sup>163</sup> and cannot be utilized within the territorial waters of any sovereign nation.<sup>164</sup> This means that, under UNCLOS III, nations cannot seize

<sup>157.</sup> *Id.* The others are Afghanistan, Cambodia, Iran, Israel, Malawi, Thailand, and Venezuela. *Id.* at 1 n.1. An additional twenty-three states are parties to neither treaty. *Id.* 

<sup>158.</sup> President Ronald Reagan, United States Oceans Policy, Statement by the President, (Mar. 10, 1983) (acknowledging that although the United States will not sign UNCLOS III, it nonetheless accepts its provisions, with the exception of those parts related to deep seabed mining); Bush, *supra* note 28, 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.cfm?id=284357 (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"); *see also* 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.or g/insights070611.cfm (noting that the United States accepts the piracy provisions of UNCLOS III); Kontorovich, *supra* note 29 (stating that although the United States is not a party to UNCLOS III, "it ratified an earlier incarnation [the HSC] with identical piracy provisions"); Rice, *supra* note 70 (noting that the provisions of piracy in UNCLOS III constitute international law followed by the United States).

<sup>159.</sup> Kontorovich, supra note 29.

<sup>160.</sup> UNCLOS III, *supra* note 153, art. 100. Article 14 of the HSC uses identical language. HSC, *supra* note 151, art. 14.

<sup>161.</sup> UNCLOS III, supra note 153, art. 105; see also HSC, supra note 151, art. 19.

<sup>162.</sup> See sources cited supra note 161.

<sup>163.</sup> UNCLOS III, *supra* note 153, art. 101; *see also* HSC, *supra* note 151, art. 15. The convention later makes it clear that the term "high seas" includes nations' Exclusive Economic Zones (EEZs). UNCLOS III, *supra* note 153, art. 58, para. 2; *see also* GUILFOYLE, *supra* note 43, at 2; Stiles, *supra* note 54, at 308; Jesus, *supra* note 14, at 379. The EEZ of any nation covers 200 nautical miles from the nation's shore. UNCLOS III, *supra* note 153, art. 57.

<sup>164.</sup> Azubuike, *supra* note 14, at 51; Jesus, *supra* note 14, at 379; Passman, *supra* note 14, at 13. UNCLOS III provides that a nation's territorial waters extend to twelve nautical miles from the nation's shore. UNCLOS III, *supra* note 153, art. 3.

pirates who are found in the territorial waters of another country, or pursue a pirate into those territorial waters, absent the consent of the coastal state<sup>165</sup> or a reciprocity agreement between the two countries involved.<sup>166</sup> This limitation stems from a historical belief that while acts of piracy on the high seas interfered with international shipping, 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.<sup>167</sup> Nonetheless, this represents an enormous loophole exploited by pirates, who often quickly retreat to territorial waters, such as that of dysfunctional states like Somalia, to avoid attack or seizure.<sup>168</sup>

The UNCLOS III provisions also contain a "two-ship" requirement; they apply only to attacks committed by one private vessel against another.<sup>169</sup> This limitation is based on the idea that acts committed aboard a ship, without outside influence, were believed to concern only that ship, and therefore only that ship's flag state, not the international community.<sup>170</sup> Regardless of the basis or rationale, 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.<sup>171</sup> This would therefore exclude terrorist attacks such as that on the *Achilles Lauro*,<sup>172</sup> discussed above, which involved terrorists coming on board a ship as passengers and then engaging in an attack on the vessel.<sup>173</sup> 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."<sup>174</sup> Some argue that this precludes any acts committed for "political," as opposed to "personal," ends.<sup>175</sup> Under this interpretation, terrorist acts would not

<sup>165.</sup> GUILFOYLE, *supra* note 43, at 5; Azubuike, *supra* note 14, at 53; Madden, *supra* note 14, at 146.

<sup>166.</sup> Jesus, *supra* note 14, at 383. Such reciprocity agreements are described in Article 113(3) of UNCLOS III.

<sup>167.</sup> Madden, supra note 14, at 146.

<sup>168.</sup> Gabel, supra note 14, at 1442.

<sup>169.</sup> Azubuike, *supra* note 14, at 53; Jesus, *supra* note 14, at 376–77; Madden, *supra* note 14, at 147; Passman, *supra* note 14, at 12–13.

<sup>170.</sup> Madden, supra note 14, at 147.

<sup>171.</sup> GUILFOYLE, *supra* note 43, at 3; Jesus, *supra* note 14, at 388; Madden, *supra* note 14, at 147.

<sup>172.</sup> Madden, *supra* note 14, at 148–49.

<sup>173.</sup> See supra text accompanying note 117.

<sup>174.</sup> GUILFOYLE, supra note 43, at 3.

<sup>175.</sup> *Id.* (describing the two interpretations); Stiles, *supra* note 54, at 323–25 (asserting that the term differentiates between private and political ends); *see also* Diaz & Dubner, *supra* note 14, at 535; Gabel, *supra* note 14, at 1442; Jesus, *supra* note 14, at 377–79; Passman, *supra* note 14, at 12.

be considered acts of piracy prohibited by UNCLOS III,<sup>176</sup> nor would attacks on ships by environmentally focused organizations such as Greenpeace,<sup>177</sup> as both types of attacks are committed for political purposes, not 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. Under this interpretation, the act must be committed by a private entity rather than by or on behalf of a government.<sup>178</sup> As noted above, historically, some states used pirates for political ends.<sup>179</sup> 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 ships on behalf of a government (which would not be piracy prohibited by UNCLOS III) versus acts committed by ships that are unconnected to any state.<sup>180</sup> This majority view comports with the common base understanding that pirates do not act on behalf of any state.<sup>181</sup>

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.<sup>182</sup> This leads to inconsistencies amongst nations as to 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

The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA)<sup>183</sup> sought to resolve the gaps and limitations on piracy created by UNCLOS III.<sup>184</sup> It went into force in 1992,<sup>185</sup> and the United States ratified it in 1995.<sup>186</sup>

<sup>176.</sup> GUILFOYLE, *supra* note 43, at 3; Diaz & Dubner, *supra* note 14, at 539–40; Jesus, *supra* note 14, at 377–79; Passman, *supra* note 14, at 12.

<sup>177.</sup> Jesus, *supra* note 14, at 379; Gabel, *supra* note 14, at 1442.

<sup>178.</sup> GUILFOYLE, *supra* note 43, at 3–4; Azubuike, *supra* note 14, at 52; Madden, *supra* note 14, at 144.

<sup>179.</sup> See supra text accompanying notes 33-34.

<sup>180.</sup> Azubuike, supra note 14, at 52.

<sup>181.</sup> See supra text accompanying notes 23-28 (defining the term "piracy").

<sup>182.</sup> Azubuike, *supra* note 14, at 53; Jesus, *supra* note 14, at 374–75.

<sup>183.</sup> Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 672 [hereinafter SUA].

<sup>184.</sup> GUILFOYLE, supra note 43, at 12; Kraska & Wilson, supra note 14, at 282.

<sup>185.</sup> Kraska & Wilson, supra note 14, at 282.

<sup>186.</sup> Id. at 253 n.47; see also GUILFOYLE, supra note 43, at 75.

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Article 3 of the SUA provides that "[a]ny 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."<sup>187</sup> Attempting, abetting, or threatening such an offense is also a crime.<sup>188</sup> 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,<sup>189</sup> so long as that nation is a party to the SUA.<sup>190</sup> There is also no two-ship requirement and no requirement that the act be for "personal gain."<sup>191</sup> Indeed, the only scenario in which the SUA Convention would not apply is when all facets of the piratical act take place within a nation's sovereign territory, namely, 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.<sup>192</sup> 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.<sup>193</sup>

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 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 (including territorial waters), or by one of its nationals.<sup>194</sup> 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.<sup>195</sup> 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.<sup>196</sup> Thus, again unlike UNCLOS III, the SUA theoretically provides no safety from prosecution to pirates hiding in the

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<sup>187.</sup> SUA, supra note 183, art. 3, para.1(a).

<sup>188.</sup> Id. art. 3, para. 2.

<sup>189.</sup> GUILFOYLE, *supra* note 43, at 13; Stiles, *supra* note 54, at 311; Winn & Govern, *supra* note 14, at 138.

<sup>190.</sup> Gabel, *supra* note 14, at 1444–45. It should be noted that a large majority of nations are parties to the SUA. *See* GUILFOYLE, *supra* note 43, at 71–75 (listing all the nations who are parties to the SUA).

<sup>191.</sup> GUILFOYLE, supra note 43, at 13.

<sup>192.</sup> SUA, supra note 183, art. 4; see also GUILFOYLE, supra note 43, at 13.

<sup>193.</sup> GUILFOYLE, supra note 43, at 13.

<sup>194.</sup> SUA, *supra* note 183, art. 6, para. 1.

<sup>195.</sup> Id. art. 6, para. 2.

