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Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations

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Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations

*Michael Bahar**

ABSTRACT

On January 21, 2006, a guided missile destroyer accomplished the U.S. Navy's first capture of suspected pirates in recent memory. As the Staff Judge Advocate for the NASSAU Strike Group, the Author advised the seizure, led the onboard

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This paper is dedicated to the memory of my grandfather, Sam Berger, who passed away while I was deployed and working on this paper. To borrow the words of Albert Camus, my grandfather was a man who truly compiled his life so that he should not be one of those who "hold their peace but should bear witness in favor of those plague-stricken people; so that some memorial of the injustice and outrage done them might endure; and to state quite simply what we learn in time of pestilence: that there are more things to admire in men than to despise."

The views expressed in this paper are the Author's own. They do not necessarily represent the views of the Department of Defense, the United States Navy, or any of its components. Approved for public release, Chief of Naval Operations (N09N2), 06-402, Aug. 21, 2006.

investigation, oversaw the shipboard detentions, and testified at the trial in Kenya.

Drawing upon this experience, the Author constructs a comprehensive legal and strategic theory for piracy, defining the legal status of pirates and deriving the due process rights that should be afforded them.

The Article also analyzes the evolution of customary and positive international law to demonstrate that, contrary to conventional wisdom, sufficient international law exists to counter the reemergence of piracy. It is sufficient to tackle the growing threat of piratical terrorism as well.

Finally, given the state of international law and the status of pirates as international maritime criminals, the Author argues that the United States should initiate seven domestic reforms and two regional reforms to achieve “optimal deterrence,” a naval posture sufficiently robust to minimize the economic, environmental, and humanitarian costs of piracy through strong multi-lateral and unilateral deterrence efforts, while maximizing the due process rights for detained individuals.

TABLE OF CONTENTS

I.	INTRODUCTION	3
II.	ENEMIES OF ALL MANKIND: UNIVERSAL JURISDICTION AND THE BASIC DEFINITION OF PIRACY	9
III.	THE THREE PERCEIVED “GAPS” IN THE BASIC DEFINITION.....	16
	A. <i>Piracy, for which Universal Jurisdiction Applies, Cannot Exist in Territorial Waters—Nor Should It.....</i>	18
	B. <i>Terrorism on the High Seas Can Equal Piracy Under International Law</i>	26
	C. <i>Piracy Without a Second Vessel Can Remain Piracy.....</i>	38
	D. <i>Conclusion.....</i>	40
IV.	THE LEGAL STATUS OF PIRATES AND THE SEVEN DOMESTIC REFORMS THAT DERIVE FROM IT	40
	A. <i>Affording Fourth Amendment Protection Rights at Sea.....</i>	44
	B. <i>Affording Fifth Amendment Rights While Maintaining Effective Investigations.....</i>	51

C.	<i>The Limited Role of AIS Within the SOLAS Convention</i>	56
D.	<i>Adding Greater Law Enforcement Training to VBSS Teams</i>	58
E.	<i>Exploring the Q-Ship Option</i>	61
F.	<i>Limited Authorization for Entry Within Twelve Nautical Miles of Somalia</i>	67
G.	<i>The Information Operations Campaign</i>	72
V.	REGIONAL PROPOSALS	74
A.	<i>Regional Security Arrangements with Direct U.S. Participation</i>	76
B.	<i>Regional Courts</i>	81
VI.	CONCLUSION	84

I. INTRODUCTION

He knew what those jubilant crowds did not know but could have learned from books: that the plague bacillus never dies or disappears for good; that it can lie dormant for years and years in furniture or linen-chests; that it bides its time in bedrooms, cellars, trunks and bookshelves; and that perhaps the day would come when, for the bane and the enlightening of men, it would rouse up its rats again and send them to die in a happy city.¹

On January 21, 2006, fifty-four nautical miles off the coast of Somalia, the U.S. Navy caught its first band of suspected pirates in recent memory. Ten Somali pirates had attacked an Indian dhow from three speedboats five days earlier, swarming the Indian vessel in the early morning hours and causing paralyzing fear with AK-47 bursts and shouldered rocket propelled grenade (RPG) launchers.

The Indian navigator reported that once onboard, the pirates herded the crewmembers into groups. They punctuated otherwise unintelligible orders with blows from the butts of the AK-47s and rusty pistols. The pirates made the sixteen crewmembers cook for them and directed that they take the dhow further out to sea to hunt for larger ships. It was the third of these attacks, against the motor vessel *Delta Ranger*, which proved their undoing.²

On January 20, the *Delta Ranger* reported shots fired from a dhow and three speedboats in tow. The ship managed to escape, and

1. ALBERT CAMUS, *THE PLAGUE* 278 (Stuart Gilbert trans., Alfred K. Knopf 1948) (1947).

2. Ed Jones, *Somali Pirates Gets Jail Sentence in Kenya*, KENYA LONDON NEWS NETWORK, available at http://www.int.iol.co.za/index.php?click_id=68&art_id=qw1162371420813B252&set_id=.

the U.S. Navy was called to intercept the alleged assailants. After launching helicopters, broadcasting warnings, and firing warning shots, the USS *WINSTON S. CHURCHILL*, a guided missile destroyer attached to the *NASSAU* Strike Group, managed to capture the pirates. Eight days later, the USS *NASSAU* flew the suspected pirates from its deck to Mombasa, Kenya, where their trial for piracy began. In October 2006, the ten Somalis were convicted of piracy and sentenced to seven years in Kenyan prison.

Three months after apprehending the ten pirates, *NASSAU* Strike Group assets engaged thirteen other suspected pirates, killing one and wounding five others in a high seas firefight that began when the suspects raised their weapons against the warships.³

Like Camus' plague, piracy has skulked behind cliffs and within coves for the past century, always present yet ever patient, biding its time before re-emerging with renewed fury. According to the London-based International Maritime Bureau (IMB), there were 329 reported cases of piracy worldwide in 2004.⁴ In 2005 the number of reported cases actually dropped 16%, due in part to increased naval presence, but there was also a marked increase (from two to thirty-five reported attacks) in the number of piratical attacks off the anarchic and violent coast of Somalia.⁵ Additionally, a total of twenty-three vessels were hijacked in 2005, the highest in four years, and 440 crewmembers were taken hostage, the highest number since IMB started compiling statistics in 1992.⁶ And these attacks are not at all like the romanticized swashbuckling of Hollywood buccaneers. Rather, they are often as brutal and sad as the lands from which these pirates hail.

While crews are beaten, sometimes killed, and often held hostage for long periods of time for ransom, the global economic consequences are similarly dire and extend far beyond the small dhows and cargo ships actually attacked. The IMB estimates that piracy costs transport vessels \$13-15 billion a year in losses in the waters between the Pacific and Indian oceans alone.⁷ Small cargo dhows, for example,

3. In April 2006, however, after a six-week investigation and afloat detention, the decision was made to repatriate to Somalia via Mombasa rather than prosecute. In part because there was insufficient evidence to convict these individuals of piracy vice armed assault upon federal officers, this Article will rely far more extensively upon the *Safina al Bisarat* incident for insights and examples.

4. ICC INT'L MAR. BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS 16 (2006) [hereinafter 2005 PIRACY REPORT] (finding that "the total number of worldwide reported attacks dropped to 276 compared to 329 in 2004").

5. *Id.* The Report also indicates that after the Tsunami, no reports were filed for two months. *Id.* at 15. Such a lack of reported incidents could also be the result of a decrease in the number of piracies. *Id.* at 16.

6. *Id.*

7. Margaret Ryan, *Captain Counts the Cost of Piracy*, BBC NEWS, Feb. 2, 2006, <http://news.bbc.co.uk/1/hi/world/africa/4669050.stm>.

are extending their routes to remain at least 200 miles off Somalia's east coast per IMB's guidance.⁸ They have complained that the excess fuel and opportunity costs associated with "the long route" are crippling, tempting some to cut corners, gambling against the house with their lives.⁹ While the chilling effect on international trade is substantial, pirates have also begun to directly target tourists. In November 2005, passengers on the cruise ship *Seabourne Spirit* described the horrors as Somali pirates in speedboats attacked them with AK-47 bursts and shouldered RPG launchers.¹⁰

Worse is the potential for piratical terrorism. As one commentator has warned, "[j]ust as terrorists learned to be pilots for 9/11, terrorists may now be learning to be pirates."¹¹ Citing the example of the March 2003 hijacking of the chemical tanker *Dewi Madrim* in which the Indonesian-speaking attackers "seemed primarily interested in practicing to steer the ship down the congested waterway," Burnett has noted that intentionally grounding a crude carrier hauling 2 million barrels of oil at a place like Batu Berhanti, where the Straits of Malacca are a mere 1.5 miles wide, would close the waterway indefinitely.¹² The resultant "delay in oil supplies to China, Japan, and South Korea could devastate their economies, setting off a global economic crisis."¹³

Unlike prosecutions for crimes against humanity, the fight against piracy is occurring every day. Unlike traditional naval battles, maritime security operations (MSOs) of the counter-terrorism and law enforcement variety are the way of the present and future.

8. 2005 PIRACY REPORT, *supra* note 4, at 15; see also *Pirate Attacks Ease Worldwide in 2005*, MALAYSIA STAR, Jan. 31, 2006, available at <http://thestar.com.my/news/story.asp?file=/2006/1/31/nation/20060131110121&sec=nation>.

9. Interview with First Mate of the *Safina al Bisarat*, onboard USS NASSAU (LHA 4) (Jan. 22, 2006).

10. Matt Cherry & Amanda Moyer, *Cruise Liner Outruns Armed Pirate Boats*, CNN.COM, Nov. 5, 2005, <http://www.cnn.com/2005/WORLD/africa/11/05/somalia.pirates/>.

11. John S. Burnett, Op-Ed., *The Next 9/11 Could Happen at Sea*, N.Y. TIMES, Feb. 22, 2005, at A17; see also Dan Ephron, *Terror on the High Seas: Piracy off the Coast of Somalia is a Growing Concern, But Al Qaeda Could Make a Big Problem Much Bigger*, NEWSWEEK, Apr. 11, 2006, available at <http://www.msnbc.msn.com/id/12213087/site/newsweek/from/ET/>.

12. Ephron, *supra* note 11; see also WILLIAM LANGEWIESCHE, *THE OUTLAW SEA: A WORLD OF FREEDOM, CHAOS AND CRIME* 47-48 (2004) (arguing that a maritime terrorist attack using merchant ships poses the "most serious threat to national security"); cf. Charles N. Dragonette, *Lost at Sea*, FOREIGN AFF., Mar.-Apr. 2005, at 174 (arguing that there was "no evidence" that the *Dewi Madrim* affair was a terrorist attack). Regardless of whether it was, in fact, a terrorist attack, the hijacking should nevertheless highlight the frightening capabilities and potential for one. This Article will not seek to prove a nexus in individual cases, but will demonstrate that the law, contrary to the opinions of many authors, supports essential maritime security operations against both piracy and maritime terrorism.

13. Burnett, *supra* note 11.

Thus, legal theories are needed, just as much as are the strategic options that flow from them.

What follows, therefore, is just such a legal and strategic theory for piracy, closing a serious gap. As the first point of order, it is crucial to recognize that contrary to the assertions of many commentators, authors, and practitioners, sufficient international law exists to enable the military and diplomats to counter piracy, as well as its more virulent strain of piratical terrorism. The first two Sections of this Article comprehensively explore the crime of piracy and piratical terrorism and stress that few, if any, legal changes need to occur at the international level to effectively combat the problems. Most important, this Article demonstrates that terrorism on the high seas can equal piracy under international law.

On the domestic front, this Article advocates a series of domestic reforms that reside at the intersection of international and domestic law and at the crossroads of law and strategy. Most critical, Part III defines the legal status of pirates and the optimal set of rights that flow from that status.

Pirates are not combatants or enemy prisoners of war, but they are international maritime criminals entitled to international and constitutional due process protections while in U.S. custody. Overall, the defined status and proposed reforms will increase the overall efficacy of anti-piracy efforts while maximizing the rights of those captured.

Part IV offers a pair of regional solutions, again taking the established state of international law as a given. First, the United States must promote regional security arrangements consisting of not only coordinated patrols, but joint patrols as well. Second, the United States should advance a regional court to prosecute pirates on the basis of universal jurisdiction. These specialized courts would acquire the necessary expertise and resources, the appropriate rules of evidence, and would exploit such economies of scale for efficient and just prosecution throughout affected regions, while helping spread the value and example of the rule of law.

Ultimately, this Article calls for a regime of optimal deterrence, a determined point between the poles of maximum military pursuit and neglect. International law will support a robust high seas military presence coupled with domestic prosecutions that will deter pirates and thereby save the industry vast sums of money and mariners their lives. It will also help protect the seas from the disastrous economic, political, environmental, and humanitarian consequences of piratical terrorism.

But optimal deterrence argues that too aggressive a military and investigatory response will actually increase both the costs and the dangers of piracy. First, it will diminish the prospects of effective prosecution. If in the effort to deter pirates and to crack the piratical

enterprise of modern piracy domestic and international due process rights are not respected, nations will reject U.S. efforts to turn over seized pirates for prosecution, and courts, including U.S. courts, will likely suppress evidence derived.

Second, excess militarily and investigatory zeal will cause coalition flight. While there is much the United States as preeminent naval power can accomplish, the only key to successful maritime security over the vast oceans is multilateralism. As the President's National Strategy for Maritime Security rightfully concludes:

Even an enhanced national effort is not sufficient. The challenges that remain ahead for the United States, the adversaries we confront, and the environment in which we operate compel us to strengthen our ties with allies and friends and to seek new partnerships with others. Therefore, international cooperation is critical to ensuring that lawful private and public activities in the maritime domain are protected from attack and hostile or unlawful exploitation.¹⁴

Few governments will join what the Chief of Naval Operations calls the "proverbial 1000-ship Navy" comprised of many nations,¹⁵ if the United States is perceived, in yet another arena, as unduly aggressive.¹⁶ On the other hand, a strategy that is less aggressive but multilateral will be far more effective.

Third, too great a military presence and too aggressive an investigative policy will prove counter-productive by fueling an anti-American ire that has proven the lifeblood of international terrorists. Somalia, Indonesia, and Malaysia are overwhelmingly Muslim.¹⁷ Anti-Americanism born of excess U.S. aggression into other relatively poor, predominantly Muslim regions increases the number of extremists who can be recruited into violent movements such as al Qaeda.

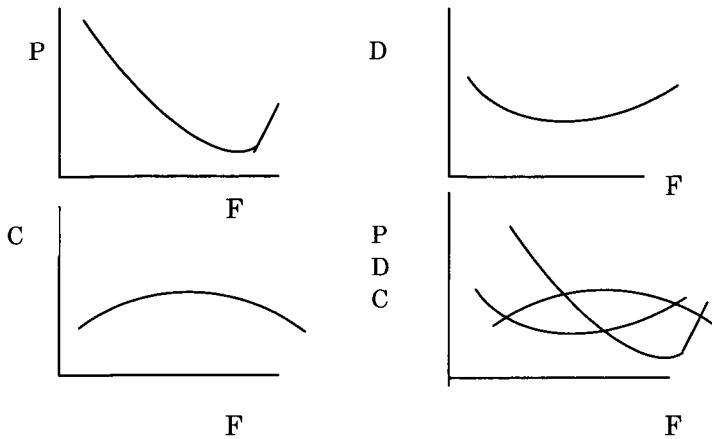
14. DEPT OF DEF. & HOMELAND SEC., THE NATIONAL STRATEGY FOR MARITIME SECURITY 25 (2005) [hereinafter THE NATIONAL STRATEGY FOR MARITIME SECURITY].