<sup>196.</sup> *Id.* art. 6, para. 4. Some commentators have asserted that this is the most significant aspect of the SUA. *See, e.g.*, Jesus, *supra* note 14, at 391.

territorial waters of an 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, "[1]everaging States SUA obligations in conjunction with existing international law against piracy provides an effective legal frame-work to deliver an 'endgame.'"<sup>197</sup> This seems overly optimistic, however. A number of critical nations have not ratified the SUA, including Indonesia, Malaysia, and Somalia.<sup>198</sup> Further, even nations that have ratified the agreement have often failed to fulfill its provisions and have not enacted forceful domestic criminal statutes related to piracy.<sup>199</sup> So pronounced is this problem that the United Nations Security Council has repeatedly passed resolutions urging nations not only to ratify the SUA Convention, but also to adopt domestic legislation to conform to the SUA's provisions.<sup>200</sup> Overall, 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.<sup>201</sup>

### D. International Convention Against the Taking of Hostages

The International Convention Against the Taking of Hostages ("Hostage Taking Convention")<sup>202</sup> entered into force in 1983.<sup>203</sup> The United States became a party to the convention in 1985,<sup>204</sup> and most nations in the world have now ratified it.<sup>205</sup> The convention declares,

<sup>197.</sup> *iCommandant: Web Journal of Admiral Thad Allen*, U.S. COAST GUARD (Dec. 3, 2008) http://blog.uscg.dhs.gov/2008/12/dealing-with-piracywhats-your-endgame.asp; *see also* Kraska & Wilson, *supra* note 14, at 283 (quoting Commander Allen).

<sup>198.</sup> Madden, *supra* note 14, at 164; GUILFOYLE, *supra* note 43, at 72–74; Sterio, *supra* note 68, at 392 n.143.

<sup>199.</sup> Prada & Roth, *supra* note 60 (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").

<sup>200.</sup> S.C. Res. 1918, ¶ 2, U.N. Doc. S/RES/1918 (Apr. 27, 2010) (encouraging nations to ratify the SUA, and imploring signatories to the treaty to "fully implement their obligations" under it); S.C. Res. 1846, *supra* note 46, ¶ 15 (same).

<sup>201.</sup> Kontorovich, *supra* note 29 (describing United States v. Lei Shi, 525 F.3d 709 (9th Cir. 2008)).

<sup>202.</sup> International Convention Against the Taking of Hostages, G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess. Supp. No. 46, U.N. Doc. A/34/46, at 245 (Dec. 17, 1979) [hereinafter Hostage Taking Convention].

<sup>203. 18</sup> U.S.C.A. § 1203 (2006).

<sup>204.</sup> Id.

<sup>205.</sup> GUILFOYLE, *supra* note 43, at 71–75.

Any 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.<sup>206</sup>

# There are no territorial limitations.<sup>207</sup>

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—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.<sup>208</sup> 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.<sup>209</sup> Finally, it is widely accepted, at least with regard to acts related to piracy, that the Hostage Taking Convention adds virtually nothing that is not already covered by the SUA,<sup>210</sup> 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.<sup>211</sup> 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."<sup>212</sup> 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.<sup>213</sup>

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, 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

<sup>206.</sup> Hostage Taking Convention, supra note 202, art. 1.

<sup>207.</sup> Id. art. 5; GUILFOYLE, supra note 43, at 27.

<sup>208.</sup> Hostage Taking Convention, *supra* note 202, art. 13.

<sup>209.</sup> Id. art. 2.

<sup>210.</sup> GUILFOYLE, supra note 43, at 28.

<sup>211.</sup> Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

<sup>212.</sup> Id. pmbl.

<sup>213.</sup> Id. art. 5, para. 1.

United Nations."<sup>214</sup> As piracy, by definition, does not involve actions by one state against another, but rather activities perpetrated by nonstate actors,<sup>215</sup> piracy would not constitute a "crime of aggression."

The last set of crimes that falls within the ICC's jurisdiction is crimes against humanity. This encompasses any of eleven enumerated crimes, including 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."<sup>216</sup> Piracy is not specifically enumerated, and it would not appear to fall within any of the eleven listed categories. Even the catchall provision would not apply because piracy, though a heinous crime, is generally treated more as an economic crime than one of physical bodily harm (though 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 prosecuting pirates, that day is not yet here.<sup>217</sup> Further, the United States has not ratified the Rome Statute and therefore is not a member of the court.<sup>218</sup>

### F. United Nations Charter and Resolutions

The United Nations, its Charter, and its various resolutions play a significant role in the area of maritime piracy. The U.N. Charter prohibits "the threat or use of force against the territorial integrity or political independence of any state."<sup>219</sup> This provision therefore precludes nations from advancing into the territorial waters of another nation 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.<sup>220</sup>

Exceptions to the general provision exist. One such exception is the right to individual or collective self-defense.<sup>221</sup> Thus, a country can al-

<sup>214.</sup> Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, G.A. Res. RC/Res. 6, U.N. GAOR, 13th Sess. (June 11, 2010).

<sup>215.</sup> See supra notes 23-28 and accompanying text (defining the term "piracy").

<sup>216.</sup> Rome Statute, supra note 211, art. 7.

<sup>217.</sup> Madden, *supra* note 14, at 161; Azubuike, *supra* note 14, at 55 ("It is a gaping omission that the Statute of the International Criminal Court did not deal with piracy.").

<sup>218.</sup> Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 90 (2003); Kofi A. Annan, Op-Ed., *Justice vs. Impunity*, N.Y. TIMES, May 30, 2010, http://www.nytimes.com/2010/05/31/opinion/31iht-edannan.html.

<sup>219.</sup> U.N. Charter art. 2, para. 4.

<sup>220.</sup> See supra notes 163-65 and accompanying text.

<sup>221.</sup> U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Na-

ways 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,"<sup>222</sup> 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.<sup>223</sup> The U.N. Charter requires all members to abide by the resolutions issued by the Security Council under Chapter VII.<sup>224</sup> As virtually every country in the world is a member of the United Nations,<sup>225</sup> 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.<sup>226</sup> The most relevant resolution, passed in June 2008, permits foreign nations to enter Somalia's territorial waters to repress piracy and authorizes the use of "all necessary means" to achieve that goal.<sup>227</sup> However, such actions must comply with international law, including international human rights laws,<sup>228</sup> and nations must "cooperat[e]" with the Somali government in their actions,<sup>229</sup> though it is unclear whether that requires prior approval from the Somali government every time an action is taken.<sup>230</sup> While the June 2008 resolution, by its terms, applied for only a six-month period, subsequent Security Council

tions, until the Security Council has taken measures necessary to maintain international peace and security.").

<sup>222.</sup> Id. art. 39.

<sup>223.</sup> Id. arts. 41, 42.

<sup>224.</sup> *Id.* art. 48, para. 1 ("The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.").

<sup>225.</sup> Currently, 193 nations are members of the United Nations. *Growth in United Nations Membership, 1945–present,* UN.ORG, http://www.un.org/en/members/growth.shtml (last visited Aug. 3, 2012).

<sup>226.</sup> Kontorovich, supra note 29.

<sup>227.</sup> S.C. Res. 1816, ¶ 7, U.N. Doc. S/RES/1816 (June 2, 2008); Passman, *supra* note 14, at 9 (noting this was the most critical of the resolutions passed by the Security Council in 2008).

<sup>228.</sup> S.C. Res. 1816, supra note 227, ¶ 11.

<sup>229.</sup> *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).

<sup>230.</sup> Though the plain language of the resolution merely requires nations to "cooperat[e]" with the Somali government in their actions, some commentators assert the language requires that the actions be preapproved by the Somali government. *See, e.g.*, Madden, *supra* note 14, 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").

resolutions have continued to authorize such activity up to the present day<sup>231</sup> and expanded the scope of military options to include actions on land in Somalia.<sup>232</sup> The United States takes the position that these Security Council resolutions also permit action against piracy in Somali airspace.<sup>233</sup>

The Security Council 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.<sup>234</sup> The Security Council further noted,

[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 [Somali government].<sup>235</sup>

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

<sup>231.</sup> S.C. Res. 2020, ¶¶ 7–14, U.N. Doc. S/RES/2020 (Nov. 22, 2011); S.C. Res. 1950, *supra* note 101, ¶ 7; S.C. Res. 1846, *supra* note 46, ¶ 10; S.C. Res. 1897, *supra* note 69, ¶ 7; S.C. Res. 1851, *supra* note 54, ¶ 6.

<sup>232.</sup> S.C. Res. 1851, *supra* note 54,  $\P$  6 (noting that nations fighting piracy in Somalia "may undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea"); Kontorovich, *supra* note 29 (stating that Resolution 1851 "extend[s] the authorization of military force to land-based operations in Somalia mainland").

<sup>233.</sup> Kontorovich, supra note 29.

<sup>234.</sup> See S.C. Res. 2020, supra note 231, pmbl.; S.C. Res. 1950, supra note 101, pmbl.; S.C. Res. 1897, supra note 69, pmbl.; S.C. Res. 1846, supra note 46, pmbl.; S.C. Res. 1816, supra note 227, pmbl.

<sup>235.</sup> S.C. Res. 1816, *supra* note 227, ¶ 9. Similar language appears in all of the subsequent Security Council Resolutions. *See* S.C. Res. 2020, *supra* note 231, ¶ 10; S.C. Res. 1950, *supra* note 101, ¶ 8; S.C. Res. 1897, *supra* note 69, ¶ 8; S.C. Res. 1851, *supra* note 54, ¶ 10; S.C. Res. 1846, *supra* note 46, ¶ 11.

long as that nation is considered a failed state.<sup>236</sup> 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 those 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.<sup>237</sup> There is no indication, however, that the U.S. government has accepted this theory.

#### IV. U.S. LAW ON PIRACY

The international law provisions outlined in Part III 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 in approaching 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.<sup>238</sup> 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."<sup>239</sup> 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 statute, but rather stems from an explicit provision in the U.S. 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,<sup>240</sup> 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."<sup>241</sup> This constitutional provision stemmed from the long-held belief that piracy constituted a violation of the laws of all countries.<sup>242</sup> As the U.S. Supreme Court emphatically pronounced in 1826, "[p]irates may, without doubt, be lawfully captured on the ocean by the public or private ships of every nation; for they are, in truth, the

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<sup>236.</sup> Azubuike, supra note 14, at 52; Madden, supra note 14, at 150-51.

<sup>237.</sup> See sources cited supra note 236.

<sup>238.</sup> See supra text accompanying note 194.

<sup>239.</sup> GUILFOYLE, *supra* note 43, at 3; *see also* Passman, *supra* note 14, at 10 (noting that pirates "are punished under the municipal laws of any state, instead of an international court" (footnotes omitted)).

<sup>240.</sup> United States v. Lei Shi, 525 F.3d 709, 720 (9th Cir. 2008).

<sup>241.</sup> U.S. CONST. art I, § 8.

<sup>242.</sup> United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-62 (1820).

common enemies of all mankind, and, as such, as liable to the extreme rights of war."<sup>243</sup> Based upon the Offense Clause, it has long been settled that the U.S. Congress has the authority to pass a wide range of statutes to protect the nation against pirates.<sup>244</sup> 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.<sup>245</sup> In 2006, President Bush, utilizing this authority in conjunction with the international conventions and Security Council resolutions described in Part III, 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, including firing upon pirates, seizing their vessels, and capturing pirates for prosecution.<sup>246</sup> This was the first authorized engagement of U.S. warships against pirates in 150 years.<sup>247</sup> Together with military ships of other NATO countries, the U.S. Navy now patrols those waters as part of NATO's Combined Task Force 151.<sup>248</sup>

U.S. military activity against pirates in and around Somalia is not open ended, however. 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 it also means 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 law<sup>249</sup> has placed a significant limitation on U.S. action. Under international law, pirates are not considered combatants, but instead are deemed civilians. International humanitarian law precludes targeting civilians except in situations of self-defense.<sup>250</sup> Due

<sup>243.</sup> The Marianna Flora, 24 U.S. (11 Wheat.) 1, 40 (1826).

<sup>244.</sup> Smith, 18 U.S. (5 Wheat.) at 162; Lei Shi, 525 F.3d at 720-21.

<sup>245. 33</sup> U.S.C. § 381 (2006). Congress enacted the original version of this statute in 1819. See 33 U.S.C.A. § 381.

<sup>246.</sup> Kraska & Wilson, supra note 14, at 247.

<sup>247.</sup> Id.

<sup>248.</sup> Kontorovich, *supra* note 64, at 747; Azubuike, *supra* note 14, at 57; Shapiro, *supra* note 46.

<sup>249.</sup> See supra note 228 and accompanying text.

<sup>250.</sup> Kontorovich, supra note 29; Sterio, supra note 68, at 390.

to this restriction, U.S. military action has been primarily defensive in nature.<sup>251</sup>

Outside of Somalia, the ability of the U.S. military to engage pirates is even more limited. Consistent with the Offense Clause and statutory authority, the military can defend U.S. merchant ships from pirate attacks. But under UNCLOS III and the U.N. Charter, any such actions cannot occur within the territorial waters of any other nation, absent Security Council authorization or consent from the host nation. Further, even if a pirate attack takes place on the high seas, the United States cannot chase the pirates into the territorial sovereignty of another nation (again, unless the nation consents).<sup>252</sup>

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.<sup>253</sup> 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 boarding the Ashland; the Ashland ended up capturing many of the pirates.<sup>254</sup> 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.<sup>255</sup> When the boats broke off the attack and fled, the Nicolas followed and eventually captured several of the pirates.<sup>256</sup> In September 2010, Marines conducted a pre-dawn raid against a ship in the Gulf of Aden that pirates had captured.<sup>257</sup> The Marines retook the ship and arrested the nine pirates on board without firing a single shot.<sup>258</sup> In January 2012, a U.S. Navy destroyer even rescued an Iranian fishing boat outside the Persian Gulf that pirates had held captive for more than forty days, despite Iran's concurrent demands that the American military vessels cease patrolling the area.<sup>259</sup> Altogether, the U.S. Navv has captured hundreds of pirates and thwarted numerous pirate attacks.<sup>260</sup> The success rate of piracy attacks in the regions of U.S. naval patrols has dropped precipitously-from sixty-three percent in 2007 to

<sup>251.</sup> Kontorovich, supra note 29.

<sup>252.</sup> See supra notes 164-65 and accompanying text.

<sup>253.</sup> See supra text accompanying notes 1-13.

<sup>254.</sup> United States v. Said, 757 F. Supp. 2d 554 (E.D. Va. 2010), vacated and remanded, 680 F.3d 374 (4th Cir. 2012).

<sup>255.</sup> United States v. Hasan, 747 F. Supp. 2d 559 (E.D. Va. 2010).

<sup>256.</sup> Id.

<sup>257.</sup> Gettleman & Schmidt, supra note 60, at A4.

<sup>258.</sup> Id.

<sup>259.</sup> U.S. Rescues Iranian Ship Held by Pirates, CBS NEWS (Jan. 6, 2012), http://www.cbsnews.com/2102-202\_162-57353833.html.

<sup>260.</sup> Kontorovich, supra note 64, at 747; Madden, supra note 14, at 163.

thirty-four percent in 2008 and twenty-one percent in 2009.<sup>261</sup> Attacks fell forty-three percent in 2011, due mainly to military presence.<sup>262</sup>

There is some question, however, as to the overall efficacy of U.S. military action against piracy. While American efforts have tended to deter many piratical acts along the Somali coastline, the pirates have responded by moving their operations further and further from that shore, up to 1,000 miles from the coast.<sup>263</sup> 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.<sup>264</sup> Naval commanders have acknowledged that the resultant area under patrol—more than 2.5 million nautical miles<sup>265</sup>—is much too large an area to police effectively.<sup>266</sup> Further, as noted above, though the United States captures a number of pirates, it allows a large number (close to half) to go free.<sup>267</sup> Together, these limitations raise questions about the overall deterrence value of such patrols.<sup>268</sup>

In addition, 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.<sup>269</sup> 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."<sup>270</sup>

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<sup>261.</sup> Bento, supra note 36, at 410.

<sup>262.</sup> World Sea Piracy Drops in 2011, Somali Attacks Up, supra note 39.

<sup>263.</sup> Straziuso, *supra* note 94 (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").

<sup>264.</sup> Shapiro, *supra* note 46.

<sup>265.</sup> Id.

<sup>266.</sup> Peter Apps, *As Pirate Attacks Grow, Shipowners Take Arms*, REUTERS, May 3, 2011, *available at* http://www.reuters.com/article/2011/05/03/us-special-report-pirates-idUSTRE7421RY2 0110503; Craig Witlock, *Lack of Prosecution Poses Challenge for Foreign Navies that Catch Somali Pirates*, WASH. POST, May 24, 2010, at A8.

<sup>267.</sup> See supra note 66 and accompanying text.

<sup>268.</sup> Azubuike, *supra* note 14, at 57 (noting that the focus of the international effort "has been to ward off the pirates rather than to pursue and apprehend them"); Kontorovich, *supra* note 29.

<sup>269.</sup> Kontorovich, supra note 29.

<sup>270.</sup> Mark Thompson, How to Save a Trillion Dollars, TIME, Apr. 14, 2011, available at http://www.time.com/time/magazine/article/0,9171,2065246,00.html .

### Maritime Piracy

### B. Seizure of Piratical Vessels

Another option to combat piracy is to seize pirate vessels, which Congress has permitted. 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 that attempts or commits a piratical attack against any U.S. vessel or citizen, or indeed against any vessel at all.<sup>271</sup> 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, including by piracy.<sup>272</sup>

U.S. courts have consistently upheld the right of the United States to engage in such seizures.<sup>273</sup> The knowledge of the ship's owner that the vessel would be used in piratical activity is not relevant.<sup>274</sup> 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.<sup>275</sup> 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.<sup>276</sup>

### C. Covert Action

"Covert action" is "an activity or activities of the U.S. 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."<sup>277</sup> It therefore involves an attempt by the U.S. government to create an impact overseas, while hiding the U.S. government's involvement. By statute, the President may authorize a 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."<sup>278</sup> The government agency typically involved in covert action is my agency, the Central Intelligence Agency.

<sup>271. 33</sup> U.S.C. § 382 (2006).

<sup>272. 14</sup> U.S.C. § 89 (2006); see also Robert D. Peltz & Lawrence W. Kaye, *The Long Reach of U.S. Law Over Crimes Occurring on the High Seas*, 20 U.S.F. MAR. L.J. 199, 226–27 (2007–2008) (describing the ability of the Coast Guard to seize vessels that have violated U.S. laws).

<sup>273.</sup> The Marianna Flora, 24 U.S. (11 Wheat.) 1, 39-41 (1826).

<sup>274.</sup> United States v. Brig Malek Adhel, 43 U.S. 210, 234 (1844).

<sup>275.</sup> Id. at 235-36.