15. Christopher P. Cavalas, *New U.S. Navy Chief Wants "1,000-Ship" International Navy*, DEFENSENEWS.COM, Aug. 28, 2006, <http://www.defensenews.com/story.php?F=1076711&C=navwar>.

16. See, e.g., Stephen M. Walt, *Taming American Power*, FOREIGN AFF., Sept. 1, 2005, at 105 (arguing that when "foreign populations disapprove of U.S. policy and are fearful of U.S. dominance, their governments are less likely to endorse Washington's initiatives and more likely to look for ways to hinder them").

17. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2006), available at <https://www.cia.gov/cia/publications/factbook/index.html> (finding Muslim the majority religious group in Somalia, Indonesia and Malaysia).

Optimal deterrence can be conceptualized as follows:



As the charts above illustrate, the level of naval force (F) is inversely proportional to the costs to international commerce of piracy (P).¹⁸ The more pronounced a military presence in an area, the more shipping will move freely through the areas and transit costs will decrease. Even scaling back the 200-mile bubble around Somalia to its territorial seas of twelve nautical miles, for example, will save merchant vessels significant transit time, food and fuel costs, wages, and other opportunity costs. Insurance premiums would abate as well.¹⁹ The dangers of piracy and maritime terrorism (D) will also decrease with a stronger military presence. In July 2005, for example, Indonesia launched an offensive known as “Gurita 2005” which, according to the IMB, accounted for its “dramatic reduction” in

18. For purposes of this Article, the costs of U.S. naval patrols will be held as fixed. Unless additional assets are deployed specifically for counter-piracy operations, vessels already scheduled for deployments will simply be tasked within that deployment to patrol piracy areas. The costs of naval patrols for other countries, as well as ways to reduce U.S. counter-piracy costs, however, will be discussed.

19. The Straits of Malacca were added to Lloyd’s Market Association Joint War Committee (JWC) War Risk List in June of 2005, placing them in the same category as Somalia, Iraq, and Lebanon. Underwriters now have the discretion of charging extra premiums for vessels operating in the straits. In January 2006, the committee noted the significant security improvements in the Straits region but nevertheless stated that it was still too soon to know if the improvements were long-term or simply a short-term fix. In August 2006, in response to tri-lateral efforts, see *infra* note 373 and accompanying text, the Straits were taken off the list. See James Brewer, *Malacca Strait Declared a High Risk Zone by Joint War Committee Casualty*, LLOYD’S LIST, July 1, 2005, at 3, available at <http://www.the-lma.com/DocImages/5353.htm> (finding the Malacca straight “one of the world’s busiest shipping lanes” and asserting the new guidelines to underwriters will “give them more bargaining ammunition with shipowners”).

number of attacks.²⁰ Finally, as effectiveness increases with forcefulness, coastal nations will want to be part of the successful effort (C).

However, the graphs also portray the tipping points. Too aggressive an anti-piracy effort, both militarily and investigatory, will begin to attract greater terrorist activity, which is devastatingly expensive and tremendously dangerous. Increasing the level of aggressiveness too much also risks losing coalition members.

Thus, optimal deterrence is a comprehensive legal and strategic theory for anti-piracy specifically and for naval constabulary operations in general. It reveals international law as sufficiently enabling; defines the status of detained pirates; proposes domestic legal and operational reforms; and advances a military posture, both sufficiently pronounced as well as sufficiently restrained.

II. ENEMIES OF ALL MANKIND: UNIVERSAL JURISDICTION AND THE BASIC DEFINITION OF PIRACY

On January 20, 2006, the merchant vessel *Delta Ranger* came under attack by ten Somali men armed with AK-47s and RPG launchers.²¹ The Somalis approached at high rates of speed in small skiffs, approximately 210 nautical miles off the Somali coast.²² Through defensive maneuvers and rudder swings, *Delta Ranger* was able to escape the attack, but it sustained bullet holes in its hull.²³ By the time the Navy could respond the next day, it found two skiffs attached to one Indian dhow, the *Safina al Bisarat*, with the ten men holding captive sixteen Indian crewmembers.²⁴ Was this piracy?

20. 2005 PIRACY REPORT, *supra* note 4, at 31.

21. See U.N. Sec. Council, Report of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1630, at 29, U.N. Doc S/2006/229 (2005), available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Somalia%20S2006229.pdf>.

22. See *id.* (placing the hijacking “about 300 kilometers off the Somali coast”).

23. See *id.*

In this instance, the name of the [attacked] vessel [was] known: the Bahamas-registered bulk carrier *MV Delta Ranger*. Little did the pirates know that this attack would trigger a chain of events that would make it their last. The *MV Delta Ranger* reported the attack to the International Maritime Bureau (IMB) at Kuala Lumpur. The hunters had now become the hunted.

Id.

24. See US Navy capture pirates, SHIPTALK.COM, Jan. 22, 2006, <http://www.shiptalk.com/index.asp?ItemID=249&rcid=149&pcid=148&cid=149> (“The Navy says sailors discovered 16 Indians and 10 Somalis aboard the vessel (a dhow), along with various small arms.”).

Yes, it was piracy, both against the *Delta Ranger* and the *Safina al Bisarat*. According to Article 101 of the 1982 United Nations Law of the Sea (UNCLOS)²⁵ and Article 15 of the Geneva Convention on the High Seas (High Seas Convention),²⁶ piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).²⁷

The United States is not a party to UNCLOS, but it is a party to the 1958 High Seas Convention. Regardless, the definition of piracy contained within both these treaties has become customary international law, binding on all nations, including the United States.²⁸

The Somali men in the first instance committed an act of illegal violence against *Delta Ranger*, on the high seas, against another ship, for private ends. The same Somalis were pirates for hijacking the Indian dhow. In fact, on January 16, 2006, these same ten men allegedly chased down *Safina Al Bisarat* in their skiffs, fired AK-47s in the air, aimed RPG launchers, and eventually boarded the hapless

25. United Nations Convention on the Law of the Sea art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

26. Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 [hereinafter High Seas Convention].

27. UNCLOS, *supra* note 25, at art. 101; High Seas Convention, *supra* note 26, at art. 15.

28. Customary international law is comprised of those practices and customs that states view as obligatory and that are engaged in or otherwise acceded to by a preponderance of states in a uniform and consistent fashion. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 5-7 (Oxford Press 1998) (1966); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (stating that customary international law “results from . . . [the] consistent practice of states followed by them from a sense of legal obligation”). According to the Restatement, “by express or tacit agreement accompanied by consistent practice, the United States, and states generally, have accepted the substantive provisions of the Convention, other than those addressing deep sea-bed mining, as statements of customary law binding upon them apart from the Convention.” *Id.* Pt. V, introductory note.

dhow in the hopes of using it as a “mother ship” from which to commit other attacks, one of which against the *Delta Ranger*.²⁹

Just because their armed attack, on the high seas, from a second vessel, and for private ends qualifies the ten Somalis as pirates *iure gentium*, how can the international community that promulgated this definition hold the men themselves accountable? In other words, with international law applying among states, and with pirates being non-state actors by definition, how can “pirates” be convicted of the crime of piracy?

The answer lies in universal jurisdiction. Under international law, any person who fits the international definition of a pirate can be prosecuted by any state, based on that state’s own anti-piracy laws.³⁰ Piracy, in fact, is the oldest offense that invokes this powerful jurisdictional brand, dating back as far as the sixteenth century.³¹ Even before there was such a thing as “international law” in the modern sense, pirates were considered *hostis humani generi*—enemies of all mankind.³² The English Act of Henry VIII of 1516 extended the jurisdiction of the Crown to pirates.³³ In 1615, British courts determined “*pirata est hostis humani generis*.”³⁴ In 1822, a U.S. federal judge wrote that, “[N]o one can doubt that vessels and property in the possession of pirates may be lawfully seized on the high seas by any persons, and brought in for adjudication.”³⁵

29. See U.N. Sec. Council, *supra* note 21, at 29.

30. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

31. See Willard B. Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CAL. L. REV. 177, 181-94 (1945); cf. Edwin D. Dickinson, *Is The Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334, 335-39 (1925) (dating pirates as the enemies of all mankind subject to universal jurisdiction to at least as early as the seventeenth century); see also Zou Keyuan, *Implementing the United Nations Convention on the Law of the Sea in East Asia: Issues and Trends*, 9 SING. J. INT’L & COMP. L. 37, 44 (2005) (explaining that piracy existed in the East Asian region as early as the fourteenth century). During Zheng He’s seven voyages to the Indian Ocean during the Ming Dynasty (1405-1433 A.D.), he undertook action to suppress pirates in the South China Sea and Southeast Asia to bring order and maintain a degree of peace in the region.

32. Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 TEX. L. REV. 785, 791 (1988).

33. An Act for the punishment of pirates and robbers of the sea, 1516, 39 Hen. 8, c. 15 (Eng.); *In re Piracy Jure Gentium*, [1934] A.C. 586, 837 (P.C.) (U.K.).

34. *King v. Marsh*, (1615) 81 Eng. Rep. 23 (K.B.).

35. *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 843 (C.C.D. Mass. 1822) (No. 15,551); see also *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844) (“A pirate is deemed, and properly deemed, *hostis humani generis*.”); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 156 (1820) (“The common law, too, recognizes and punishes piracy as an offence, not against its own municipal code, but as an offence against the law of nations (which is part of the common law), as an offence against the universal law of society, a pirate being deemed an enemy of the human race.”); 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 951-68 (1906).

In the mid-nineteenth century, the modern movement toward formalizing piracy's ignominious status in treaties began.³⁶ During the eighteenth and nineteenth centuries, nations actually used pirates to harass their enemies' merchant shipping.³⁷ The letter of marque, issued to such historical luminaries as Francis Drake and Walter Raleigh, was an official commission to engage in piracy.³⁸ After a series of draconian laws passed by George I of England effectively banished pirates from the Atlantic, the famed Mediterranean corsairs became the "maritime mercenaries" of choice.³⁹ Once the wars ended, however, the corsairs continued their piratical ways⁴⁰—much to the chagrin of the European nations. With trade flourishing in the relative calm of Napoleon's demise and Metternich's Concert, nations no doubt began to increasingly view piracy as detrimental to their commercial and imperial interests. Therefore, to counter a menace that attacked all nations indiscriminately and that could not be controlled by the normal means of state-on-state diplomacy or warfare,⁴¹ they signed the Declaration of Paris in 1856.⁴² At the same time the major powers

36. Prior to the modern era, perhaps the earliest multilateral efforts against piracy were those undertaken by the cities of the Hanseatic League from the thirteenth century onward. At its beginning, the Hanseatic League united German cities because defense at sea was necessary against the swarms of pirates in the Baltic, North Sea, and elsewhere. See Samuel J. Menefee, *The New "Jamaica Discipline": Problems with Piracy, Maritime Terrorism and the 1982 Convention on the Law of the Sea*, 6 CONN. J. INT'L L. 127, 133 (1990).

37. Douglas R. Burgess, Jr., *The Dread Pirate Bin Laden*, LEGAL AFF., July-Aug. 2005, at 32, 34 ("Queen Elizabeth viewed English pirates as adjuncts to the royal navy, and regularly granted them 'letters of marque' (later known as privateering, or piracy, commissions) to harass Spanish trade.").

38. *Id.* Burgess further explains that while issuing these letters of marque, the queen of England, for example, could preserve the vestiges of diplomatic relations, reacting with feigned horror to revelations of the pirates' depredations:

Witness, for example, the queen's disingenuous instructions saying that if Raleigh "shall at any time or times hereafter robbe or spoile by sea or by lance, or do any acte of unjust or unlawful hostilities [he shall] make full restitution, and satisfaction of all such injuries done." When Raleigh did what Elizabeth had forbidden—namely, sack and pillage the ports of then-ally Spain—Elizabeth knighted him.

Id.

39. *Id.*

40. See *id.* ("The corsairs refused to curtail their activities after each war's conclusion, and the states realized that they had created an uncontrollable force.").

41. Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention of Maritime Safety*, 82 AM. J. INT'L L. 269, 287-88 (1988).

42. Declaration Respecting Maritime Law, Apr. 16, 1856, available at <http://www.icrc.org/IHL.nsf/INTRO/105?OpenDocument>.

were concluding the Crimean War, they abolished state-sponsored piracy.⁴³

Until recently, however, universal jurisdiction over piracy was largely thought to be a historical artifact with little or no modern relevance. The *NASSAU* Strike Group has proven that assumption itself to be outdated. Today, Article 105 of UNCLOS, which is identical to Article 19 of the 1958 High Seas Convention, provides:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ship, aircraft or property, subject to the rights of third parties acting in good faith.⁴⁴

This provision indicates that parties have the right, but not the obligation, to assume jurisdiction over piratical acts with which they have no direct connection.⁴⁵ Nonparties to the Convention may assert universal jurisdiction over piracy under customary international law.⁴⁶ The state that flagged the pirate vessel will retain jurisdiction, if the vessel is indeed flagged—unlike the skiffs used by the Somali pirates⁴⁷—but under universal jurisdiction it will

43. In 1861, at the beginning of the Civil War, the United States, while not a signatory to the Declaration, announced that it would nevertheless respect the principles of the Declaration for the duration of the hostilities. *See id.* Additionally, in 1898 during the war against Spain, it was affirmed that the policy of the government of the United States would be to abide by the provisions of the Declaration throughout the hostilities. The rules laid down in the Declaration were later considered part of general international law, and even the United States, which is not formally a party thereto, abides by its provisions. *Id.*; *see also* Menefee, *supra* note 36, at 133; Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 239 n.26 (1990).

44. UNCLOS, *supra* note 25, at art. 105; High Seas Convention, *supra* note 26, at art. 19.

45. Randall, *supra* note 32, at 792.

46. *Id.*; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 404, 423 (1987) (identifying piracy as one of the offences that the universality principle permits the United States and other states to define and adjudicate).

47. Even if the pirate skiff, or any pirate vessel, flies an actual state's flag, it can nevertheless be considered a vessel over which no national authority reigns if the flag state deems as such. *See* UNCLOS, *supra* note 25, at art. 104 ("A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the state from which such nationality was derived."). Flying false colors renders the same result. *See* *United States v. Marino-Garcia*, 679 F.2d 1373, 1378-79 (11th Cir. 1982), *cert. denied*, 459 U.S. 114 (1983). Thus, the pirates lose the protection of legitimate state affiliation and, in turn, the flag state loses only its ability to claim *exclusive* jurisdiction. *See* Harvard Research in Int'l Law, *Draft Convention and Comment on Piracy*, 26 AM J. INT'L L. 739, 760-64, 825 (Supp. 1932) [hereinafter Harvard Research].

simply lose its *exclusive* jurisdiction normally permitted to its own vessels and nationals under the law of the sea.