<sup>276.</sup> Id. at 237.

<sup>277. 50</sup> U.S.C. § 413b(e) (2006).

<sup>278.</sup> Id. § 413b(a).

Pursuant to this authority, a U.S. President could legally authorize a U.S. government agency to engage in covert action operations against pirates by directing the agency to help defend commercial vessels from pirate attacks, or even to engage in lethal or nonlethal 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<sup>279</sup> as well as international conventions such as the SUA and UNCLOS III, both of which the United States has accepted.<sup>280</sup> However, I have found no indication in any open source literature or public statement that any President has ever authorized a U.S. government agency to engage in any covert action operations against any pirates.

### D. Arresting Pirates

As discussed in Part V, piracy and numerous acts related to piracy are prohibited under U.S. law. Different U.S. government agencies have authority to implement these statutes by capturing and arresting individuals involved in piratical attacks. The Coast Guard can arrest individuals in U.S. waters and on the high seas for violations of U.S. law or for prevention of future violations of U.S. law. <sup>281</sup> This authority applies to both U.S.-flagged vessels and foreign-flagged vessels,<sup>282</sup> and to both U.S. and non-U.S. citizens.<sup>283</sup> The FBI can make arrests worldwide if it has reasonable grounds to believe that there has been a felony in violation of U.S. law.<sup>284</sup> Such arrests, however, when conducted outside of U.S. territorial waters, must comply with international law and specifically with the limitations imposed by UNCLOS III and the U.N. Charter.<sup>285</sup> Finally, the President has the authority to direct the military to capture pirates for prosecution.<sup>286</sup> As indicated in Part IV, Presidents have directed the U.S.

<sup>279.</sup> Id. § 413b(a)(5).

<sup>280.</sup> See supra notes 158, 186 and accompanying text.

<sup>281. 14</sup> 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 272, at 226–27.

<sup>282.</sup> United States v. Padilla-Martinez, 762 F.2d 942, 950 (11th Cir. 1985); United States v. May May, 470 F. Supp. 384, 396–97 (S.D. Tex. 1979).

<sup>283.</sup> May May, 470 F. Supp. at 396-97.

<sup>284. 18</sup> U.S.C. § 3052 (2008); 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); Peltz & Kaye, *supra* note 272, at 227–28.

<sup>285.</sup> 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).

<sup>286.</sup> See supra note 245 and accompanying text.

Navy to engage in such capture operations in the waters surrounding Somalia.<sup>287</sup>

# 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, many of the bilateral extradition treaties that the United States has entered into explicitly preclude the extradition of any national of the foreign country.<sup>288</sup> This can create obvious limitations on 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.<sup>289</sup> In the case of Somalia, for example, a lack of a working government and working court system clearly hampers any attempt to extradite pirates from that country.<sup>290</sup>

The United States also has the option of turning to rendition in instances where extradition proves unworkable.<sup>291</sup> 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."<sup>292</sup> Used by the United States government for centuries, rendition operations are less expensive than extraditions, do not require use of a foreign nation's (sometimes corrupt or unworkable) court system, and often permit the host nation to have plausible deniability.<sup>293</sup> They are also much more controversial.<sup>294</sup> 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 United States to prosecute such an individual.<sup>295</sup>

<sup>287.</sup> See supra notes 246-48 and accompanying text.

<sup>288.</sup> Daniel L. Pines, *Rendition Operations: Does U.S. Law Impose Any Restrictions*?, 42 LOY. U. CHI, L.J. 523, 531 (2011).

<sup>289.</sup> Id. at 531-32.

<sup>290.</sup> See supra note 54 and accompanying text.

<sup>291.</sup> Winn & Govern, supra note 14, at 139; Peltz & Kaye, supra note 272, at 219.

<sup>292.</sup> Pines, supra note 288, at 525.

<sup>293.</sup> Id. at 526, 530-33.

<sup>294.</sup> Id. at 526-27.

<sup>295.</sup> United States v. Lei 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 U.S. government or any "nation in amity with the United States."<sup>296</sup> The U.S.-flagged vessel may also subdue and capture the attacking vessel.<sup>297</sup>

Nevertheless, U.S. regulations and laws enacted to preclude weapons trafficking<sup>298</sup> make it very difficult for U.S.-flagged vessels to arm themselves in order to engage in such self-help or self-defense. These regulations prohibit U.S.-flagged ships from carrying virtually any armament, ammunition, or "implement of war" absent special license or exception.<sup>299</sup> Violators are subject to fine or imprisonment.<sup>300</sup> 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<sup>301</sup> absent acquisition of another license, which appears to be a fairly difficult process.<sup>302</sup> Violators of those statutes are subject to fines of up to \$1 million and imprisonment of up to ten years.<sup>303</sup>

# 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.<sup>304</sup> 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,<sup>305</sup> was a U.S. guided-missile frigate that apparently resembled a cargo ship.<sup>306</sup> Navy gunners returned fire, captured the pirates, and brought them to the United States to face trial.<sup>307</sup> The five pirates involved in the attack received life sen-

<sup>296. 33</sup> U.S.C. § 383 (2006).

<sup>297.</sup> Id.

<sup>298.</sup> 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).

<sup>299. 44</sup> C.F.R. §§ 401.1, 401.2 (2010).

<sup>300.</sup> Id. § 401.6.

<sup>301. 22</sup> U.S.C. § 2278 (2006).

<sup>302. 22</sup> C.F.R. § 123.1 (2010) (outlining the complex process for acquiring a license).

<sup>303. 22</sup> U.S.C. § 2278(c) (2006).

<sup>304.</sup> Press Release, U.S. Att'y's Office for the E. Dist. of Va., supra note 15.

<sup>305.</sup> See supra note 76 and accompanying text.

<sup>306.</sup> Bob Drogin, High-Seas Piracy Drama Plays out in Courtroom, L.A. TIMES, Nov. 21,

<sup>2010,</sup> http://articles.latimes.com/2010/nov/21/nation/la-na-pirates-20101121.

<sup>307.</sup> Id.

tences plus eighty years.<sup>308</sup> While certainly a triumph for the American judicial system, this prosecution revealed one sobering fact: it was the first U.S. jury conviction for piracy in almost 200 years.<sup>309</sup>

Overall, U.S. prosecutors have indicted approximately thirty pirates altogether in U.S. courts.<sup>310</sup> Aside from the *Nicholas* pirates, the remaining pirate from the *Maersk Alabama* attack pled guilty to piracy and received an almost thirty-four year sentence.<sup>311</sup> The *Ashland* pirates have been indicted for piracy and other charges.<sup>312</sup> In April 2011, a Washington, D.C. district court sentenced a Somali pirate to twenty-five years in prison for attacking a Danish ship off the coast of Somalia.<sup>313</sup> The pirate had pled guilty to conspiracy to commit piracy and conspiracy to use a firearm during a violent crime.<sup>314</sup> Finally, the pirates involved in the *Quest* massacre were indicted on charges of piracy, conspiracy to commit kidnapping, and use of a firearm during a crime of violence; several of those pirates pled guilty and received life sentences.<sup>315</sup>

Nonetheless, this seems to constitute a small number of prosecutions in view of the numerous recent attacks on U.S. ships<sup>316</sup> and the U.S. Navy's capture of hundreds of pirates.<sup>317</sup> Much of the problem is expense: transporting pirates and witnesses to the United States, as well as the actual prosecution of pirates in U.S. courts, can run into the millions of dollars.<sup>318</sup> 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. Further, 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-

<sup>308.</sup> Shapiro, supra note 46.

<sup>309.</sup> Press Release, U.S. Att'y's Office for the E. Dist. of Va., *supra* note 15; Drogin, *supra* note 306.

<sup>310.</sup> Shapiro, *supra* note 46 (noting the prosecutions of twenty-six pirates in U.S. courts in four separate attacks); Alexandra Malatesta, *Federal Judge Sentences Somali Pirate to 25 years in Prison*, JURIST (Apr. 7, 2011), http://jurist.org/paperchase/2011/04/federal-judge-sentences-somali-pirate-to-25-years-in-prison.php (describing the prosecution of a Somali pirate in a D.C. district court in April 2011).

<sup>311.</sup> See supra note 13 and accompanying text.

<sup>312.</sup> United States v. Said, 757 F. Supp. 2d 554 (E.D. Va. 2010), vacated and remanded, 680 F.3d 374 (4th Cir. 2012).

<sup>313.</sup> Malatesta, supra note 310.

<sup>314.</sup> Id.

<sup>315.</sup> See supra notes 82-83 and accompanying text.

<sup>316.</sup> See supra notes 75-83 and accompanying text.

<sup>317.</sup> See supra note 260 and accompanying text.

<sup>318.</sup> Winn & Govern, supra note 14, at 141; Sterio, supra note 68, at 394.

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?"<sup>319</sup>

Despite the dearth of prosecutions, as well as the difficulties of trial, numerous legal options nonetheless exist for the United States to convict pirates and those who assist them, whether through the U.S. Anti-Piracy Statute, other U.S. criminal laws, or U.S. encouragement of other nations' prosecutorial efforts.