In the United States, for example, Article 1, Section 8 of the Constitution provides that: "The Congress shall have Power . . . to define and punish piracies and felonies committed on the high seas, and offences against the Law of Nations." Congress has exercised this power by enacting Title 18 U.S. Code Section 1651 which provides that: "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."⁴⁸

In Kenya, where the ten Somalis were tried, Section 69 of the Kenyan penal code similarly cites the law of nations in its piracy statute: "Any person who, in territorial waters or upon the high seas, commits any act of piracy *jure gentium* is guilty of the offence of piracy."⁴⁹ The High Court of Malaysia has jurisdiction to try all offences committed within its local jurisdiction, on the high seas on board any Malaysian-flagged vessel, by any Malaysian citizen or resident on the high seas, and "by any person on the high seas where the offence is piracy by the law of nations."⁵⁰

But why exactly was *universal* jurisdiction required? Bart Simpson's understanding of the "high seas" as a lawless wild west, while humorous, reflects a popular misconception. Universal jurisdiction does *not* fill any actual jurisdictional gaps. The high seas, absent universal jurisdiction, would not be a proverbial no-man's land, a safe haven for miscreants. After all, pirates do not commit

48. 18 U.S.C. § 1651 (1988); *see also* §§ 1652-1653, 1654-1661 (Piracy and Privateering); §§ 381-384 (Regulations for the Suppression of Piracy). While U.S. law makes criminal those acts proscribed by international law as piracy, other provisions of U.S. municipal law proscribe related conduct. For example, U.S. law makes criminal arming or serving on privateers, § 1654, and assault by a seaman on a captain so as to prevent him from defending his ship or cargo, § 1655. Although international law is law of the United States, a person cannot be tried in the federal courts for an international crime unless Congress adopts a statute to define and punish the offense. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 111, 422 cmt. a (1987); *see also* United States v. Coolidge, 14 U.S. (1 Wheat.) 415 (1816) (finding no federal common law crimes in United States); United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812). The act of Congress may, however, define the offense by reference to international law. *See In re Yamashita*, 327 U.S. 1, 7-8 (1946); *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942); United States v. Smith, 18 U.S. (5 Wheat.) 153, 156 (1820). The language of 18 USC § 1651 (1948) (Piracy Under the Law of Nations) might suggest that the United States would have to wait until a pirate is in the United States before taking any action against him. However, in *United States v. Yunis*, 924 F.2d 1086, 1091-93 (D.C. Cir. 1991), the court determined that it had jurisdiction over a defendant accused of aircraft piracy under a statute with a similar jurisdictional provision, even though the only reason he was in the United States was because he had been forcibly taken there.

49. Penal Code of Kenya (1967) Cap. 8 § 69(1), 24 s. 6.

50. Courts of Judicature Act § 22(1)(a)(iv) (1964) (Malaysia).

their acts in the water, but on, and against, other ships. Vessels on the seas have always been considered within the territorial jurisdiction of their flag state, and that state retains jurisdiction over the pirates that attacked its ship.⁵¹ Moreover, both the pirates and their victims have come from somewhere; thus, the crime could have been within the jurisdiction of their home states.⁵²

Universal jurisdiction actually solves the problem of enforcement. Ruth Wedgwood explains that relying on nationality for jurisdiction was problematic because nationality was not always clear: “[T]he basis for ascribing human nationality may be birthplace, genealogical descent, prior oath-taking, or current profession of allegiance.”⁵³ Additionally, ships can change (and feign) nationality by conveyance of title or by hoisted flag, complicating any claim of exclusive jurisdiction.⁵⁴ Concurrent jurisdiction had the “considerable virtue of permitting any nation catching an offender to act upon his wrongs—without resolving the fine points of a theory of exclusive jurisdiction, and without facing the political, moral, and legal concerns of aiding a foreign system of justice.”⁵⁵ In sum, as Professor Anne-Marie Slaughter explains, universal jurisdiction is the “way in which international law has responded to the pragmatic

51. See *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 4, 18-19 (Sept. 7) [hereinafter *S.S. Lotus*]; see also Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals about the Limits of the Alien-Tort Statute*, 80 NOTRE DAME L. REV. 111, 151 (2004).

52. See *S.S. Lotus*, *supra* note 51, at 18 (finding that “the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offenses, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offense, and more especially its effects, have taken place there”). In general, customary international law recognizes four bases on which a state may exercise criminal jurisdiction over a citizen or non-citizen for acts committed outside of the prosecuting state, in addition to universal jurisdiction. These four well-recognized bases of criminal jurisdiction are: (1) the “objective territorial principle,” which provides for jurisdiction over conduct committed outside a state’s borders that has, or is intended to have, a substantial effect within its territory; (2) the “nationality principle,” which provides for jurisdiction over extraterritorial acts committed by a state’s own citizen; (3) the “protective principle,” which provides for jurisdiction over acts committed outside the state that harm the state’s interests; and (4) the “passive personality principle,” which provides for jurisdiction over acts that harm a state’s citizens abroad. See generally *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 n.7 (D.C. Cir. 1984) (Edwards, J., concurring); *In re Marc Rich & Co.*, 707 F.2d 663, 666 (2d Cir. 1983) (citing *Introductory Comment to Research on International Law, Part II, Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT’L L. 435, 445 (Supp. 1935)); *United States v. Marino-Garcia*, 679 F.2d 1373, 1380-83 & nn.13-16 (11th Cir. 1982); *United States v. Pizarusso*, 388 F.2d 8, 10-11 (2d Cir. 1968).

53. Wedgwood, *supra* note 43, at 239.

54. *Id.*

55. *Id.*

difficulties . . . of prosecuting offences recognized as illegal in domestic legal systems around the world.”⁵⁶

It is upon this impetus behind universal jurisdiction that the United States, and other nations, must capitalize. The status of pirates as subject to universal jurisdiction will remain secure, at least for the foreseeable future. If trade and imperial ambitions initially motivated the Europeans to ban state-sponsored privateering (and thereby all forms of piracy), the fact that approximately 90% of current world trade is conducted through maritime channels⁵⁷ will likely mean that states (especially maritime states) will have very little incentive to revoke pirates’ status as global outlaws. Additionally, with 50,000 vessels transiting the multi-nation Straits of Malacca each year,⁵⁸ the pragmatic need for universal enforcement seems just as certain.

While these facts emphasize the need and benefit of regional/coalition security arrangements, to be discussed in depth below, they also reveal a caveat. States, concerned with countering a common threat, are also wary lest any common actions infringe on their sovereignty.⁵⁹ Any regional/coalition security arrangements, or any proposed changes to the law of piracy, which would threaten territorial sovereignty are likely to fail. Universal jurisdiction authorized a common pursuit and prosecution, but only outside the jurisdiction of any state—a fact to be further analyzed in the next Part.

III. THE THREE PERCEIVED “GAPS” IN THE BASIC DEFINITION

The key to effective anti-piracy operations, as well as counter maritime terrorism, is availing the United States and coalition members of universal jurisdiction. Meeting the international definition of piracy affords the United States and its partners the first crack at prosecuting those now detained in their brigs, or just as important, affords them the largest set of available countries to which to turn over those they capture. After a one-week investigation into the ten Somali pirates from the *Safina*, the United States decided not

56. Anne-Marie Slaughter, *Defining the Limits: Universal Jurisdiction and National Courts*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 168-69 (Stephen Macedo ed., 2004).

57. International Maritime Organization, Introduction to the IMO, http://www.imo.org/about/mainframe.asp?topic_id=3.

58. 2005 PIRACY REPORT, *supra* note 4, at 32.

59. Halberstam, *supra* note 41, at 287-88.

to prosecute and found a willing partner in Kenya.⁶⁰ For the March incident, which involved the death of one Somali, we found it impossible to find any nation willing to prosecute. The difference between the two is that in the former, the elements of piracy were sufficiently met to afford universal jurisdiction, while in the latter, there was not enough evidence to meet the elements of UNCLOS Article 101.

Thus, it is essential to fully understand Article 101. While there may be at least six different meanings of “piracy” circulating among various domestic and international laws,⁶¹ the UNCLOS definition is the binding “black letter law” applicable to all nations.⁶² It is the starting point for any discussion on how nations, as opposed to statistical agencies or insurance companies, should respond to the resurgence of piracy.

The Safina incident was straightforward—there was an armed attack, on the high seas, for private ends, by another ship—but other situations will not always be that easy. What if the attack occurred within a nation’s territorial seas? What if the suspected pirates were “freedom fighters”? What if the suspected pirates had posed as legitimate crewmembers rather than attacking from skiffs? These questions will illustrate the three purported “gaps” in the UNCLOS definition: (1) its limitation of piracy to the high seas; (2) its “for private ends” provision; and (3) its two-ship requirement. Only the first, however, will prove a true gap. Despite the hopes of many theorists, closing that gap through international legal reform will prove improbable, as well as inadvisable.

As for the latter two, neither will prove a gap at all. Despite conventional wisdom to the contrary, freedom fighters or political terrorists can be pirates, and no second ship is necessarily required for piracy.

In essence, piracy analysis turns on the relationship among the act, actors, and states. If the piratical act occurs within a state’s jurisdiction, or if the pirates (or their specific acts) are commissioned by a state, then the act is not piracy. The harmed states can seek redress to deter future attacks through diplomatic and military channels. If, on the other hand, the act has no state connection, then the only means of redress is through criminal or constabulary means.

60. U.S. Embassy, Pub. Affairs Section, Capture of Suspected Somali Pirates (Feb. 2, 2006), <http://usembassy.state.gov/nairobi/wwwhsusopir.html>.

61. See Lawrence J. Kahn, *Pirates, Rovers, and Thieves: New Problems with an Old Enemy*, 20 TUL. MAR. L.J. 293, 295-96 (1996).

62. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt. V, introductory note (1987) (“Where the Convention reflects customary law, this Restatement generally uses the language of the Convention as a ‘blackletter’ statement of international law.”).

Subjective intent of the attackers does not alone establish the necessary state connection.

A. *Piracy, for which Universal Jurisdiction Applies, Cannot Exist in Territorial Waters—Nor Should It*

Suppose that the armed attack on the *Delta Ranger* and the *Safina Al Bisarot* occurred less than twelve nautical miles from Somalia. Would that attack still be considered piracy?

No. An armed attack on a ship committed 12.1 nautical miles out to sea differs from the exact same act 11.9 miles out to sea in that the former, under *international* law, is piracy, and the latter is not. The connection of the act to the state is the determinative factor.

Seaward of twelve nautical miles from a coastal state's "baseline" are its territorial seas.⁶³ Territorial seas are subject to the territorial sovereignty, and thus criminal codes and local courts, of coastal nations.⁶⁴ If the armed act occurs within the territorial seas of a country, it is a violation of that country's municipal code, just as if a robbery occurred in one of that nation's cities. Of course, a municipal code could refer to those acts as piracy, but they would not be piracy *iure gentium*, and consequently those acts would not trigger universal jurisdiction. Accordingly, the right and responsibility for enforcing domestic law in territorial waters befalls the coastal state, and personal jurisdiction attaches.

Outside territorial waters, however, there is limited coastal state jurisdiction and therefore limited enforcement ability.⁶⁵ International waters are those in which all nations enjoy high seas freedoms of navigation and over-flight.⁶⁶ No nation, with limited exceptions for

63. UNCLOS, *supra* note 25, at art. 2. The United States claims a twelve nautical mile territorial sea and recognizes territorial sea claims of other nations up to a maximum breadth of twelve nautical miles. See President's Statement on the Law of the Sea (Mar. 10, 1983), available at www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/USA_1983_Statement.pdf ("[T]he United States will recognize the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and other under international law are recognized by such coastal states.").

64. Convention on the Territorial Sea and Contiguous Zone arts. 1-2, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205 [hereinafter *Territorial Sea Convention*]; UNCLOS, *supra* note 25, at art 2.

65. As one moves beyond the territorial waters, a coastal state still retains some jurisdiction and enforcement abilities in what is known as its contiguous zone. Within that zone, the coastal state may exercise the control necessary to prevent or punish infringement of its navigation, sanitation, customs, and fiscal and immigration laws and regulations. UNCLOS, *supra* note 25, art. 3.3. Violent crimes, however, are not part of the jurisdictional reach of the contiguous zone. *Id.*

66. RICHARD J. GRUNAWALT, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 1.5 (1997) [hereinafter *COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS*].

exclusive economic zones (EEZ), may exercise its jurisdiction over the high seas.⁶⁷ Thus, if an armed attack occurs on a vessel within a nation's territorial waters, it will be up to the coastal state to repress and prosecute that act under its domestic law.⁶⁸

There is no problem with such a setup so long as the coastal state: (a) has a municipal law proscribing such attacks; (b) is willing to enforce it; and (c) is physically able to do so.

Think, however, about Somalia. Since 1991, that nation has had no functioning government, no real laws, and no enforcement power.⁶⁹ When asked why he and his compatriots were caught with weapons, one of the ten suspected Somali pirates simply responded to me, "I am Somali; the gun is our government." Pottengal Mukundan, Director of the IMB, stated that the absence of an effective government in Somalia amounted to a "pirates' charter."⁷⁰ Lacking such a government, Somalia has no formal maritime defense forces,⁷¹ and thus it ranked second highest in the world for reported piracy attacks. In 2005, it was considered the most dangerous nation in

67. UNCLOS piracy provisions do apply to the EEZ. See UNCLOS, *supra* note 25, at art. 58(2) (noting high seas provisions apply to EEZ unless displaced). After all, pursuing pirates does not impinge on any economic rights reserved to coastal states. See, e.g., Thomas A. Clingan Jr., *The Law of Piracy*, in PIRACY AT SEA 170 (Eric Ellen ed., 1989).

68. See generally UNCLOS, *supra* note 25, at arts. 21, 27.

69. See U.S. Dep't of State, Background Note: Somalia, <http://www.state.gov/r/pa/ei/bgn/2863.htm> (last visited Nov. 19, 2006) [hereinafter Background Note: Somalia] ("Somalia has been without a central government since 1991, and much of the territory has been subject to serious civil strife."). A two-year reconciliation process led by the Inter-governmental Authority on Development (IGAD), however, concluded in 2004. IGAD resulted in the formation of a transitional government, the components of which are known as the Somalia Transitional Federal Institutions (TFIs). The TFIs include a transitional parliament, known as the Transitional Federal Assembly (formed in August 2004), as well as a Transitional Federal Government (TFG) that includes a transitional President, Prime Minister, and ninety member cabinet known as the "Council of Ministers." The TFIs, however, have only just begun to establish authority inside Somalia. On February 26, 2006 the first session on Somali soil of the Transitional Federal Parliament took place in the city of Baidoa. Guled Mohamed, *Somali Parliament Holds First Session on Home Soil*, Feb. 26, 2006, <http://www.awdalnews.com/wmview.php?ArtID=6943>. See generally *infra* notes 116-19 and accompanying text.

70. Rob Crilly, *African Businesses Hit Hard as Tourists Scared off by Pirates*, USA TODAY, Nov. 14, 2005, at A14.

71. Background Note: Somalia, *supra* note 69. The Somali Transitional Government, however, had reportedly contracted with a U.S. marine security firm to help control piracy off its waters. See *U.S. Firm to Fight Somali Pirates*, BBC NEWS, Nov. 25, 2005, <http://news.bbc.co.uk/2/hi/africa/4471536.stm> [hereinafter *Fight Somali Pirates*]. Unfortunately, it appears it may have contracted with a defunct company. Despite the reported \$50 million contract, there has been no evidence of patrols or interceptions made by that firm. See *U.S. to Help Tackle Somali Pirates*, BBC NEWS, Apr. 17, 2006, <http://news.bbc.co.uk/2/hi/africa/4915726.stm> [hereinafter *Tackle Somali Pirates*]. Had it actually received the maritime security services, it would have been interesting to note how it would have paid for them.

Africa.⁷² During a two-month stretch in 2005-2006, the NASSAU Strike Group and the international community observed extended hostage scenarios.⁷³ All it could do, however, was monitor the situation because the hostage-takers were not definitively pirates, at least not for the acts they were then committing.⁷⁴

On the other hand, in the three nations that border the Straits of Malacca, the 550-mile wide waterway that carries one-third of the world's trade, half of the world's oil supply, and is the most dangerous chokepoint on earth for piracy,⁷⁵ there are laws and effective governments with the will to enforce their laws, but the hundreds of miles of coastline and numerous uninhabited islands make maritime law enforcement exceedingly difficult. Resource limitation has limited the effectiveness of the coastal states' efforts to patrol the Straits and its approaches, through which 600 vessels and 11 million barrels of oil pass through each day.⁷⁶ Indonesia, for example, in whose waters most of the maritime attacks occur, must sweep the Augean stables of its vast coastline and 17,000 islands with an aging and depleted navy, consisting of dilapidated warships, patrol boats, and support vessels, most of which are not even seaworthy.⁷⁷ No doubt the December 2004 tsunami is also hampering Indonesia's efforts to shore up its maritime security.⁷⁸

Because the majority of attacks actually occur in the territorial seas of nations such as Indonesia, the IMB, citing "statistical reasons," removed the line of demarcation between UNCLOS piracy,

72. 2005 PIRACY REPORT, *supra* note 4, at 16.