# A. The U.S. Anti-Piracy Statute

As noted above,<sup>320</sup> 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."321 Pursuant to this authority, Congress enacted the Anti-Piracy Statute in the late 1700s. Amended nominally since that time, the statute 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."<sup>322</sup> While it is unclear exactly what the "law of nations" on piracy actually was or is, <sup>323</sup> 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.<sup>324</sup> In addition, the U.S. criminal code enumerates other actions that constitute violations of the Anti-Piracy Statute. They include the following: 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;<sup>325</sup> foreign nationals "cruising" against the United States or its citizens on the sea in violation of a treaty;<sup>326</sup> 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;<sup>327</sup> a seaman who assaults his or her commander to prevent the commander's ability to defend the ves-

<sup>319.</sup> Prada & Roth, supra note 60 (quoting Brad Kieserman).

<sup>320.</sup> See supra text accompanying notes 240-41.

<sup>321.</sup> U.S. CONST. art I, § 8.

<sup>322. 18</sup> U.S.C. § 1651 (2006).

<sup>323.</sup> Gabel, supra note 14, at 1443.

<sup>324.</sup> United States v. Brig Malek Adhel, 43 U.S. 210, 230–33 (1844); The Marianna Flora, 24 U.S. (11 Wheat.) 1 (1826); The Ambrose Light, 25 F. 408 (1885).

<sup>325. 18</sup> U.S.C. § 1652 (2006).

<sup>326.</sup> Id. § 1653.

<sup>327.</sup> Id. § 1654.

sel,  $^{328}$  and members of a piratical vessel who commit acts of robbery on shore.  $^{329}$ 

During the first few decades of the nation's existence, when piracy was prevalent, the United States utilized the Anti-Piracy Statute on numerous occasions. Indeed, between 1815 and 1823, piracy convictions were some of the U.S. Supreme Court's most reviewed cases.<sup>330</sup> Through these early decisions, which included the famous *Mariana Flora*<sup>331</sup> and *Ambrose Light*<sup>332</sup> 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,"<sup>333</sup> 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, including territorial waters.<sup>334</sup> In addition, the Fourth Circuit recently held that even unsuccessful pirate attacks fall within the Anti-Piracy Statute.<sup>335</sup>

The courts have also held that the rationale for the pirate attack is irrelevant. 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."<sup>336</sup> It is therefore irrelevant whether the act was committed "for purposes of plunder, or for purposes of hatred, revenge, or wanton abuse of power."<sup>337</sup> 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.<sup>338</sup> The only "intent" necessary is the intent to attack the maritime vessel.<sup>339</sup>

The Anti-Piracy Statute also enjoys exceptional jurisdictional reach.<sup>340</sup> That reach encompasses activities committed in U.S. territorial waters, as well as crimes by or against Americans on the high seas.<sup>341</sup> 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.<sup>342</sup>

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339. Id. at 427.

342. Id.

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<sup>328.</sup> Id. § 1655.

<sup>329.</sup> Id. § 1661.

<sup>330.</sup> Kraska & Wilson, *supra* note 14, at 257.

<sup>331.</sup> The Marianna Flora, 24 U.S. (11 Wheat.) 1 (1826).

<sup>332.</sup> The Ambrose Light, 25 F. 408 (1885).

<sup>333.</sup> See supra note 321 and accompanying text.

<sup>334.</sup> Cox, *supra* note 88, at 158.

<sup>335.</sup> United States v. Dire, 680 F.3d 446 (4th Cir. 2012).

<sup>336.</sup> United States v. Brig Malek Adhel, 43 U.S. 210, 232 (1844).

<sup>337.</sup> Id.

<sup>338.</sup> The Ambrose Light, 25 F. 408, 422–23 (1885).

<sup>340.</sup> United States v. Flores, 289 U.S. 137, 155–56 (1933); United States v. Lei Shi, 525 F.3d 709, 720–21 (9th Cir. 2008).

<sup>341.</sup> Peltz & Kaye, supra note 272, at 201.

Further, the statute protects U.S.-flagged 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.<sup>343</sup> Under the "Territorial Extension Doctrine," also known as 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 that may disrupt the nation's shipping interests related to its vessels.<sup>344</sup> 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,<sup>345</sup> as well as in U.S. territorial waters or any other waters within the admiralty and maritime jurisdiction of the United States.<sup>346</sup> This jurisdiction therefore applies to an offense committed anywhere a U.S. ship operates, regardless of the nationality of the perpetrator or the victim.<sup>347</sup> In fact, the courts have held that where the perpetrator is a U.S. national and the activity involves a U.S.-flagged ship, the United States not only can prosecute the offender, but indeed has an obligation to do so. <sup>348</sup>

Yet the jurisdictional reach of the U.S. Anti-Piracy Statute even goes beyond U.S. territories, U.S. persons, and U.S. ships. Under a concept known as the protective principle, "protective jurisdiction [over an individual] is proper if the activity threatens the security or governmental functions of the United States."<sup>349</sup> The activity need not take place in U.S. territory, the individuals involved need not be Americans, and there is no requirement that the United States prove an actual or even intended effect on the United States.<sup>350</sup> 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."<sup>351</sup>

<sup>343.</sup> Cox, supra note 88, at 156.

<sup>344.</sup> Id.

<sup>345.</sup> Flores, 289 U.S. at 149-50; Cox, supra note 88, at 156-57.

<sup>346. 18</sup> U.S.C. § 7 (2006); Miller v. United States, 88 F.2d 102, 104 (9th Cir. 1937).

<sup>347.</sup> Peltz & Kaye, supra note 272, at 201.

<sup>348.</sup> *Flores*, 289 U.S. at 159 (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").

<sup>349.</sup> United States 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).

<sup>350.</sup> Peterson, 812 F.2d at 494; United States v. Marino-Garcia, 679 F.2d 1373, 1380 (11th Cir. 1982); Peltz & Kaye, *supra* note 272, at 205.

<sup>351.</sup> United States v. Gonzalez, 776 F.2d 931, 939 (11th Cir. 1985).

The United States has long employed the protective principle in U.S. criminal maritime law,<sup>352</sup> 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.<sup>353</sup> For example, the United States 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.<sup>354</sup> The principle has also been applied with regard to other illicit trade and smuggling.<sup>355</sup> While no 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 condemnation of piratical activities by virtually all nations, it is 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, "[u]niversal jurisdiction is based on the premise that offenses against all states may be punished by any state where the offender is found."<sup>356</sup> 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."<sup>357</sup> 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."<sup>358</sup>As noted in Part III, piracy is considered a universal jurisdiction crime under customary international law. In fact, piracy constituted the "original rationale for creating universal 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 United States.<sup>359</sup>

<sup>352.</sup> *Id.* ("Reliance on the protective principle is not a novel idea in American law."); Cox, *supra* note 88, at 147 (noting that the protective principle "is a widely recognized source of U.S. maritime criminal law authority").

<sup>353.</sup> Peterson, 812 F.2d at 494; Marino-Garcia, 679 F.2d at 1380.

<sup>354.</sup> Peterson, 812 F.2d at 494; Romero-Galue, 757 F.2d at 1154.

<sup>355.</sup> Gonzalez, 776 F.2d at 939

<sup>356.</sup> United States v. Lei Shi, 525 F.3d 709, 722 (9th Cir. 2008).

<sup>357.</sup> Id. at 722–23.

<sup>358.</sup> Id. at 723.

<sup>359.</sup> Id.

Overall, then, the Anti-Piracy Statute has an exceptionally broad reach, both in its coverage and its jurisdictional application.<sup>360</sup>

# 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 during plea bargaining. For example, robbery or burglary at sea is punishable by imprisonment of up to fifteen years.<sup>361</sup> 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.<sup>362</sup> 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;<sup>363</sup> for anyone to attempt to corrupt a captain to run away with a vessel or to furnish a pirate with ammunition or provisions;<sup>364</sup> 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;<sup>365</sup> for anyone to attack a vessel in order to plunder it;<sup>366</sup> or for anyone to knowingly receive pirated property.<sup>367</sup> Knowingly damaging or destroying vessels carries a penalty of up to twenty years imprisonment.<sup>368</sup> 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.<sup>369</sup>

In addition, Congress has passed statutes that adopt several of the international conventions described above in Part III. Congress's authority to pass such legislation stems from two constitutional provisions. The first is the above-mentioned Offense Clause, which authorizes Congress to "punish piracies."<sup>370</sup> In addition, the Necessary and Proper Clause 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

<sup>360.</sup> See United States v. Furlong, 18 U.S. (5 Wheat.) 184, 193, 197 (1820) (noting that the nationality of the pirates, the attacked individuals, the vessel sailed, and the vessel attacked are all irrelevant under the Anti-Piracy Statute).

<sup>361. 18</sup> U.S.C. § 2111 (2008); Kraska & Wilson, supra note 14, at 253.

<sup>362. 18</sup> U.S.C. § 113 (2008); Kraska & Wilson, supra note 14, at 253.

<sup>363. 18</sup> U.S.C. § 1656 (2006).

<sup>364.</sup> Id. § 1657.

<sup>365.</sup> Id. § 1658.

<sup>366.</sup> Id. § 1659.

<sup>367.</sup> Id. § 1660.

<sup>368.</sup> Id. § 2291.

<sup>369.</sup> Id. § 924(c).

<sup>370.</sup> See supra text accompanying notes 240-41.

Officer thereof."<sup>371</sup> These "Powers" include the President's Treaty Power under Article II of the Constitution.<sup>372</sup> The Necessary and Proper Clause permits Congress not only to codify international anti-piracy conventions into the U.S. criminal code, but also to extend jurisdiction over such acts beyond U.S. borders.<sup>373</sup>

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.<sup>374</sup> 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 aboard a ship if the violence will endanger the ship's safe navigation; destruction of a ship; or conspiracy to do any of these activities.<sup>375</sup> Violators can be fined and imprisoned for up to twenty years.<sup>376</sup> The mere threat to take most of these actions is also punishable by fine or imprisonment.<sup>377</sup> Life imprisonment and even the death penalty are available sanctions if the death of any person results from the activity.<sup>378</sup>

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.-flagged ship anywhere in the world.<sup>379</sup> Jurisdiction also extends to any situation worldwide where a U.S. national is seized, threatened, injured, or killed, as well as to situations in which the offender is later found in the United States.<sup>380</sup> 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 United States.<sup>381</sup> Jurisdiction also extends to attacks on any vessel where the activity is undertaken to attempt to compel the United States to do or abstain from doing any act.<sup>382</sup> which is a provision

<sup>371.</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>372.</sup> Missouri v. Holland, 252 U.S. 416, 432 (1920); United States v. Lei Shi, 525 F.3d 709, 721 (9th Cir. 2008).

<sup>373.</sup> *Lei 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).

<sup>374.</sup> Lei Shi, 525 F.3d at 719.

<sup>375. 18</sup> U.S.C. § 2280(a)(1) (2006).

<sup>376.</sup> Id.

<sup>377.</sup> Id. § 2280(a)(2).

<sup>378.</sup> Id.

<sup>379.</sup> Id. § 2280(b)(1).

<sup>380.</sup> Id.

<sup>381.</sup> United States v. Lei Shi, 525 F.3d 709, 725 (9th Cir. 2008).

<sup>382. 18</sup> U.S.C. §§ 2280(b)(2), (3).

intended to apply to piratical acts involving hostage taking or terrorism. Unfortunately, despite the overall wide sweep of this statute, it appears to have been used only once in U.S. courts,<sup>383</sup> though its use resulted in a successful conviction.<sup>384</sup>

The United States has similarly codified the key provisions of the Hostage Taking Convention into U.S. law.<sup>385</sup> This statute deems hostage taking to be a criminal offense punishable with a life sentence or by death if a hostage is killed.<sup>386</sup> The prohibition extends to hostage taking outside the United States if the hostage or the hostage takers are U.S. nationals, the offenders are found in the United States, or the hostage takers are seeking to compel action by the U.S. government.<sup>387</sup>

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.<sup>388</sup> Thus, unless the Anti-Piracy Statute applies to a given situation, the United States might not be able to prosecute individuals engaging in seemingly piratical activities if such activities lack a sufficient nexus with 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 consequently the United States can utilize universal jurisdiction to convict individuals of violations of the U.S. statute enacting the SUA.<sup>389</sup>

# C. Prosecution Outside the United States

Between the Anti-Piracy Statute and other criminal provisions, the United States 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.<sup>390</sup> Fortunately, the United States is rarely the sole nation with jurisdiction over a crime of piracy because 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

<sup>383.</sup> Kontorovich, supra note 29.

<sup>384.</sup> Lei Shi, 525 F.3d at 709.

<sup>385.</sup> United States v. Ferreira, 275 F.3d 1020, 1027 (11th Cir. 2001).

<sup>386. 18</sup> U.S.C. § 1203 (2006).

<sup>387.</sup> Id. § 1203(b)(1).

<sup>388.</sup> See supra text accompanying notes 355-58.

<sup>389.</sup> Lei Shi, 525 F.3d at 722-24.

<sup>390.</sup> See supra text accompanying notes 318-19.

have concurrent jurisdiction.<sup>391</sup> 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."<sup>392</sup> 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.

As might be expected, the problem is rarely that too many nations seek jurisdiction to prosecute a given pirate, but rather that no nation is interested in prosecuting the pirate.<sup>393</sup> 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,<sup>394</sup> described as the first modern piracy trial in Europe.<sup>395</sup> 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.<sup>396</sup> Seychelles sentenced eleven Somali pirates to ten years in prison in July 2010 for attempting to hijack a Seychelles coast guard ship.<sup>397</sup> 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.<sup>398</sup> The captured pirates received sentences ranging from twelve years to life imprisonment.<sup>399</sup> Nations as diverse as Germany, Mauritius, France, Somalia, Russia, and Spain have also prosecuted suspected pirates.<sup>400</sup> Overall, almost twenty countries have recently initiated prosecutions against nearly 950 pirates 401

The United States and other nations have gone a step further and have sought to induce nations near Somalia to assert universal jurisdic-

<sup>391.</sup> United States v. Flores, 289 U.S. 137, 157 (1933).

<sup>392.</sup> Id. at 158.

<sup>393.</sup> See supra text accompanying notes 61–73.

<sup>394.</sup> Who They're Sentencing in Rotterdam, TIME, July 5, 2010, at 15.

<sup>395.</sup> Id.

<sup>396.</sup> Sarah Miley, Yemen Court Sentences 6 Somali Pirates to Death, JURIST (May 18, 2010), http://jurist.org/paperchase/2010/05/yemen-court-sentences-12-pirates-6-to-death.php.

<sup>397.</sup> Dwyer Arce, *Seychelles Court Convicts Somali Pirates*, JURIST (July 26, 2010), http://jurist.org/paperchase/2010/07/seychelles-court-convicts-somali-pirates.php.

<sup>398.</sup> South Korea Indicts 5 Suspected Somali Pirates, WASH. POST., Feb. 25, 2011, http://www.washingtonpost.com/wp-dyn/content/article/2011/02/25/AR2011022501009\_pf.html.

<sup>399.</sup> Somalia: Supreme Court Confirms Life Sentence for Somali Pirate, ALLAFRICA.COM (Dec. 22, 2011), http://allafrica.com/stories/201112230934.html.

<sup>400.</sup> Andrés Cala, *Spain Arraigns Somalis Suspected of Piracy*, NYTIMES.COM (Oct. 13, 2009), http://www.nytimes.com/2009/10/14/world/europe/14iht-spain.html; Malatesta, *supra* note 310; Schwirtz, *supra* note 45, at A6 (noting that a Russian court sentenced six men to sentences of seven to twelve years for committing piracy against a Russian ship off the coast of Sweden).

<sup>401.</sup> Shapiro, supra note 46.

tion to prosecute pirates captured by U.S. and European forces, even though such third countries have absolutely no connection to the act, the attackers, or the victims. These 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.<sup>402</sup> They also greatly reduce the prosecutorial costs and manpower on U.S. and European courts.<sup>403</sup> The first such case took place in 2007.<sup>404</sup> 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 states, the pirates were transferred to Kenya for trial. Applying universal jurisdiction, the Kenyan court convicted and sentenced the pirates to seven years in prison.<sup>405</sup>

Buoyed by that success, the United States and other countries subsequently entered into memoranda of understanding with Kenya to send captured pirates to Kenya for prosecution.<sup>406</sup> More than 100 alleged pirates have been transferred to Kenya under this agreement.<sup>407</sup> Of course, Kenya's willingness to prosecute such pirates is not limitless, given the exceptional expense of such prosecutions, as well as domestic grumbling about why the relatively poor nation is expected to do the world's dirty work.<sup>408</sup> Indeed, in 2010, Kenya suspended its agreement to prosecute pirates.<sup>409</sup> It later begrudgingly agreed to reconsider new prosecutions, but only after being reassured of additional financial support.<sup>410</sup> Following the Kenyan example, Seychelles is creating a U.N.-supported center to prosecute suspected pirates.<sup>411</sup> Overall, it is expected that donor nations will spend more than \$9 million to support piracy trials in Kenya and Seychelles.<sup>412</sup> Mauritania and Tanzania have also expressed an inter-

<sup>402.</sup> Kraska & Wilson, supra note 14, at 257.

<sup>403.</sup> Cala, supra note 400.

<sup>404.</sup> Kraska & Wilson, supra note 14, at 257.

<sup>405.</sup> Id.; Passman, supra note 14, at 2-3, 14.

<sup>406.</sup> Azubuike, *supra* note 14, at 55; Gathii, *supra* note 18, at 363, 365; Kontorovich, *supra* note 64, at 747.

<sup>407.</sup> Kontorovich, *supra* note 64, at 748; *Q&A: What Do You Do with a Captured Pirate?*, BBC NEWS (Jan. 25, 2011), http://www.bbc.co.uk/news/world-africa-11813168.

<sup>408.</sup> Kontorovich, supra note 64, at 748; Arce, supra note 397; Gathii, supra note 18, at 137.

<sup>409.</sup> Drogin, supra note 306; Arce, supra note 397; Kenya Ends Co-operation in Hosting Somali Pirate Trials, BBC NEWS (Oct. 1, 2010), http://www.bbc.co.uk/news/world-africa-11454762.

<sup>410.</sup> Arce, supra note 397; Hanson, supra note 65.

<sup>411.</sup> Arce, supra note 397.