73. See, for example, the fishing vessel *Feng Jung 16* and merchant vessel *Julia 54*, the facts of which are summarized in the 2005 PIRACY REPORT, *supra* note 4, at 27.

74. Of course, an argument can be made that Somalia, a "failed state," has no territorial waters, and thus those who commit crimes within its coastal waters are indeed pirates under UNCLOS. See discussion *infra* Part III.

75. See Inst. for the Analysis of Global Sec., *Chilly Response to U.S. Plan to Deploy Forces in the Strait of Malacca*, May 24, 2003, <http://www.iags.org/n0524042.htm>.

76. Ioannis Gatsiounis, *Malacca Strait: Target for Terror*, ASIA TIMES ONLINE, Aug. 11, 2004, http://www.atimes.com/atimes/Southeast_Asia/FH11Ae02.html.

77. See, e.g., Inst. for the Analysis of Global Sec., *supra* note 75; Gatsiounis, *supra* note 76 (noting "only 30 of the Indonesia navy's 117 warships are currently operational"). Indonesia, however, has announced plans to augment its fleet by sixty modern patrol vessels over the next decade. Still, Indonesia's Chief Admiral admits that his fleet is "almost obsolete." *Indonesia Plans Fleet Expansion*, ABC NEWS ONLINE, Feb. 12, 2005, <http://www.abc.net.au/news/newsitems/200502/s1301509.htm>.

78. Tammy Sittnick, *State Responsibility and Maritime Terrorism In The Strait of Malacca: Persuading Indonesia and Malaysia to Take Additional Steps to Secure the Strait*, 14 PAC. RIM. L. & POL'Y J. 743, 753-54 (2005).

which must occur on the high seas, and “armed robbery against ships,”⁷⁹ in its definition of “Piracy and Armed Robbery”:

An act of boarding, or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act.⁸⁰

But why only remove the demarcation line for “statistical purposes”? Why must hostages crewmembers in Somali territorial waters be kept from their saviors by an invisible fence-line .1 miles away?

The answer: “Nebraska.”

If, for example, a man demands money from another by gunpoint in a dark Nebraska alleyway, France does not send in its military. Indeed, even if the French offered, the United States would never allow foreign militaries to patrol its streets. The same applies to territorial waters. Within the twelve nautical miles, coastal nation law applies, and it is that coastal nation’s coast guard, or its equivalent, that has the responsibility for policing its borders.⁸¹ The principle of universal jurisdiction does not allow nations to violate the sovereignty of other nations to seek out the accused (though if such “kidnapping” occurs, jurisdiction in the new state is still valid).⁸² In fact, UNCLOS only provides a right of innocent passage through a nation’s territorial seas, passage which expressly does not include “any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State,” or even “any exercise or practice with weapons of any kind.”⁸³ In other words, few

79. The IMB defines armed robbery against ships as: “any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of ‘piracy,’ directed against a ship or against persons or property on board such ship, within a State’s jurisdiction over such offences.” Robert C. Beckman, *Combating Piracy and Armed Robbery Against Ships in Southeast Asia: The Way Forward*, 33 OCEAN DEV. & INT’L L. 317, 319 (2002).

80. 2005 PIRACY REPORT, *supra* note 4, at 3.

81. UNCLOS, *supra* note 25, at arts. 21, 27.

82. The classic case is of Adolf Eichmann. The head of the Jewish Gestapo did not have any claim based on Israel’s admitted violation of Argentina’s territorial sovereignty; only Argentina could assert that international law violation. As indicated in the district court’s opinion in *Eichmann*, “the violation by one country of the sovereignty of another is susceptible of redress as between the two countries and cannot vest in the accused rights of his own.” Attorney Gen. of Isr. v. Eichmann, 36 I.L.R. 18, 70 (D.C. of Jm. 1961), *aff’d*, [1962] 36 I.L.R. 277 (S. Ct. 1962). This decision is consistent with the United States’ *Ker-Frisbie* doctrine, which holds that irregularities in the defendant’s procurement do not violate due process, assuming that the defendant receives the necessary procedural guarantees once within the prosecution’s jurisdiction. *Ker v. Illinois*, 119 U.S. 436 (1886) (international seizure); *Frisbie v. Collins*, 342 U.S. 519 (1952) (domestic interstate seizure), *reh’g denied*, 343 U.S. 937 (1952); *see also* United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991).

83. UNCLOS, *supra* note 25, at art. 19.

nations, if any, would appreciate, or tolerate, foreign militaries policing their maritime Nebraska.

From Malaysia's perspective, threats to its sovereignty are its highest priority.⁸⁴ Indonesian priorities are similar.⁸⁵ In 2004, the United States, through Admiral Thomas Fargo, Commander Pacific Fleet, offered Malaysia, Indonesia, and Singapore direct aid to share intelligence and maintain joint training exercises.⁸⁶ Malaysia's Defense Minister refused any U.S. warships in its territorial seas, including its portion of the Straits of Malacca.⁸⁷ Indonesia responded to the offer by stating: "We may need a thousand ships, but not the Americans. . . . These are our straits."⁸⁸ Misleading reports that the United States wanted to take part in joint patrols in the Straits evoked irritated responses from Malaysia, as well as Indonesia, which suggested that the presence of foreign forces would fuel Islamic fanaticism.⁸⁹ In other words, Malaysia and Indonesia are also worried that having U.S. warships in its territorial seas would transform mere piracy into piratical terrorism.

Singapore, on the other hand, welcomed U.S. involvement.⁹⁰ But would it welcome Chinese involvement? Would the United States welcome Iran's patrolling two miles off the coast of New York City? If the definition of piracy in international law were changed to obliterate the territorial fence-line, all nations would be entitled to enter one another's territorial seas. It would not make any sense to change UNCLOS Article 101 without changing the enforcement provision in Article 105.

84. Mark J. Valencia, *Ensuring Asia's Maritime Security*, FAR E. ECON. R., Oct. 14, 2004, at 27. For an excellent analysis of Southeast Asian sovereignty sensitivities as a whole, see generally John F. Bradford, *The Growing Prospects for Maritime Security Cooperation in Southeast Asia*, NAVAL WAR C. REV., Summer 2005, at 63.

85. See generally ROBERT MANGINDAAN, MARITIME TERRORIST THREAT: AN INDONESIAN PERSPECTIVE, a paper prepared for the "Workshop on Maritime Counter-Terrorism," Nov. 29-30, 2004, New Delhi, India, available at www.observerindia.com/reports/maritime/paper_indn.pdf. Rear Admiral (Ret) Mangindaan, a member of the Board of Experts to the Governor of Indonesian National Resilience Institute, concluded his paper with, "It was quite clear that the position of Indonesia to be self-reliant and the government will not use nor 'borrow' the external forces to fight maritime terrorism within our national jurisdiction." *Id.* at 6.

86. Benjamin Sand, *US, Malaysia to Boost Security in Asian Shipping*, VOICE OF AM., June 21, 2004, available at <http://www.iwar.org.uk/news-archive/2004/06-21-4.htm>. The Regional Maritime Security Initiative, which Admiral Fargo formally proposed, will be discussed in greater detail *infra* notes 377-81 and accompanying text.

87. *Strait Talks on Oil Tanker Terror Fear*, HERALD SUN (AUSTRALIA), June 4, 2004.

88. *Id.*

89. P.T. Bangsberg, *Malaysia Rejects US Patrols for Malacca Strait*, PACIFIC SHIPPER, June 9, 2004.

90. Yeoh En-Lai, *Terror Fears Grow on Vital Oil Route, Muslim Nations Dismiss U.S. Help for Straits of Malacca*, GRAND FORKS HERALD, June 4, 2004.

The 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention or Rome Convention), drafted in response to the *Achille Lauro* affair,⁹¹ effectively changed the long-standing definition of piracy to include attacks within territorial waters.⁹² However, it did not extend universal jurisdiction to such attacks. Most significantly, it did not extend universal, or even U.S., enforcement where it is needed the most.

Under the Convention, State Parties bind themselves to consider as offences those acts that are “unlawfully and intentionally” committed by a person who:

- (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
- (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
- (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
- (d) places or causes to be placed on a ship, by means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or it is likely to endanger the safe navigation of that ship; or
- (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
- (f) communicates information which he knows that is false, thereby endangering the safe navigation of the ship; or
- (g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).⁹³

It is worth pointing out that not only are territorial limitations stripped away from the above definitions (under which piracy and

91. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221, 27 I.L.M. 668 (1988) [hereinafter SUA Convention]. The other instrument is the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (SUA Protocol), 27 I.L.M. 685 (1988), which was adopted at the same time as the Rome Convention and contains similar provisions.

92. See generally Tullio Treves, *The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 2 SING. J. INT'L & COMP. L. 541 (1998). Treves is the judge of the International Tribunal for the Law of the Sea.

93. SUA Convention, *supra* note 91, at art. 3.1. Attempting or abetting the commission of these offences, or being otherwise an accomplice, are also offences under the Convention, as is the act of a person who threatens to commit the offences set forth in paragraphs (b), (c), and (e) “with or without a condition, as provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act,” provided the threat is likely to endanger the safe navigation of the ship in question. *Id.* at art. 3.2.

piratical terrorism are subsumed), but the “for private ends” language and any reference to two vessels are noticeably absent as well.

Additionally, the 2005 Protocol to the SUA Convention, not yet entered into force, outlaws acts designed to “intimidate a population, or to compel a Government or an international organization to do or to abstain from any act” when those acts involve a weapon of mass destruction (WMD) (be it radiological, chemical, or biological) or the use of a vessel in a manner that “causes death or serious injury.”⁹⁴ The 2005 Amendment also proscribes unlawful WMD proliferation.⁹⁵ But defining a crime only goes so far. Jurisdiction is required, as is the means to enforce the law.

The SUA Convention does not extend universal jurisdiction over the above offences, but it does create a broad jurisdictional grant, providing it over any ship that “is navigating or is scheduled to navigate into, through or from the waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States.”⁹⁶ As specified in the travaux, the SUA Convention will thus logically apply in “straits used for international navigation.”⁹⁷ In the unlikely event that jurisdiction does not attach in the first circumstance, the Convention also provides jurisdiction “when the offender or the alleged offender is found in the territory of a State party other than the State referred to in paragraph 1.”⁹⁸

But, despite the SUA Convention’s title, the means for actual suppression of pirates or piratical terrorists, jurisdiction notwithstanding, are scant. The Convention only obligates party states to establish jurisdiction where possible, submit those cases falling within their jurisdictions to their competent authorities for prosecution,⁹⁹ or extradite the alleged offender to another competent

94. Amendments to the 1988 SUA Convention and its related Protocol were adopted by the Diplomatic Conference on the Revision of the SUA Treaties held October 10-14, 2005. The amendments were adopted in the form of Protocols to the SUA treaties (the 2005 Protocols). The amendments will enter into force ninety days after the date on which twelve states have either signed it without reservation as to ratification, acceptance, or approval, or have deposited an instrument of ratification, acceptance, approval, or accession with the Secretary-General. The amended Protocol requires ratification from three states that are also party to the SUA Convention, but it cannot come into force unless the 2005 SUA Convention is already in force.

95. *Id.*

96. *Id.* at art. 4.1.

97. *Id.*

98. *Id.* at art. 4.2.

99. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 3 in cases where the alleged offender is present in its territory and it does not extradite him to any of the State parties which have established their jurisdiction in accordance with paragraphs 1 and 2 of this article.

state.¹⁰⁰ While ratification of the Convention gives signatory governments the power to prosecute people caught in their own territorial waters for acts of SUA-defined piracy committed in another country's jurisdiction,¹⁰¹ there is no right-of-entry into territorial waters for nations capable of actual suppression. There is also no real obligation to submit offenders to criminal jurisdiction and consequently to punish them.¹⁰² A state party does have the obligation, if it does not extradite, to "submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the law of that State"¹⁰³ and to "take [its] decision in the same manner as in the case of any other offence of a grave nature under the law of that State";¹⁰⁴ but it is not required to actually prosecute the alleged offender before an independent court of criminal justice.¹⁰⁵

Article 13 only requires states to cooperate in the prevention of offences by:

- (a) taking all practicable measures to prevent preparation in their respective territories for the commission of those offences within or outside their territories;
- (b) exchanging information in accordance with their national law, and coordinating administrative and other measures as appropriate to prevent the commission of offences set forth in article 3.¹⁰⁶

Most significant, however, is that while UNCLOS is customary international law binding on all nations, the SUA Convention is only applicable to those states that have signed onto it.¹⁰⁷ Only if the

Id. at art. 6.4.

100. *Id.* at art. 10.1.

The State Party in the territory of which the offender or the alleged offender is found shall, in cases to which article 6 applies, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the law of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of grave nature under the law of that State.

101. *Id.*

102. See generally Treves, *supra* note 92.

103. SUA Convention, *supra* note 91, at art. 11.1.

104. *Id.* at art. 10.1.

105. Treves, *supra* note 92, at 550. It is just required to hold a preliminary hearing. See *infra* note 205 and accompanying text.

106. SUA Convention, *supra* note 91, at art. 13.1.

107. See, e.g., ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 64 (1994) (stating that jurisdiction created by treaty is never "universal jurisdiction *stricto sensu*" because only state parties are vested with jurisdiction by the treaty). Thus, SUA would only oblige contracting states to enact

perpetrators or victims are nationals of a party state, and only if the offending acts take place in a party state's territorial waters, or the offending vessel was scheduled to navigate through such waters, can the Convention apply.¹⁰⁸ But the SUA Convention is inapplicable to Somalia as well as to the Straits of Malacca. While Singapore has ratified the SUA Convention, Indonesia, Malaysia, and Somalia have not.¹⁰⁹ Even party states that are technically obligated to act in response to an offense are not forced to comply by any sanctions provisions within the SUA Convention.¹¹⁰

International law remains grounded in theoretical realism, and thus one's response must be realistic. The SUA Convention is a step in the right direction and will likely prove helpful in the broader context of MSOs, especially with respect to anti-proliferation efforts. However, since the prospects of changing the enforcement provisions of customary international law—and in important instances treaty law as well—to accommodate territorial patrols and incursions are understandably and justifiably dim, practical means of combating piracy and piratical terrorism within existing law are essential. While invitation, U.N. Security Council Resolutions, the addition of piracy to the Rome Statutes of the International Criminal Court could afford the appropriate jurisdiction and right of entry, changes in domestic laws and practice will more reliably, and *ex ante*, optimize the legal environment for effective counter-piracy efforts, as will be discussed *infra*.

B. *Terrorism on the High Seas Can Equal Piracy Under International Law*

Now consider what would happen if the attack on the *Safina al Bisarat*, while taking place in international waters, had been motivated by a desire to punish the West for perceived injustices against Mohammed, or if Jemaah Islamiyah (JI), a militant Islamist group active in several Southeast Asian countries, especially

domestic (or "municipal") laws to proscribe certain conduct or to conform with the provisions therein.

108. SUA Convention, *supra* note 91.

109. For signatories, see http://www.imo.org/includes/blastDataOnly.asp/data_id%3D13491/status.xls (last visited Nov. 19, 2006). As of October 31, 2006, 142 nations have ratified the 1988 Convention, and 132 have ratified the SUA Protocol. See IMO, Summary of Conventions as at 30 November 2006, http://www.imo.org/Conventions/mainframe.asp?topic_id=247.

110. See SUA Convention, *supra* note 91, at art. 16 (providing a forum for dispute resolution between parties regarding issues arising out of the interpretation or application of the Convention, but providing no specific sanctions).

Indonesia,¹¹¹ hijacked an oil tanker in the Straits, threatening to blow it up if certain demands were not met.

Piracy? Yes. Unless those terrorists were commissioned by a state, they are private actors. Their armed attack in international waters, no matter their subjective motivations, would render them pirates.

Many today, however, mistakenly assume that the “for private ends” provision within UNCLOS removes terrorist acts from piracy.¹¹² Even the *Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations* states that terrorist attacks on shipping “for the sole purpose of achieving some political end are arguably not piracy under current international law.”¹¹³ Thus, when members of the Palestine Liberation Front (PLF), disguised as tourists, boarded the *Achille Lauro* and threatened to blow up the cruise ship if Israel did not release fifty Palestinian prisoners, some argued that their political motivation immunized the terrorists from being considered pirates.¹¹⁴ When those same terrorists shot and killed Leon Klinghoffer, a wheel-chair bound Jew from the United States, and threw his body into the water, people

111. Founded in the 1960s by Abu Bakar Baasyir and Abdullah Sungkar, JI’s stated goal is to create an Islamic state comprising Malaysia, Singapore, Indonesia, and the southern Philippines. Council on Foreign Relations, Background: Jemaah Islamiyah, <http://www.cfr.org/publication/8948/> (last visited Nov. 19, 2006).

112. See, e.g., Keyuan, *supra* note 31, at 44. Keyuan, while composing an otherwise trenchant article, merely states that since UNCLOS defines piracy as only for “private ends,” “terrorist acts at sea for political ends are generally excluded.” *Id.* In Sittnick, *supra* note 78, at 758, the author writes an otherwise strong piece, but merely takes as a given that UNCLOS “prevents maritime terrorism from being included within the ambit of international piracy laws because acts of terrorism are committed for public political ends.” See also Erik Barrios, *Casting a Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia*, 28 B.C. INT’L & COMP. L. REV. 149, 156 (stating that since UNCLOS “excludes attacks that are politically motivated,” maritime crimes “committed by regional dissidents, including kidnappings of crewmen to put pressure on regional governments and environmental attacks involving hijacked oil tankers, are not punishable as piracy under UNCLOS”); Randall, *supra* note 32, at 798 (“Although universal jurisdiction may exist over the offenders for crimes other than piracy, universal jurisdiction specifically over piracy will not reach today’s politically motivated actors on the high seas.”).

113. COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, *supra* note 66, ¶ 3.5.2.3 n.30.

114. See, e.g., George R. Constantinople, Note, *Towards a New Definition of Piracy: The Achille Lauro Incident*, 26 VA. J. INT’L L. 723, 748 (1986) (“The Palestinians’ actions, however, do not qualify as piracy under international law.”). It is worth pointing out that it is not clear whether the initial seizure took place within Egyptian territorial waters or on the high seas. Regardless, the *Achille Lauro* was on the high seas during the hostage phase. Compare John Tagliabue, *Ship Carrying 400 Seized, Hijackers Demand Release of 50 Palestinians in Israel*, N.Y. TIMES, Oct. 8, 1985, at A1, with *Perspectives on the Achille Lauro*; Jerusalem: *Elation at Enemy’s Setback*, N.Y. TIMES, Oct. 13, 1985, at 22. Additionally, there was not a second vessel involved in the attack, a subject that will be address in the next Part.

still argued that the hijackers were not pirates.¹¹⁵ But, they are pirates because, like all *hostis humani generi*, they have no legitimate connection to a state whereby the international community can seek redress in the normal diplomatic and military channels. The United States recognized this age-old distinction and appropriately took the position that the *Achille Lauro* terrorists were pirates subject to universal condemnation and jurisdiction.¹¹⁶ In fact, all so-called politically motivated attacks on the high seas are piracy.

The piratization of terrorism is a significant worry in Southeast Asia¹¹⁷ and is becoming more of a possibility in Somalia. According to the Somali Prime Minister Ali Mohamed Gedi, Osama bin Laden “is strongly involved in some areas in Somalia and has militant training bases.”¹¹⁸ Until very recently, Mogadishu was in the hands of Islamists, separate from the Transitional Federal Government (TFG).¹¹⁹ In mid-January, the TFG reasserted its authority with the help of Ethiopian forces, but militant factions—including possible Al Qaeda suspects—remain.¹²⁰

115. Constantinople, *supra* note 114, at 748.

116. The Justice Department obtained arrest warrants charging the hijackers with hostage taking, conspiracy, and “piracy on the high seas.” Documents Concerning the Achille Lauro Affair and Cooperation in Combating International Terrorism, 24 I.L.M. 1509, 1556-57 (1985). The charge read:

From on or about October 7, 1985, to on or about October 10, 1985, in the Mediterranean Sea, on the high seas, in various locations outside of the United States, the defendants, HALLAH ABDALLA AL-ASAN, MAGED YUSSEF AL-MALAKI, HAMMAD ALI ABDULLA, ABDEL ATIF IBRAHIM FATAYER, and ABU EL-ABAS did knowingly, willfully, and unlawfully commit and cause the commission of the crime of piracy as defined by the law of nations, that is, did knowingly, willfully and without legal authority from any sovereign power and for private ends seize control of the cruise ship Achille Lauro by force, violence and threat of force and violence.

Id.; see also Gerald P. McGinley, *The Achille Lauro Affair—Implications for International Law*, 52 TENN. L. REV. 691, 700 (1985) (“Thus it is evident that the seizure of the Achille Lauro was piracy *jure gentium*.”).

117. See generally Rommel C. Banlaoi, *Maritime Terrorism in Southeast Asia: the Abu Sayyaf Threat*, NAVAL WAR C. REV., Autumn 2005, available at http://findarticles.com/p/articles/mi_m0JIW/is_4_58/ai_n15930861; Simon Elegant & Kuala Sepetang, *Dire Straits: Ships that Pass through Some of the Busiest Waterways in Asia are Often the Target of Pirates. Is a Terrorist Attack Next?*, TIME ASIA, Nov. 29, 2004, available at <http://www.time.com/time/asia/magazine/article/0,13673,501041206-832306-1,00.html>.

118. *Bin Laden Wants More Chaos in Somalia*, REUTERS, July 3, 2006, available at <http://www.topix.net/content/reuters/3458749987185131216608178044053503550260?threadid=VHTI1B7VORPH4CEE>.

119. Jeffrey Gettleman, *Islamists Out, Somalia Tries to Rise from the Chaos*, N.Y. TIMES, Jan. 8, 2007.

120. *Raid Killed Somali Allies of Al Qaeda, U.S. Says*, N.Y. TIMES, Jan. 12, 2007.

Southeast Asia is home to a multitude of militant organizations, some of which are violent Islamist groups.¹²¹ The others have Islam as an important part of their identity—but only as it relates to demands for autonomy or secession, not as ends in itself.¹²² To the former belong JI and the Mumpulan Mujahideen Malaysia; to the latter belong the Moro National Liberation Front, the Moro Islamic Liberation Front in the Philippines, and the Free Aceh Movement in Indonesia.¹²³ Present also in Southeast Asia are radical Islamist paramilitary groups that “blur the edges between criminal gangs and militias,” like Abu Sayyaf in the Philippines and Laskar Jihad in Indonesia.¹²⁴

According to Indonesia’s state intelligence agency, for example, detained senior JI members admitted that the group has considered launching attacks on ships in the Strait of Malacca.¹²⁵ In 2002, the Free Aceh Movement announced that vessels moving through the Strait were to seek its permission for safe passage.¹²⁶ It has also admitted to attacking Exxon-Mobil natural gas plants in Aceh.¹²⁷ In March 2003, the attack on the chemical tanker *Dewi Madrim* spread fears that the attack was “flight school” for maritime 9-11 terrorists.¹²⁸

Lamentably, the UNCLOS “for private ends” provision lacks clarity. Neither the Law of the Sea Convention nor the 1958 High Seas Convention addresses political activity, nor does either define “for private ends.” Additionally, the document upon which the drafters of the High Seas Convention heavily relied, the Harvard Research in International Law and the Comment to the Draft

121. John Gersham, *Is Southeast Asia the Second Front?*, FOREIGN AFF., July-Aug. 2002, at 60.

122. *Id.*

123. *Id.*

124. *Id.*; see also Dana R. Dillon, Speech at Nihon University, Mishima, Japan: Southeast Asia and the Brotherhood of Terrorism (Nov. 19, 2004), transcript available at <http://www.heritage.org/Research/AsiaandthePacific/hl860.cfm>.

125. Gal Luft & Anne Korin, *Terrorism Goes to Sea*, FOREIGN AFF., Nov.-Dec. 2004, at 63.

126. Burnett, *supra* note 11; Elegant & Sepetang, *supra* note 117.

127. Burnett, *supra* note 11.

128. *Id.*; see also THE NATIONAL STRATEGY FOR MARITIME SECURITY, *supra* note 14, at 5 (the “capabilities to board and commandeer large underway vessels—demonstrated in numerous piracy incidents—could also be employed to facilitate terrorist acts.”); Graham Gerard Ong, “Ships Can be Dangerous Too”: Coupling Piracy and Maritime Terrorism in Southeast Asia’s Maritime Security Framework, in INSTITUTE FOR SOUTHEAST ASIAN STUDIES WORKING PAPER: INTERNATIONAL POLITICS AND SECURITY ISSUES SERIES 7-8 (2004), available at <http://www.iseas.edu.sg/ipsi12004.pdf> (“Intelligence analysts believe that because of the hardening of all land-based targets regional terrorist networks will instinctively target the region’s maritime infrastructure, the remaining ‘soft belly’ of states.”).

(Harvard Research) by Professor Bingham, contains no definition of the phrase.¹²⁹

That said, the history of piracy, the motives behind the establishment of universal jurisdiction, as well as judicial precedent, powerfully demonstrate that a thwarted pirate cannot escape the world's jails merely by pronouncing a political cause, nor must the international community's diplomatic and military arms stand impotently by because no state can be fairly held accountable. As Chief Justice Cockburn noted in *In re Tivnan*, "it is not because persons assume the character of belligerents that they can protect themselves from the consequences of an act really piratical."¹³⁰ "For private ends" must be understood to distinguish between state-sponsored piracy or privateering, which could be redressed under the laws of war, and piracy, which could not. Again, essential to piracy's definition is not the actor's intent, but whether any state can be held liable for the actor's actions.

Recall from Part I that a letter of marque authorized its bearer to attack and seize civilian ships on the high seas—essentially the same conduct that constituted piracy. Yet the privateer was not only free from universal jurisdiction, he was also free of any criminal culpability.¹³¹ The only difference between a lawful privateer and an outlaw pirate was the latter's lack of sovereign authorization.¹³² Thus, prior to the 1856 Declaration of Paris, someone who committed the actions constituting piracy, but did so with sovereign authorization, would not violate the law of nations.¹³³ But, a pirate acting without state sanction was considered an enemy of all mankind.¹³⁴

Twelve years prior to the Declaration of Paris, Justice Story of the United States Supreme Court recognized that robbery, or the intent to benefit financially from a violent act on the high seas, is not a requisite for piracy:

129. See Harvard Research, *supra* note 47.

130. Samuel J. Menefee, *Anti-Piracy Law in the Year of the Ocean*, 5 ILSA J. INT'L & COMP. L. 309, 312 n.21 (1999).

131. Kontorovich, *supra* note 51, at 145-46.

132. *Id.* (citing 14 WILLIAM BLACKSTONE, COMMENTARIES 251 ("[T]he lord chancellor shall make him out letters of marque under the great seal; and by virtue of these he may attack and seize the property . . . without hazard of being condemned a robber or a pirate.")).

133. Kontorovich, *supra* note 51, at 145-46.

134. To further understand why a state would want to lose exclusive jurisdiction (a necessary corollary to universal jurisdiction), it is important to understand that historically, pirates were private parties who often acted against the interest of their home state, and thus were held to waive their home state's protection. See *supra* note 48. Not only might they attack their home state's ships directly, but by existing side-by-side with privateering, their actions would diminish the state's overall income derived from privateering as well.

A pirate is deemed, and properly deemed, *hostis humani generis*. But why is he so deemed? Because he commits hostilities upon the subjects and property of any or all nations, without any regard to right or duty, or any pretence of public authority. If he willfully sinks or destroys an innocent merchant ship, without any other object than to gratify his lawless appetite for mischief, it is just as much a piratical aggression, in the sense of the law of nations, and of the act of Congress, as if he did it solely and exclusively for the sake of plunder, *lucri causa*. The law looks to it as an act of hostility, and being committed by a vessel not commissioned and engaged in lawful warfare, it treats it as the act of a pirate, and of one who is emphatically *hostis humani generis*.¹³⁵

Justice Story understood that the very reason piracy became a universal crime was because attacks at sea by private individuals, like the corsairs, could not be attributed to any one state. Deciding the case based on the law of nations, Justice Story defined piracy as not only “hostile,” “wanton,” and “criminal in its commission,” but also as “utterly without sanction from any public authority or sovereign power.”¹³⁶ In 1819, an appellate court in New York found a defendant innocent of piracy precisely because there was sanction from a sovereign power.¹³⁷

As the Court proclaimed in *Marianna Flora*, piracy should be considered “a private unauthorized war,” punishable by “all the penalties which the law of nations can properly administer.”¹³⁸ Because attacks without state sanction cannot be addressed within the laws of war and diplomacy, they must be addressed criminally.¹³⁹

Perhaps Viscount Sankey, an authority outside the United States, puts it best:

When it is sought to be contended, as it was in this case, that armed men sailing the seas on board a vessel, *without any commission from any state*, could attack and kill everybody on board another vessel, sailing under a national flag, without committing the crime of piracy unless they stole, say, an article worth six-pence, their Lordships are

135. *Harmony v. United States*, 43 U.S. (2 How.) 210, 232 (1844) (emphasis added).

136. *Id.*

137. *United States v. Bass*, 24 F. Cas. 1028, 1029 (C.C.D.N.Y. 1819) (No. 14,537) (despite making captures of Spanish and Portuguese vessels, the defendant was found innocent because he was doing so under the color of authority of the newly independent provinces of South America).

138. *In re The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 41 (1825).

139. See *United States v. Klintock*, 18 U.S. (5 Wheat.) 144, 150 (1820) (upholding the conviction of a pirate who operated under a commission issued by an illegitimate and unknown authority (the “Brigadier of the Mexican Republic” and the “Generalissimo of the Floridas”). The Supreme Court held that since the “Mexican Republic” was unknown and unacknowledged by the government of the United States, and the Floridas were still considered provinces of Spain, the defendant was not officially authorized to make armed captures at sea, and thus his captures were properly analyzed as a robbery on the high seas, not “*jure belli*.” *Id.*

almost tempted to say that a little common sense is a valuable quality in the interpretation of international law.¹⁴⁰

It would be nonsensical indeed to interpret “for private ends” in UNCLOS to exclude the kind of attacks that occurred on the *Achille Lauro* or in the hypothetical scenario that appeared at the top of this Part.