<sup>412.</sup> Id.

est in becoming a destination for piracy trials,<sup>413</sup> and the United Nations Security Council has urged additional nations to consider the same.<sup>414</sup>

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.<sup>415</sup> This provision has often deterred European nations, for example, from turning pirates over to the Somali government.<sup>416</sup> It could also affect the willingness of nations to turn pirates over to other countries with less than impeccable human rights records, even if it is unclear whether torture will ensue. It is important to note, however, that U.S. 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.<sup>417</sup>

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 it provides that prosecution of seized pirates should be carried out by "the courts of the state which carried out the seizure."<sup>418</sup> The drafting history of Article 105 indicates that it was intended to prevent transfers of pirates to third parties for prosecution.<sup>419</sup> However, such a restriction contradicts pre-UNCLOS III customary international law that clearly permitted such transfers to third countries.<sup>420</sup>

While no case has explored whether the transfer of a pirate from a capturing country to a third country actually violates the terms of UNCLOS III,<sup>421</sup> a variety of states routinely transfer pirates to third nations.<sup>422</sup> This indicates an implicit assessment by the international community that either Article 105 does not preclude such transfers or the pre-existing customary international law permitting such transfers survived Article 105.<sup>423</sup> This would appear to be an appropriate result because pi-

<sup>413.</sup> 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.

<sup>414.</sup> S.C. Res. 1897, *supra* note 69, ¶ 6.

<sup>415.</sup> Passman, supra note 14, at 34; Sterio, supra note 68, at 398.

<sup>416.</sup> Kontorovich, supra note 29.

<sup>417.</sup> Id.

<sup>418.</sup> UNCLOS III, supra note 153, art. 105.

<sup>419.</sup> Kontorovich, supra note 29; Gathii, supra note 18, at 122.

<sup>420.</sup> Kontorovich, supra note 64, at 748; Gathii, supra note 18, at 125.

<sup>421.</sup> Kontorovich, supra note 29.

<sup>422.</sup> Gathii, supra note 18, at 124-25.

<sup>423.</sup> *Id.* at 125; Kontorovich, *supra* note 64, at 748. *But see* Sterio, *supra* note 68, at 391 (suggesting that the legality of transferring captured pirates to a third country is "dubious" under Article 105).

rates are subject to universal jurisdiction.<sup>424</sup> 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 near 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.

#### VI. PROPOSALS FOR AUGMENTING THE U.S. FIGHT AGAINST PIRACY

As Part V illustrates, the United States possesses numerous legal options to combat piracy. But the actual U.S. effort thus far has been fairly limited. Though its naval ships patrol the oceans around Somalia, the U.S., as well as other nations patrolling such waters, uses a strategy of mostly 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 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 increase in pirate attacks, with no resolution in sight. The United States has numerous other pressing concerns for its time, focus, and funding (for example, rebuilding Iraq and Afghanistan, addressing the national debt, and mitigating turbulence in the Middle East). But 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 could be made on the legal front, which, if implemented, would help reduce the threat posed by piracy.

# A. Increase U.S. Prosecutions

Various commentators have asserted that the minimal threat of prosecution contributes to the escalation of piratical attacks.<sup>425</sup> As one author has noted, "[p]rosecution is the weakest link in the current inter-

<sup>424.</sup> See supra Part III.A.

<sup>425.</sup> Kontorovich, supra note 29.

national effort to combat piracy."<sup>426</sup> 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.<sup>427</sup> As the shipping executive stated, "[w]hen [piracy] implies a great risk of being caught and hanged, and the cost of losing ships and weap-ons becomes too big, it will decrease and eventually disappear."<sup>428</sup> While such a proposal is a bit over-the-top, 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.<sup>429</sup>

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 toward piracy trials. Laws could also be enacted that would expand the scope of cases that can be brought against those who assist pirates. The Patriot Act created a criminal statute precluding material support to terrorism,<sup>430</sup> which is interpreted extremely broadly to effectively forbid virtually any support to terrorists.<sup>431</sup> It has proven exceptionally helpful to prosecutors.<sup>432</sup> Indeed, a 2009 Human Rights First Report found the most common charge brought in terrorism cases since 9/11 has been for a material support to terrorism, and such charges yielded the most convictions.<sup>433</sup> In the piracy

<sup>426.</sup> Hanson, supra note 65.

<sup>427.</sup> Bjoern H. Amland, Norwegian Shipper: Kill Pirates "On the Spot," GUARDIAN (Feb. 16, 2011), http://www.guardian.co.uk/world/feedarticle/9504241.

<sup>428.</sup> Id. (statement of Jacob Stolt-Nielsen).

<sup>429.</sup> Prada & Roth, supra note 60.

<sup>430. 18</sup> U.S.C. § 2339A(a) (2006) (making it a criminal offense to "provide[] material support or resources or conceal[] or disguise[] 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).

<sup>431.</sup> *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").

<sup>432.</sup> Ben Conery, "Material Support" Ban in Terrorism Law Upheld, WASHINGTON TIMES.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 gov-ernment's most frequently used tools in the battle against terrorism"); Adam Serwer, Scotus Upholds Material Support for Terrorism Law, AMERICAN PROSPECT (June 21, 2010), http://prospect.org/article/scotus-upholds-material-support-terrorism-law (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 ninety-one percent conviction rate in terrorism cases in civilian court").

<sup>433.</sup> Richard B. Zabel & James J. Benjamin, Jr., In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts 2009 Update and Recent Developments, HUMAN RIGHTS FIRST 18 (July

realm, the U.S. government has already issued policy guidance noting the government's desire to disrupt pirates' financial backing, as well as the suppliers of their fuel, outboard motors, ladders, and other supplies.<sup>434</sup> In order to effectuate this goal, the United States should enact a material-support-to-piracy statute, which would allow U.S. prosecutors to bring claims against anyone in the chain of piracy.<sup>435</sup>

### **B.** Increase International Prosecutions

Piracy is an international dilemma and, though it significantly impacts U.S. national security, it is imperative that other nations also step up enforcement of anti-piracy laws. Terrorism is a U.S. national security matter, but terrorism 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.

One problem is the lack of prosecutions of pirates by foreign nations. Many nations engage in a capture-and-release policy, rather than a prosecute-and-convict policy because of a lack of political will and financial cost.<sup>436</sup> However, part of the problem stems from the fact that piracy prosecutions are based on national laws and many countries have weak national anti-piracy laws.<sup>437</sup> Therefore, the United States should continue its policy of encouraging key nations, especially those most plagued by piracy, to ratify the SUA.<sup>438</sup> 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 United States can also continue to establish agreements with third countries for their assistance in piracy prosecutions, as has already been done with Kenya and Seychelles.<sup>439</sup> This would allow for prosecutions close to the regions where most pirate attacks occur, making it easier to bring 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. Moreover, trials conducted by local African courts

 $<sup>2009),\</sup> http://www.humanrightsfirst.org/wp-content/uploads/pdf/090723-LS-in-pursuit-justice-09-up \ date.pdf.$ 

<sup>434.</sup> Shapiro, supra note 46.

<sup>435.</sup> 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* Part V.B., these provisions are shotgun approaches to the problem and do not cover as many acts as a material-support-to-piracy statute would.

<sup>436.</sup> See supra note 64 and accompanying text.

<sup>437.</sup> See supra notes 60–61 and accompanying text.

<sup>438.</sup> See supra note 200 and accompanying text.

<sup>439.</sup> See supra text accompanying notes 410-18.

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.<sup>440</sup> However, creation of such a court faces the hurdles of gaining financing, support from nations, and the time needed to create a new tribunal.<sup>441</sup> Rather than create a brand new tribunal, the international community should instead utilize a perfectly functioning one that already exists. As noted above in Part III, 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, the ICC would be the perfect mechanism to handle such claims. The ICC is already an established and wellrecognized entity even though the United States has yet to join it. It 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.<sup>442</sup> Pirates often use this limitation to evade capture by darting into territorial waters when chased.<sup>443</sup> 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, out, and between Indonesian and Malaysian territorial waters to evade pursuit.<sup>444</sup> This limit on hot pursuit greatly restricts the ability of the United States and other nations to capture pirates, prosecute them, and deter others from piratical attacks.

<sup>440.</sup> 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-forpiracy-trials.php; Shapiro, *supra* note 46; Sterio, *supra* note 68, at 395–96 (noting several proposals for establishment of an ad hoc tribunal); Bento, *supra* note 36, at 443; NATIONAL SECURITY COUNCIL, *supra* note 52, at 14; Kontorovich, *supra* note 29.

<sup>441.</sup> Sterio, supra note 68, at 396; Bottorff, supra note 440;.

<sup>442.</sup> See supra text accompanying notes 163-68.

<sup>443.</sup> Luft & Korin, supra note 14, at 69.

<sup>444.</sup> Id.

One solution would be to amend UNCLOS III to permit hot pursuit of pirates into another nation's sovereign territory. Still, as noted above, the protection of sovereign territory goes to the very heart of the United Nations Charter<sup>445</sup> and is quite frankly one of the most basic precepts behind the concept of a nation-state. Thus, it seems unlikely that nations would permit such an amendment of UNCLOS III.

A better solution would be to follow the example of Somalia. The United Nations Security Council passed resolutions permitting nations to chase and capture pirates in Somali waters due to the blanket permission of the Somali government.<sup>446</sup> Without going through the tedious task of seeking and acquiring Security Council resolutions with regard to other territorial waters, the United States could seek to reproduce the Somali model elsewhere by negotiating bilateral agreements on hot pursuit protocols with other countries experiencing significant piratical acts in their territorial seas. These agreements could authorize blanket approvals, though it is unlikely that most nations would accept such wide infringement of their sovereignty. Alternatively, the bilateral agreements could establish specific and efficient mechanisms for quickly acquiring permission to engage in hot pursuit of pirates into territorial waters on a caseby-case basis. Either option, however, would enable more pirates to be apprehended and invoke a higher level of deterrence as pirates would lose one of their best mechanisms for evading capture.