The opposite of “private ends” must be understood as public ends; that is, ends equating to the commissioned benefit of a state. The weight of history and precedent for this age-old crime negates any real ambiguity in the term.¹⁴¹ *United States v. Smith*, for example, cites pages of famed international law publicists who support this proposition, dating back centuries, including Sir Leoline Jenkins who wrote: “If these violations of property be perpetrated by any national authority, they are the commencement of a *public war*; if without that sanction, they are *acts of piracy*.”¹⁴² The fact that a raider may intend to give away his booty like Robin Hood does not render his actions “for a public end” any more than would a fundamentalist’s hijacking a vessel in the name of his organization, no matter how political that organization.¹⁴³ An eco-warrior who hobbles an oil tanker may say that he is working for the world public, but has that public authorized him to do so? No. All three are acting as individuals, not as states empowered with the ability to declare

140. *In re Piracy Jure Gentium*, [1934] App. Cas. 586, 598 (U.K.) (emphasis added), cited in Halberstam, *supra* note 41, at 274.

141. Menefee, *supra* note 36, at 143 (noting the “ambiguity” in UNCLOS’s failure to define “private ends” or in stating its opposite).

142. *United States v. Smith*, 18 U.S. (5 Wheat) 153, 163 n.h. (1820) (first emphasis added). The case also states that persons “not under the acknowledged authority or deriving protection from the flag or commission of any government” are pirates. *Id.* at 154; see also *United States v. Ambrose Light*, 25 F. 408, 416 (S.D.N.Y. 1885) (holding that the “majority of authors on international law” define piracy as “the offense of depredating on the high seas without being authorized by any sovereign state; or with commissions from different sovereigns at war with each other”).

143. In 1885, the Southern District of New York reasoned:

But if the mayor of New York should send out vessels commissioned in his own name to blockade Baltimore or Boston, and to capture or sink any British ships seeking to enter those ports, it would not be contended that the British navy must remain quiet, and see such vessels sunk, unable to arrest the cruiser as piratical, because New York city was a politically organized community.

Ambrose Light, 25 F. at 436; see also *Smith*, 18 U.S. at 163 n.h. (quoting Rutherford: “A *band of robbers* or a *company of pirates* may in fact be united to one another by compact, &c. But they are still, by the law of nature, only a number of unconnected individuals; and consequently, in the view of the law of nations they are not considered as a collective body or public person. For the compact by which they unite themselves is void, because the matter of it is unlawful, &c. &c. The common benefit which a *band of robbers* or a *company of pirates* propose to themselves consists in doing harm to the rest of mankind.”).

war. Thus, all three need to be processed in accordance with the rules of international criminal law, not warfare.

The bottom line is that intent, except to distinguish between intentional versus accidental attacks,¹⁴⁴ does not matter. Modern authors like Tina Garmon¹⁴⁵ fall into the trap of looking at the words divorced from their historical meaning, state practice, and judicial precedent.¹⁴⁶ According to Ms. Garmon: "Current disparities under the 1982 Law of the Sea Convention would enable a situation where a terrorist organization could hijack a vessel in the high seas with impunity. Specifically, because terrorists necessarily have a political goal, their crime is automatically precluded from the consideration of piracy."¹⁴⁷

Even if terrorists "necessarily" had political goals, there are surely at least some private ends that would bring maritime terrorists, on the high seas, under UNCLOS. The drafters specifically excluded the intention to rob (*animus furandi*) from their definition, stating in their commentary that acts of piracy "may be prompted by feelings of hatred or revenge, and not merely by the desire for gain."¹⁴⁸ Justice Story, after all, noted that piracy is piracy whether the intent is for "purposes of plunder, or for purposes of hatred, revenge, or wanton abuse of power."¹⁴⁹ Whether they be payment, publicity, political advantage within their organization, martyrdom, revenge, or pure hatred, even political attackers have private aims. Ms. Garmon provides no support for a proposition that an espoused

144. According to U.S. case law, a defendant could only be convicted of piracy if he intended to act as a pirate. See *In re The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 6 (1825) (holding that those on a Portuguese vessel that fired upon a U.S. vessel, mistaking the latter for a pirate vessel on the high seas, could not be convicted of piracy without showing specific piratical or felonious intent under U.S. law); see also *Ambrose Light*, 25 F. at 409 ("It is not necessary that the motive be plunder, or that the depredations be directed against the vessels of all nations indiscriminately. As in robbery upon land, it is only essential that the spoliation, or intended spoliation, be felonious, i.e., done willfully, with intent to injure, and without legal authority or lawful excuse.").

145. Tina Garmon, *International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th*, 27 TUL. MAR. L.J. 257 (2002).

146. See, e.g., *In re The Bello Corrunes*, 19 U.S. (6 Wheat.) 152, 163-76 (1821) (finding Defendant, a United States citizen who took out a commission from a nation at war with Spain to cruise against Spanish shipping guilty of piracy, because at the time, the United States was in a treaty with Spain forbidding citizens of either side from taking out such commissions and raiding the commerce of the other; the Defendant, whose intent may have been political, was nonetheless guilty of piracy because he was not acting under color of a *valid* commission).

147. Garmon, *supra* note 145, at 274.

148. *Report of the International Law Commission to the General Assembly*, 2 U.N. GAOR Supp. (No. 9), U.N. Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. Int'l L. Comm'n 253, 282, U.N. Doc. A/CN.4/SER.A/1956/Add.1 [hereinafter *Report of the International Law Commission*].

149. *Harmony v. United States*, 43 U.S. (2 How.) 210, 232 (1844).

political aim automatically negates all other, thoroughly human, aims. Rather, the Harvard Committee itself specifically keeps the door open for all manner of motives, be they to “plunder,” to act with “gratuitous malice,” or most significant, “to destroy, in private revenge for real or supposed injuries done by persons or classes of persons, or by a particular national authority.”¹⁵⁰

Thus, as Malvina Halberstam rightfully concludes, it is indeed “more likely” that the intention behind the Harvard Committee’s inclusion of the phrase “for private ends” was to “exclude unrecognized insurgents acting [solely] against a foreign government and ships acting under public authority”¹⁵¹—precisely what hundreds of years of history and practice would demand. Erik Barrios concurs that piracy, throughout history, extended to politically motivated acts.¹⁵² But strikingly, rather than advocate for a correct interpretation of the customary international law that UNCLOS codified, he asserts that UNCLOS represents a “significant departure from what the international community accepted as piracy.”¹⁵³ His only citation is to Malvina Halberstam, who actually argues that UNCLOS *did* incorporate the customary international law of piracy, and that UNCLOS’s “for private ends” phrase sought only to exclude from piracy the “unsettled question concerning insurgents.”¹⁵⁴

This discussion leads to the final question under this second “gap”: what if the supposed pirates are legitimate insurgents, attacking the shipping of the nation from which they are trying to achieve independence?

Following the logic of *hostis humani generi*, the insurgents would not necessarily be pirates, because: (a) they would be attacking only one nation;¹⁵⁵ and (b) the insurgents might have obtained, or may soon be obtaining, legitimate belligerent rights.¹⁵⁶ If they blockaded

150. See Halberstam, *supra* note 41, at 282 (citing Harvard Research, *supra* note 47, at 806).

151. Halberstam, *supra* note 41, at 282.

152. Barrios, *supra* note 112, at 161.

153. *Id.* at 162.

154. Halberstam, *supra* note 41, at 283.

155. See *id.* at 276 (“Even those publicists who urged, and those states that accepted, an exemption for insurgents extended it only to insurgents whose acts were directed against a particular state.”).

156. As the Court in *Ambrose Light* explained, courts are precluded from:

[R]ecognizing any new authority in foreign nations until the political or executive department has done so. Until then, courts have no discretion in holding all intentional, unlawful violence and injury to others as criminal. The ulterior end and motive are, as I have said, not a justification in the courts, whether that motive be plunder, a livelihood, political ambition, or patriotic ardor.

or somehow attacked other nations' vessels, they would lose their insurgency exemption but would not necessarily become pirates so long as they maintained the status of lawful belligerents, thereby affording other nations recourse to the laws of war for redress.

Consider the *Achille Lauro* incident in contrast with the famous *Santa Maria* incident of 1961. In the latter case, Captain Henriques Galvao seized a Portuguese cruise ship on the high seas.¹⁵⁷ Captain Galvao was a well-known political opponent of Portugal's Salazar government, gave repeated assurances that he did not want to harm any interests or nationals of other countries (though he did seize a ship of some 600 mixed nationalities), and declared the seizure to be "the first step aimed at overthrowing the Dictator Salazar of Portugal."¹⁵⁸ He was arguably less an enemy of all mankind than an enemy of Portugal.

The PLF, on the other hand, attacked much more indiscriminately, seizing an Italian vessel and killing an American Jew. While commentators disagree on whether Captain Galvao was a "pirate,"¹⁵⁹ his case for the insurgency exemption is much stronger than that of the PLF's. The United States, in fact, did consider Captain Galvao a pirate,¹⁶⁰ but ultimately he received asylum in Brazil where he docked the *Santa Maria* and was thus never tried. Regardless, the *Santa Maria* incident does not demonstrate that political motives alone immunize an individual from piracy,¹⁶¹ but rather that a political decision on the international character of the captor, based in part on the targets of the attack, does.

Thus, subjective intent does not matter beyond *mens rea*.¹⁶² All that does matter is the *international character* of the attack. International recognition implies state commissioning. Diplomacy and possibly even warfare would be the available forms of recourse.

157. Halberstam, *supra* note 41, at 286.

158. *Id.*

159. Compare C. G. Fenwick, "Piracy" in the Caribbean, 55 AM. J. INT'L L. 426, 426-27 (1961) (finding Galvao an insurgent but not affording him the insurgency exemption from piracy because his attacks, while directed solely against Portugal, involved attacks on civilians), with L. C. Green, *The Santa Maria: Rebels or Pirates*, 37 BRIT. Y.B. INT'L L. 496, 503 (1961) (arguing that Galvao was not a pirate because, among other factors, he did not seize the *Santa Maria* for "private ends"). Green, while providing an excellent analysis of the insurgency exemption, nevertheless jumps to the unsupported assertion that the "for private ends" language in the 1958 Geneva Convention means that subjective personal motives, rather than international status, is the dispositive determination. Green, *supra*, at 503.

160. *Id.* at 496.

161. Cf. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 522 (1987) (citing the *Santa Maria* incident in 1961 for the proposition that "[s]eizure of a ship for political purposes is not considered piracy").

162. See, e.g., *United States v. Ambrose Light*, 25 F. 408, 425-26 (S.D.N.Y. 1885).

The lack of international recognition, on the other hand, allows nations to treat the matter as criminal.

Given those two options, the choice must be taken seriously. After the Khmer Rouge seized the U.S. container ship SS *Mayaguez* sixty miles off the Cambodian coast, President Ford characterized the attack as piracy.¹⁶³ Even though attacks by warships are not normally piracy, President Ford nonetheless determined that the *Mayaguez* seizure was an attack against a third-country by an "illegitimate" government.¹⁶⁴ Thus, had the attackers been tried in the United States, they could not have availed themselves of the insurgency exception, regardless of their stated motives. But had the United States treated the seizure as an act by a legitimate government, it would have been justified in considering the attack an act of war.

On the other hand, during the U.S. Civil War, the United States recognized the Confederacy as having belligerent rights, and thus, the U.S. courts never once executed a Confederate for the crime of piracy. Those suspected of piracy, convicted, or both during the war were either released or treated as prisoners of war.¹⁶⁵

In the case of Somalia today, it is far better to consider high seas attackers as pirates. Recourse may be at the criminal, not national level, and deterrence can be achieved without disrupting the international order. As will be discussed below, captured pirates would, and should, receive Geneva Conventions treatment, but they should also remain eligible for prosecution.

All the facts support the treatment of the Somali attackers as criminals, not as legitimate members of a government or as lawful insurgents. The attackers are not striking the shipping of only one nation, and certainly not that of Somalia or a faction thereof; they attack indiscriminately.¹⁶⁶ There is nothing to indicate that they are an insurgency at all. In fact, what some self-proclaimed spokesmen for seized pirates are claiming is that the Somalis are actually members of the legitimate Somali Coast Guard, guarding Somalia's

163. Philip Shabecoff, *White House Says Cambodia Seized a U.S. Cargo Ship*, N.Y. TIMES, May 13, 1975, at sec. 1, col. 8.

164. *Id.*

165. See *United States v. Steinmetz*, 973 F.2d 212, 218-19 (3d Cir. 1992). In August, 1872, Bolles, the Solicitor of the Navy Department, discussed this issue in the *Atlantic Monthly*, stating: "By establishing a blockade of Confederate ports, our Government had recognized the Confederates as belligerents, if not as a belligerent state, and had thus confessed that Confederate officers and men, military or naval, could not be treated as pirates or guerrillas, so long as they obeyed the laws of war." *Id.* (citations omitted).

166. See Bo-Mi Lim, *Militants Who Took Ship Deny Being Pirates*, ASSOCIATED PRESS, Apr. 5, 2006, available at http://www.benadir-watch.com/2006%20News/0405_Militants_deny_being_pirates.pdf.

exclusive economic zone against unlicensed fishing.¹⁶⁷ Of course, the ten suspected pirates the NASSAU Strike Group caught never explained to any of us that they were Somali Coast Guard. Even if such an assertion were true, neither the *Safina al Bisarat* nor the *Delta Ranger* were fishing vessels.

Regardless, the Court in *Ambrose Light* has made it clear that recognition of insurgency and lawful belligerency in U.S. courts is a political decision binding on U.S. courts, just as is recognition of nationhood.¹⁶⁸ There has been no global recognition of Somali pirating as a function of a legitimate insurgency, let alone the recognition of Somalia as a state with a coast guard. A prosecution in U.S. courts should not fail on that basis.

Nowhere in the history of piracy is subjective intent dispositive—only a supposed pirate's actions and status as lawful belligerents are.¹⁶⁹ Conventional wisdom is wrong: terrorism on the high seas can equal piracy.

167. See, e.g., *id.* Abdi Garaad Daahir, a militia spokesman, said that fighters from his clan had captured a South Korean vessel fishing illegally in Somalia's territorial waters: "We are not pirates, but we are patriots who stood up to defend our sea resources from those taking advantage of their country's lack of central government and coastal guards." *Id.*

168. See, e.g., *Guar. Trust Co. v. United States*, 304 U.S. 126, 137-38 (1938) ("What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political branch of the government."); *Jones v. United States*, 137 U.S. 202, 212 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive branch of any government conclusively binds the judges, as well as other officers, citizens and subjects of that government."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 203 reporters' note 1 (1987) ("United States practice long reflected the view that recognition of governments was not a matter of international obligation but could be granted or withheld at will, to further national policy."). The "political question" doctrine of U.S. constitutional law is most clearly expressed in the case of *Baker v. Carr*, 369 U.S. 186, 212-13 (1962) (specifically listing areas of, *inter alia*, international treaty termination, recognition of belligerency abroad, and recognition of foreign governments as ones generally unsuitable for judicial determination and which courts will therefore leave to adjudication through political process). See also *United States v. Three Friends*, 166 U.S. 1, 63 (1897) ("[I]t belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed."); *United States v. Klintock*, 18 U.S. (5 Wheat.) 144, 149 (1820) ("So far as this Court can take any cognizance of that fact, Aury can have no power, either as Brigadier of the Mexican Republic, a republic of whose existence we know nothing, or as Generalissimo of the Floridas, a province in the possession of Spain, to issue commissions to authorize private or public vessels to make captures at sea."); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 634-35 (1818) (holding that relations with foreign powers and the rights of part of a foreign empire are questions "generally rather political than legal").

169. See, e.g., *Klintock*, 18 U.S. at 150-52; see also *In re The Josefa Segunda*, 18 U.S. (5 Wheat.) 338, 358 (1820); *supra* note 140 and accompanying text. In *Josefa Segunda*, the United States did not acknowledge the Republic of Venezuela as an independent state at the time, but the Court recognized that it was "well known that

C. Piracy Without a Second Vessel Can Remain Piracy

Now consider what would happen if the ten Somali pirates, disguised as crewmembers, had boarded the Indian dhow while it had been loading its cargo in Kismaayo, Somalia. As soon as the *Safinal Bisaral* got underway, the Somalis overtook the vessel, sailed it into the open ocean, and held the crew hostage for ransom. Piracy?

Yes. Once the attackers have overtaken the vessel and rejected the authority of any state, including that of India, they become lawless actors and enemies of all mankind. A plain reading of the UNCLOS definition would, however, indicate that two ships are required for piracy. Piracy, after all, according to UNCLOS consists of “any illegal acts of violence or detention, or any act of depredation, committed for private ends *by the crew or the passengers of a private ship* or a private aircraft,” and directed on the high seas “*against another ship* or aircraft, or against persons or property on board such ship or aircraft.”¹⁷⁰

A look to the Harvard Research, however, indicates that the intent was only to exclude criminal acts by one passenger or crewmember against another, which were not tantamount to a revolt against law itself: “[A] simple act of violence on the part of the crew or passengers does not constitute in itself the crime of piracy, not at least as far as international law is concerned.”¹⁷¹ Even a mutiny, which seeks to supplant the leadership and “seize the ship,” does “not constitute acts of piracy.”¹⁷²

The case of *The Creole* (1841) proves instructive. A large number of slaves aboard a U.S. merchant ship mutinied, murdered a passenger, and then took the ship into the British port of Nassau.¹⁷³ The mutineers were tried for piracy and acquitted.¹⁷⁴ The British law officers who advised Lord Stanley approved the result, though they stated that the mutineers could be tried for murder.¹⁷⁵

Once a mutiny rejects the authority of any state, however, the mutineers do become pirates. Even a warship can become a pirate

open war exists” between it and Spain, in which the United States maintained strict neutrality. 18 U.S. (5 Wheat.) at 358. Given that state of things, the Court decided to “respect the belligerent rights of both parties,” and “not treat as pirates, the cruisers of either, so long as they act under, and within the scope of their respective commissions.” *Id.*

170. UNCLOS, *supra* note 25, at art. 101 (emphasis added).

171. *Summary Records of the 290th Meeting*, [1955] 1 Y.B. Int'l L. Comm'n 37, 42, U.N. Doc. A/CN.4/SER.A/1955 [hereinafter *Summary Records*] (quoting Harvard Research, *supra* note 47, at 815).

172. *Report of the International Law Commission*, *supra* note 148, at 282.

173. 2 LORD MCNAIR, INTERNATIONAL LAW OPINIONS 79, 85-87 (1956).

174. *Id.* at 85-87.

175. *Id.*

ship under UNCLOS if mutineers “take control of the ship” and then engage in Article 101 acts.¹⁷⁶ Again, the piracy analysis turns on the relationship among the act, actors, and states. The rapporteur for the International Law Commission cited L. Oppenheim for the “consensus of the legal opinion” that mutineers become pirates “when the revolt is directed, not merely against the master, but also against the vessel, for the purpose of converting her and her goods to their own use.”¹⁷⁷ At no point did he require that the mutiny somehow involve a second ship to transform it into piracy.

No case law supports a two-ship requirement either. In fact, the Queen’s Bench in *In re Tivnan* found a seizure of a U.S. schooner seized by Confederate passengers to be piracy *jure gentium*.¹⁷⁸ Gerald McGinley writes that there “seems to be no sound basis for distinguishing acts of depredation perpetrated by those who boarded from another ship.”¹⁷⁹ In his determination that the *Santa Maria* incident was one of piracy, Fenwick states that it “matters not that the act was begun on shore, by disguised entrance onto the ship.”¹⁸⁰ Finally, it is worth pointing out that the second part of the UNCLOS definition noticeably contains no “against *another* ship” language.¹⁸¹

Thus, once the Somalis took over, rejected the authority of any state, and committed any other violent action on the high seas, including the ongoing act of forcible detention, their ship became a pirate ship, and their actions piracy. Similarly, the PLF hijackers were pirates. Upon taking control of the *Achille Lauro* from within, they continued their hostage-taking and committed a murder.¹⁸² In both instances, the attackers’ actions could not be attributed to any one state, and their actions were not confined against any one state, so the proper recourse is in universal jurisdiction.

176. UNCLOS, *supra* note 25, at art. 102 (“The acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.”).

177. *Summary Records*, *supra* note 171, at 42 (quoting Harvard Research, *supra* note 47, at 815).

178. *In re Tivnan*, (1864) 122 Eng. Rep. 983, 986 (Q.B.).

179. McGinley, *supra* note 116, at 697.

180. Fenwick, *supra* note 159, at 428.

181. UNCLOS, *supra* note 25, at art. 101. According to the Commentary, acts committed outside the jurisdiction of any state were “chiefly” meant to include acts committed by a ship or aircraft on an island constituting *terra nullius* or on the shores of an unoccupied territory. *Report of the International Law Commission*, *supra* note 148, at 282. However, it indicates that the drafters were not concerned with two ships per se, only in preventing acts from “escaping all penal jurisdiction.” *Id.*

182. McGinley, *supra* note 116, at 700.

D. Conclusion

Current international law is sufficient to effectively counter piracy as well as maritime terrorism on the high seas. For an act in international waters to qualify as piracy, and thereby for universal jurisdiction to attach, the lack of state sanctioning is the determinative factor. Without an established state connection, optimal deterrence requires that the international community possess the ability to capture and prosecute pirates and piratical terrorists. With an established state connection, on the other hand, the international community has recourse in diplomacy and warfare.

Given the satisfactory state of international law, there is a distinct set of domestic and regional reforms that the United States can alone undertake to help attain optimal deterrence. For those acts committed within a nation's territorial seas, certain regional measures, with the United States as potential catalyst, are necessary to enhance the ability of governments to police their own waters. These two subjects form the bases of the subsequent two sections.

III. THE LEGAL STATUS OF PIRATES AND THE SEVEN DOMESTIC REFORMS THAT DERIVE FROM IT

I can say I know the world inside out, as you may see—that each of us has the plague within him; no one, no one on earth is free from it. And I know, too, that we must keep endless watch on ourselves lest in a careless moment we breathe in somebody's face and fasten the infection on him. What's natural is the microbe. All the rest—health, integrity, purity (if you like)—is a product of the human will, of a vigilance that must never falter. The good man, the man who infects hardly anyone, is the man who has the fewest lapses.¹⁸³

On February 23, 2006, I testified against the ten suspected pirates who attacked the *Safina al Bisrat* in their Mombasa, Kenya trial. The defense counsel spent the vast majority of time on cross examination accusing me of planting the evidence and of “trying to get Somalia back for what it did to me in 1991.” I eventually responded in half-jest: “I was barely learning how to drive in 1991, I have nothing against Somalia, or these ten defendants in particular.”

“In fact,” I added as the humid laughter died down, gesturing to the defendants who had been smiling at me the whole time, “they don't seem to have anything against me either,” at which point the defendants gave an enthusiastic thumbs up and their signature toothy smile.

183. CAMUS, *supra* note 1, at 229.

Somalia is in a primordial existence, a nasty, brutish, and short state of nature. No Somali we interviewed knew his birthday, his parents, or how to read and write. Those who did not invoke their *Miranda* rights, signed their advisement forms with an "X." Prior to their attack on the *Safina al Bisarat*, they were in an open boat for fifteen days on the seas, rationing infested rice, and taking turns nibbling away on the remains of a shark. The youngest of the ten visibly shook as he walked handcuffed into the office where we conducted the interviews. When asked if he had any questions, he responded: "I don't want to be shot."

On the other hand, the oldest of the ten, a man no more than twenty-three years old, and whose body was scarred with knife and bullet wounds, showed no fear. His eyes said that nothing we could ever do would come close to what he had already seen and experienced. "The Enforcer," as the Indian crewmembers referred to him, sat in his chair, stretched, and yawned.

What *did* get through to each of them—and got through to them in a bafflingly powerful way—was respect. At the end of my testimony in the sweltering, subequatorial courthouse, the ten suspects actually thanked me, through their defense counsel, for "treating them so well," and with such "respect and dignity." I had just spent hours on the stand testifying against them, and yet the ten suspects considered me their friend. The African press, looking to sensationalize, even had to admit that the suspects were "treated fairly without abuse of their human rights."¹⁸⁴ Only months later, after the magistrate found that they could stand trial in Kenya despite their jurisdictional arguments and claims to being "mere fishermen," did one of the suspected pirates try the torture angle.¹⁸⁵ He could provide no details, however, of any alleged mistreatment¹⁸⁶ because, of course, none occurred.

Optimal deterrence turns on the proper application of both the international laws of armed conflict and U.S. jurisprudence and practice. Given the state of international law previously discussed,

184. *US Lawyer Testifies in Pirates Case*, KENYA BROADCAST CORP., Feb. 25, 2006, <http://www.kbc.co.ke/story.asp?ID=35264> (*n.b.*: a significant number of facts within the article are erroneous. For example the prosecutor's name was not Beatrice Jaden, who was actually the presiding magistrate, but Margaret Mgawi, and neither of them would have "cross-examined" me, a government witness. Other factual errors may also be due to difficulties in translation). For a considerably more accurate account of my testimony, though still not perfect, see *U.S. Navy Officer Tells Kenyan Court That 10 Suspected Somalis Pirates Claimed They Were Fishermen*, ASSOCIATED PRESS, Feb. 23, 2006, available at www.icc.co.hu/docstore/17-24February2006.doc?PHPSESSID=2cb9d03b5c353c97d2e4e a3375f8dd71.

185. *Suspected Somali Pirate Accuses US of Torture*, REUTERS, Aug. 3 2006, available at http://www.boston.com/news/world/africa/articles/2006/08/03/suspected_somali_pirate_accuses_us_of_torture/.

186. *Id.*

accommodating and tailoring principles and practices of domestic jurisprudence to naval constabulary missions will greatly assist in the investigation, capture, detention, and prosecution of suspected pirates. But it is equally essential to respect the *international* laws of armed conflict as well, even though they do not technically apply to law enforcement missions over pirates. The Law of Armed Conflict applies “to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.”¹⁸⁷ Pirates are not state actors.

Captive pirates are therefore not enemy prisoners of war (EPWs). In fact, as has been discussed above and will be discussed further below, their position as non-state, international criminals subject to domestic laws achieves for them a rather distinct status. Nonetheless, the Department of Defense requires that the armed forces of the United States “will comply with the law of war during all armed conflicts; however such conflicts are characterized, and unless otherwise directed by competent authorities, will comply with the principles and spirit of the law of war during all other operations.”¹⁸⁸ As well it should.

Applying these norms will help ensure: (1) that no conviction is overturned for “due process” in any nation; (2) that any admissions obtained remain admissible; (3) that more nations willingly seek to join multi-lateral security operations, allow the United States to help patrol their waters, or both; (4) that respect for the rule of law is engendered among developing countries; and (5) that counter-piracy operations do not, by engendering anti-U.S. hatred, transform mere pirates into terrorists.

Through this new model of anti-piracy operations, the United States can leverage the goodwill borne of a strategy of military fortitude tempered with respectful treatment. It was no coincidence that as the *NASSAU* Security Officer and the Author were considered mild celebrities in Kenya, Kenya itself expressed interest in joining the multi-national coalition patrolling the seas off Somalia.¹⁸⁹ It is similarly not a coincidence that India joined the multi-national piracy patrols of the Straits of Malacca less than a month after sixteen of its crewmembers on one of its ships were saved from a piratical attack

187. Common Article 2 of the Five Geneva Conventions.

188. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTRUCTION 5810.01A, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM ¶ 5a (1999); *see also* DEPT OF DEF., DIRECTIVE 5100.77, DoD LAW OF WAR PROGRAM (1998); DEP'TS OF THE ARMY, THE NAVY, THE AIR FORCE & THE MARINE CORPS, OPNAVINST 3461.6, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES & OTHER DETAINEES ¶¶ 1-5 (1997) [hereinafter OPNAVINST 3461.6].

189. Kenya expressed those wishes during an international piracy conference hosted by the Kenyan Ministry of Transportation in Mombasa, which happened to take place at the exact same time as my testimony.

with international news coverage.¹⁹⁰ It would be foolish to say that they joined *because* of the NASSAU Strike Group's actions,¹⁹¹ but it would be fair to say that both countries would be more hesitant to join had the capture and seizure caused international controversy. Foreign policy, contrary to the tenets of classical realists, is often a "bottom-up" product.¹⁹²

Most important, in a world in which anger against the United States is exploited by fundamentalist demagogues into anti-American fanaticism, treating all those the United States relentlessly pursues with exceptional respect and dignity will not only keep our anti-piracy efforts from triggering a terrorist mutation, especially in a destitute and predominantly Muslim country like Somalia, but it will actually help make converts. The United States could always use the image-enhancement.¹⁹³

Thus, the United States should undertake the following seven domestic proposals at the intersection of domestic and international law and at the crossroads of law and strategy. First, the United States should better adapt rules of criminal procedure to ensure Fourth Amendment safeguards while accommodating the realities of naval law enforcement, perhaps even by applying the Uniform Code of Military Justice (UCMJ) to captured pirates. Second, the United States should ensure Fifth Amendment protections while ensuring

190. See *India - New Delhi to Join Malacca Patrols*, PERISCOPE DAILY DEF. NEWS CAPSULES, Feb. 24, 2006, available at 2006 WLNR 3270223; *India: Admiral Bhasin Talks About Submarine Training, Drills With Foreign Navies*, WORLD NEWS, Mar. 1, 2006, available at <http://www.xignite.com/xWorldNews.aspx?articleid=SAP20060326016011>.

191. For a discussion on India's strategic decision to join the patrols in the Straits, see Amit Kumar, *Strait Talk in Malacca*, INST. FOR PEACE & CONFLICT STUD., Feb. 6, 2006, available at <http://www.ipcs.org/printIndiaArticle.jsp?action=showView&kValue=1936&status=article&keyArticle=1015>.

192. See generally Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997). Moravcsik argues that liberal theory rests on a "bottom-up" view of politics in which "the demands of individuals and societal groups are treated as analytically prior to politics." *Id.* at 517. "Political action is embedded in domestic and transnational civil society, understood as an aggregation of boundedly rational individuals with differentiated tastes, social commitments, and resource endowments." *Id.*

193. In a response to a 2005 Pew Research Group international poll finding the United States' image abroad still in the negative column, especially in the Muslim world, Former Secretary of State Madeleine Albright said the United States could "improve our image if we undertake humanitarian tasks, if we support democracy without imposing democracy, and that we can mitigate some of our problems if we take other countries' national interests into calculations as we create our own." *Poll Finds America's Image Still Negative Abroad*, VOICE OF AM., June 24, 2005, available at 2005 WLNR 9989354. In 2005, President Bush was sufficiently concerned about the United States' image that he appointed his long-time confidante, Karen Hughes, to head up the task of public diplomacy. See Steven R. Weisman, *Bush Confidante Begins Task of Repairing America's Image Abroad*, N.Y. TIMES, Aug. 21, 2005, at 1.6.

the most effective investigations and prosecutions, perhaps by using the anti-racketeering model. Third, while that investigatory model should incorporate a statistical “pin-mapping” approach, the United States should not rely too heavily on the Automatic Identification System (AIS) provisions within the International Convention for the Safety of Life at Sea (SOLAS Convention) to provide a reliable maritime picture. Fourth, the United States needs to provide better training to visit, board, search, and seizure (VBSS) teams in evidence collection and documentation. Fifth, the United States could consider employing a carefully planned, and legally sound, military subterfuge known as a Q-Ship to capture and deter pirates. Sixth, the United States should adopt a very limited policy of entry within twelve nautical miles of Somalia. Finally, the United States should complement all the above efforts by conducting an Information Operations (IO) campaign to ensure the broadest dissemination of its deterrence efforts, while ensuring that the United States maintains the high ground essential to the war on terrorism.