#### D. Allow Ships to Better Protect Themselves

While prosecution offers one means of deterrence, another less expensive option is to make commercial vessels harder targets. 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 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.<sup>447</sup> Through the Maritime Transportation Security Act of 2002 (MTSA),<sup>448</sup> the United States implemented the ISPS Code into U.S. law.<sup>449</sup> Under the MTSA's provisions, foreign ports must become certified as meeting cer-

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<sup>445.</sup> See supra note 219 and accompanying text.

<sup>446.</sup> See supra notes 227-35 and accompanying text.

<sup>447.</sup> Kraska & Wilson, supra note 14, at 254-55.

<sup>448.</sup> Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064 (codified as amended in various sections of 46 U.S.C.).

<sup>449.</sup> Kraska & Wilson, *supra* note 14, at 255.

<sup>149.</sup> Klaska & wlison, *supra* note 14, at 255.

tain security requirements before they can be used as a transit for ships destined for the United States.<sup>450</sup>

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 earsplitting pulses toward a targeted area.<sup>451</sup> 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 ship from pirate attacks.<sup>452</sup>

There are clear indications that vessels employing such defense systems have been extremely successful at staving off piracy.<sup>453</sup> Indeed, the *Maersk Alabama*, discussed in the Introduction, provides anecdotal proof. Amazingly enough, pirates again attacked the *Alabama* off the Somali coast a mere seven months after the first attack.<sup>454</sup> This time, however, the ship was better prepared, having installed anti-pirate structural features and safety equipment, as well as an armed security force.<sup>455</sup> The latter opened fire on the pirates and repelled the attack.<sup>456</sup> Such success stories, combined with the increased number of pirate attacks and the limited ability and willingness of the world's navies to fully patrol the areas of danger, makes it almost inevitable that more private vessels will seek to obtain self-defense mechanisms.<sup>457</sup>

To encourage such self-help measures, the United States advocates for all vessels to adopt best management practices to protect themselves from attack—including maintaining additional lookouts on watches and using closed circuit television cameras and razor wire.<sup>458</sup> However, these best management practices do not include arming the crews of vessels.<sup>459</sup> Indeed, as noted in Part IV, the United States has actually implemented laws and regulations that greatly restrict U.S.-flagged ships from carrying weapons that could be used to defend against pirate attacks.

<sup>450. 46</sup> U.S.C. § 70103 (2006); Kraska & Wilson, supra note 14, at 255.

<sup>451.</sup> Kraska & Wilson, supra note 14, at 263; Winn & Govern, supra note 14, at 144.

<sup>452.</sup> Kraska & Wilson, supra note 14, at 247; Winn & Govern, supra note 14, at 144-45.

<sup>453.</sup> Hanson, supra note 65.

<sup>454.</sup> Dana Hughes, *Maersk Alabama Battles Pirates for Second Time*, ABC NEWS (Nov. 18, 2009), http://abcnews.go.com/Business/International/pirates-attack-us-flagged-maersk-alabama/story ?id=9114429#.T-zujY7rM0s.

<sup>455.</sup> Id.

<sup>456.</sup> Id.

<sup>457.</sup> Apps, supra note 266.

<sup>458.</sup> Shapiro, supra note 46; NATIONAL SECURITY COUNCIL, supra note 52, at 9.

<sup>459.</sup> Shapiro, supra note 46; NATIONAL SECURITY COUNCIL, supra note 52, at 4.

The United States needs to change its policies in this area. There are legitimate concerns that untrained armed crews could fire upon innocent civilians,460 that an arms race could ensue between the vessels and the pirates,<sup>461</sup> or that vessels permitted to bring weapons on board could use such weapons to engage in arms smuggling. Nevertheless, the use of armed crews and guards has proved effective in deterring pirate attacks. The United States government has recognized that "not a single ship employing armed guards has been successfully pirated."462 In fact, much of the recent success in thwarting piratical attacks has been attributed to the increase in private security personnel on ships.<sup>463</sup> As the world's navies 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 United States augment its best management practices to include arming of crews, but U.S. regulations should also be amended to permit, if not require, U.S.-flagged ships and ships using U.S. ports to purchase and maintain armaments for defensive purposes.<sup>464</sup>

These regulations should not be open-ended. They should provide that vessels can possess only a limited number of weapons to preclude arms trafficking. 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 itinerarycruise ships travelling a relatively benign path between Florida and the Caribbean would not need the same set of defenses as an oil tanker travelling through the Gulf of Aden. All vessels should 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.<sup>465</sup> Instituting these regulations with the above limitations will allow U.S. vessels to defend themselves from attack. Equally important, it would give pirates notice that

<sup>460.</sup> Apps, *supra* note 266.

<sup>461.</sup> Id.; Bento, supra note 36, at 452.

<sup>462.</sup> Shapiro, *supra* note 46 (statement of Andrew J. Shapiro, Assistant Secretary, Bureau of Political-Military Affairs, U.S. Dept. of State); *see also* Apps, *supra* note 266 ("[N]o vessel carrying armed guards has yet been pirated.").

<sup>463.</sup> World Sea Piracy Drops in 2011, Somali Attacks Up, supra note 39.

<sup>464.</sup> 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. *See* Luft & Korin, *supra* note 14, at 68.

<sup>465.</sup> Apps, supra note 266.

these vessels are likely to carry these weapons without undermining the purpose of the original regulations to preclude arms trafficking.<sup>466</sup>

Implementing such proposals will make pirates well aware that U.S.-flagged ships and 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. Also, arming crews increases the possibility of mutiny, accidental discharge, or weapons being confiscated and employed by passengers or the pirates. Further, other ports or territorial waters used by our ships may have restrictions on gun ownership, and authorities may believe the ship is engaged in weapons smuggling.<sup>467</sup> Nonetheless, the value of arming vessels to deter piracy—both in general and in specific instances of attacks—appears to outweigh these potential negatives.

Self-help options beyond merely arming crews to stave off attacks should also be considered. For example, a ship's crew 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.<sup>468</sup> Such arrests do not violate the Fourth Amendment of the Constitution because the arresting individual is not an employee of the U.S. government.<sup>469</sup> But the rules governing citizen's arrests are promulgated on a state-by-state basis.<sup>470</sup> It is therefore unclear whether citizen's arrest rules apply overseas and if so, which state's rules apply in a given overseas scenario. As such, a federal citizen's arrest law, particularly in the area of combatting piracy given its universal approbation, would allow private

<sup>466.</sup> See supra notes 298–303 and accompanying text. Other exceptions for arms control regulations already exist. See, e.g., 22 C.F.R. §§ 123.16, .17 (2010) (listing several exceptions to the requirement).

<sup>467.</sup> Bento, *supra* note 36, at 452; Kraska & Wilson, *supra* note 14, at 264–65; Madden, *supra* note 14, at 151; Winn & Govern, *supra* note 14, at 144.

<sup>468.</sup> 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); *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 committed or attempted 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 citizen).

<sup>469.</sup> 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) ("[I]t 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.").

<sup>470.</sup> *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).

U.S.-flagged ships to capture and detain pirates without having to wait for a passing military vessel. U.S.-flagged ships 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.-flagged 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 cause of action. Even foreign-flagged vessels could be encouraged to bring civil claims in U.S. courts against pirates. The Alien Tort Statute (ATS), for example, grants U.S. district courts "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."<sup>471</sup> Piracy is one of the laws of nations encompassed under the ATS.<sup>472</sup> Encouraging civil suits in U.S. courts against pirates and those who assist them would be another mechanism for deterrence.

#### VII. CONCLUSION

Piracy is on the rise. Its actual and potential relationship to terrorism is unmistakable. While this nation laments not taking preventative action with regard to airplane hijacking prior to 9/11, it has an opportunity to avoid 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 United States and abroad. U.S. policymakers have made additional pledges to engage in further deterrence efforts.

But little will actually be done until the United States government and the American populace recognize piracy for what it truly is—a potentially devastating national security matter. Once this realization is made—hopefully before a crippling pira-terrorist attack—the United States will then need to take important steps to address the issue. Many such steps fall within the political and military realm, and thus are beyond the scope of this Article. Numerous options for improvement, including those offered in the prior section, exist in the legal arena, and must be seriously considered.

Fortunately, piracy is one of the few crimes of universal jurisdiction in the world. This is due to the long-held, world-wide repugnance for the act, which negatively impacts commerce as well as law and order, and threatens the very concept of nationhood. Addressing this considerable

<sup>471. 28</sup> U.S.C. § 1350 (2006).

<sup>472.</sup> Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).

threat should receive bipartisan support, domestically and internationally. While one person's terrorist may be another's freedom fighter, it is difficult to envision the same sentiment toward pirates. This agreement on preventing piracy gives the United States a tremendous opportunity to work with the world community to take action now, before a real crisis erupts. Piracy is nearing a tipping point: it, and its association with terrorism, is on the rise, but currently containable. The United States therefore needs to take appropriate steps to address this budding national security concern before it becomes a national security disaster. 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.