A. *Affording Fourth Amendment Protection Rights at Sea*

According to Secretary of the Navy Instruction 1640.9C, afloat brigs such as the one on the USS *NASSAU* are not certified to house those, like pirates, who are not subject to the UCMJ without express waiver from the Secretary of Defense or designee.¹⁹⁴ However, seized pirates are likely to be dangerous individuals, especially if they are also terrorists, and thus need to be detained in secure facilities. When the *NASSAU* Strike Group found itself in this position, it filed for a specific waiver to use *NASSAU*'s ten-person brig. Rather than have future groups go through the waiver process, it would be more efficient to amend the regulation to accommodate naval constabulary missions.

However, such a straightforward change reveals the presence of a larger issue: the afloat justice system is not sufficiently attuned to deal with constabulary missions.¹⁹⁵ The ten suspected Somali

194. SEC'Y OF THE NAVY, SECNAVINST 1640.9C, DEPARTMENT OF THE NAVY CORRECTIONS MANUAL ¶ 7105 (2006).

195. It is worth noting at this point that the Posse Comitatus Act (PCA), 18 U.S.C.A. § 1385 (West 2006), which prohibits the willful use of the Army or Air Force to execute the laws, does not bar naval constabulary missions. First, the PCA only applies in the absence of constitutional or congressional authorization. “Public armed vessels” are specifically authorized to “subdue, seize, take, and send” pirates into “any port of the United States.” 33 U.S.C.A. §§ 381, 382 (West 2006). Additionally, the United States has specifically signed onto the 1958 Geneva Convention with its piracy-repression obligations. International agreements are “law of the United States.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987). Furthermore, since the courts have refused to extend the reach of the PCA to

pirates, for example, remained in U.S. custody for eight days before being transferred to Kenya for prosecution. Indeed, those captured on the high seas will typically have to wait a long time in the brig before the interested states make a decision on who is best to prosecute. Such a decision will likely first require a trip by U.S. investigators to the ship (often an extended process in and of itself), a series of interviews, and a decision by the U.S. Attorney in Washington, D.C. If the United States declines to prosecute, then the diplomatic process of seeking the appropriate state continues in earnest, and the transit to that state begins. Until the handover to prosecuting authorities, no probable cause determination is made, no formal charges are levied, and the suspects remain confined.

Were pirates non-citizen enemy combatants, extended detention without probable cause determination, charges, or trial would not present a legal problem.¹⁹⁶ They could not, however, be placed in an afloat brig for other than transit purposes¹⁹⁷ and must be repatriated at the end of the conflict.¹⁹⁸ As Professors Goodman and Jenks also

the Navy or Marine Corps, *see* United States v. Yunis, 924 F.2d 1086, 1093 (D.C. Cir. 1991); U.S. v. Acosta-Cartagena, 128 F.Supp.2d 69, 71 (D.P.R. 2000) (stating that PCA “prohibits the Army or Air Force from enforcing civilian law, but not the Navy”), there is no controlling statute that would trump the customary international law obligations under UNCLOS. *See* discussion *infra* Part III.E. Second, the PCA imposes no restriction on the use of U.S. armed forces abroad, since Congress intended to preclude military intervention in domestic civil affairs. *See* Yunis, 924 F.2d. at 1093. *See generally* Extraterritorial Effect of the Posse Comitatus Act, 13 OP. OFF. LEGAL COUNSEL 321 (1989) (opining that the Posse Comitatus Act does not apply outside the territory of the United States); Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL’Y REV. 383 (2003) (arguing that if the military is to be handed an ongoing law enforcement role the bright line should be drawn “at the borders”). Third, while military regulations extend the requirements of the PCA to the Navy via DEP’T OF DEF., DIRECTIVE 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS encl. 4, ¶ 3 (1986) [hereinafter DIRECTIVE 5525.5] and SEC’Y OF THE NAVY, SECNAVINST 5820.7B, COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS ¶ 9 (1988), the Defense Department has directed that the Navy or Marine Corps may still conduct missions “undertaken for a primarily military or foreign affair’s [sic] purpose.” DIRECTIVE 5525.5, *supra*, at encl. 4, ¶ 1.2.1.6. Fourth, in refusing to extend the reach of the PCA to the Navy, courts have also refused to extend the exclusionary rule to any violations. *See* Yunis, 924 F.2d at 1093.

196. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 518-19 (2004) (“The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again,” not punishment) (internal citations omitted).

197. OPNAVINST 3461.6, *supra* note 188, ¶ 2-1(b).

198. *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; *see also* Geneva Convention Relative to the Treatment of Prisoners of War art. 75, July 27, 1929, 47 Stat. 2055 (providing that repatriation should be accomplished with the least possible delay after conclusion of peace); Hague Convention on Laws and Customs of War on Land art. 20, Oct. 18, 1907, 36 Stat. 2301 (stating “conclusion of peace”); Hague Convention on Laws and Customs of War on Land art. 20, July 29, 1899, 32 Stat. 1817 (providing as soon as possible after “conclusion of peace”). If convicted of war crimes, however, those

persuasively contend, they would also be entitled to “minimum procedural guarantees” of procedural rights under the Geneva Conventions, both for their initial seizure, and for their continued detention.¹⁹⁹ If the pirates were non-citizen terrorists, they could also be subject to extended detention until the resolution of the war on terrorism and would likely be transferred to a shore-based facility like Camp Delta.²⁰⁰ At Guantanamo Bay, the detainees would also have the right to appear before a Combatant Status Review Tribunal (CSRT) to determine whether they were enemy combatants.²⁰¹ The extent of any further procedural rights is a subject of intense debate, but at a minimum, even terrorists have some procedural guarantees.

But what about a non-citizen, non-terrorist pirate?

As already discussed, pirates are not technically within the Law of Armed Conflict.²⁰² It is nevertheless possible that a court could hold that humanitarian principles of international law legally require that basic minimum procedural standards apply to all detained individuals. Furthermore, any piracy prosecutions under the SUA Convention will entail certain due process rights, including the right of the defendant to inform his state “without delay” and to be visited by a representative of his state.²⁰³ In addition, states are directed to deal with the case “in the same manner as in the case of any other

individuals may be detained beyond the end of hostilities. See, e.g., *Johnson v. Eisentrager*, 339 U.S. 763, 785-86 (1950).

199. Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653, 2659 (2005); see also OPNAVINST 3461.6, *supra* note 188, ¶¶ 1-6.

200. Approximately two months after the September 11, 2001 attacks, President Bush issued a Military Order that required the detention—and military trial if criminal charges were filed—of non-citizens who the President had “reason to believe”: (a) were members of Al Qaeda; (b) were involved in specified ways in present or potential future activities with “adverse effects on the United States, its citizens, national security, foreign policy, or economy”; or (c) had knowingly harbored any of the former individuals. Military Order of November 13, 2001: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism § 2(a), 66 Fed. Reg. 57,833 (Nov. 16, 2001). There is no time limit on the period of detention. *Id.*

201. PAUL WOLFOWITZ, DEPUTY SEC’Y OF DEF., MEMORANDUM FOR THE SECRETARY OF THE NAVY (2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>. Here, the status must be shown by a preponderance of the evidence to three commissioned military officers. See GORDON ENGLAND, SEC’Y OF THE NAVY, MEMORANDUM FOR DISTRIBUTION (July 29, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>. Under the CSRT, the rules of evidence are relaxed, and a non-lawyer represents the detainee. *Id.* Once the government makes this showing, it may confine the detainees for the duration of the combat, namely the confrontation with Al Qaeda, provided they still pose a threat. See GORDON ENGLAND, SEC’Y OF THE NAVY, MEMORANDUM FOR DISTRIBUTION (Sept. 14, 2004), available at <http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf> (establishing the annual Administrative Review Procedures for enemy combatants).

202. See *supra* note 187 and accompanying text.

203. SUA Convention, *supra* note 91, at art. 7.

offence of a grave nature under the law of that State,”²⁰⁴ which not only requires international due process rights, including a preliminary hearing to determine sufficiency of evidence for trial,²⁰⁵ but it may require a state such as the United States to afford the defendant its own procedural safeguards.

So what are those procedural rights in the United States that might apply, and would those rights apply regardless of the SUA Convention if the United States prosecuted suspected non-citizen, non-terrorist pirates?

First, in *United States v. Verdugo-Urquidez*,²⁰⁶ the U.S. Supreme Court held that the Fourth Amendment’s protections against illegal searches, seizures, and arrests do not apply abroad to non-U.S. citizens, even when such illegal acts are perpetrated by U.S. agents. The court stated: “There is likewise no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters.”²⁰⁷

However, a piracy prosecution under the SUA Convention, a treaty which the United States has ratified, could nonetheless oblige the United States to provide the full complement of Fourth Amendment protections. International law and international agreements of the United States are law of the United States and supreme over the law of the several states.²⁰⁸

Aside from the rare SUA prosecution, however, the Supreme Court’s holding in *Verdugo-Urquidez* seemingly gives a blank check to naval constabulary operations for warrantless arrests and indefinite

204. *Id.* at art. 10.1.

205. The language in Article 10.1 of the SUA Convention, *supra* note 91, mirrors, though not identically, the language of Article 7 of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 (entered into force Oct. 14, 1971). As Christopher Joyner explains, “this language preserves for the alleged offender the rights of due process, a fair trial, and guarantees the concept of innocent until proven guilty. Presumably, an investigation into the facts of the allegation against an accused offender determines whether to proceed to the trial phase.” Christopher C. Joyner, *International Extradition and Global Terrorism: Bringing International Criminals to Justice*, 25 LOY. L.A. INT’L & COMP. L. REV. 493, 512-13 (2002) (emphasis added).

206. 494 U.S. 259 (1990).

207. *Id.* at 267 (emphasis added).

208. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987). The Supremacy Clause of the Constitution provides that treaties “shall be the supreme Law of the Land” and that the “Judges in every State shall be bound thereby.” U.S. CONST. art. VI, cl. 2. It may be possible to argue, however, that the SUA Convention Article 10.1 is not binding on the courts because the SUA Convention is not self-executing. See § 111. See generally Malvina Halberstam, *United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 31 GEO. WASH. J. INT’L L. & ECON. 49 (1997) for an excellent discussion on the constitutionality of non self-executing treaties.

detentions on the high seas. After all, the rules of U.S. criminal procedure requiring a warrant prior to arrest, or a forty-eight hour probable cause determination subsequent to an arrest without a warrant, were designed to effectuate the Fourth Amendment.²⁰⁹ The military's forty-eight hour probable cause determination,²¹⁰ seventy-two hour requirement of a command memorandum detailing the probable cause for pretrial restraint,²¹¹ and the initial review officer's (IRO's) independent determination of probable cause would also be inapplicable,²¹² since these requirements are based on the Fourth Amendment.

What would happen, however, if one day seized, suspected pirates turned out to be the legitimate fishermen they claimed to be? What would happen if the courts, concerned with that possibility, for example, began to expand the reach of Fourth Amendment protections to non-citizen suspected pirates? The *Safina al Bisarat* pirates were availed of neither the civilian nor military procedures. Even if they were explicitly required, the former would not have been practicably available off the coast of Somalia, and the latter did not apply to them. Would effective U.S. prosecution be hamstrung from the beginning?

The scenario is not inconceivable. One way in which a court could apply Fourth Amendment strictures to suspected non-citizen pirates is through recognizing that a U.S.-flagged vessel is floating U.S. territory,²¹³ as is a U.S. warship within which detention would occur.²¹⁴

209. See *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (“[A] jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*.”); *Gerstein v. Pugh*, 420 U.S. 103, 111-19 (1975) (holding unconstitutional Florida procedures under which persons arrested without a warrant could remain in police custody for thirty days or more without a judicial determination of probable cause).

210. Manual for Courts-Martial, United States (2005), R.C.M. 305(i)(1) [hereinafter R.C.M.]; see also *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976) (holding, in reference to *Gerstein*, that “those procedures required by the Fourth Amendment in the civilian community must also be required in the military community,” unless military necessity required a different rule). The court also held that, since bail does not exist in the military, “a neutral and detached magistrate must decide more than the probable cause question.” *Courtney*, 1 M.J. at 271. “A magistrate must decide if a person could be detained and if he should be detained.” *Id.* “The purpose of RCM 305 was to comply with *Gerstein* and *Courteny* and their progeny.” *United States v. Rexroat*, 38 M.J. 292, 295 (C.M.A. 1993).

211. R.C.M., *supra* note 210, at 305(h)(2)(A)-(C).

212. R.C.M., *supra* note 210, at 305(i)(2). Note that the IRO does not review the commander's decision for an abuse of discretion; rather, he makes an independent decision of probable cause and necessity.

213. UNCLOS, *supra* note 25, at art. 92 (“Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.”).

The Supreme Court has recognized that aliens are “persons” entitled to constitutional protection before being criminally sanctioned.²¹⁵ While later the Court in *Verdugo-Urquidez* limited these constitutional protections, they did require them when the aliens “have come within the territory of the United States and have developed substantial connections with this country.”²¹⁶ So, if an attacker fires upon or illegally boards a U.S. vessel, he may be deemed to be sufficiently encroaching upon U.S. territory to subject himself both to U.S. jurisdiction and constitutional protection, just as if he were assaulting persons in Nebraska.

Furthermore, while the *Verdugo-Urquidez* majority hinted in dicta that the substantial connections must be “voluntary,” they did leave open the fact that involuntary detention within the United States, at some point, could lead to Fourth Amendment protection.²¹⁷ How long a suspected, non-citizen, non-enemy combatant, non-terrorist must endure detention before he is invested with the legal right for an independent review of his detention has yet to be decided. *Verdugo-Urquidez* offered a case-by-case “substantial connections” test, and only ruled on a Fourth Amendment *search* in the case, not the more serious matter of an arrest. Moreover, as Justice Harlan put it, “the question of which specific safeguards . . . are appropriately to be applied in a particular context . . . can be reduced to the issue of what process is ‘due’ a defendant in the particular circumstances of a particular case.”²¹⁸

In the face of any military operation, foreseeable uncertainty should be limited wherever possible. Prosecutors will no doubt find succor in the plenary power doctrine in which the Court, by deferring to Congress and the executive branch, has stripped away much of the promised constitutional protection.²¹⁹ And even if a U.S. court were to apply some measure of the Fourth Amendment to seized pirates, there is flexibility in the current rules. In addition to rejecting the proposition that a probable cause hearing is only prompt under *Gerstein* when provided “immediate[ly]” upon completion of the

214. High Seas Convention, *supra* note 26, at art. 8; UNCLOS, *supra* note 25, at arts. 32, 95, 236.

215. See, e.g., *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (aliens protected by Fifth and Sixth Amendments); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (aliens protected by Fourteenth Amendment); see also discussion on Fifth Amendment application *infra* Part III.B.

216. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990).

217. *Id.* at 271-72 (“The extent to which respondent might claim the protection of the Fourth Amendment if the duration of his stay in the United States were to be prolonged—by a prison sentence, for example—we need not decide.”).

218. *Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring).

219. See generally Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707 (1996); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965 (1993).

“administrative steps incident to arrest,”²²⁰ *McLaughlin* allows the Government to demonstrate “the existence of a bona fide emergency or other extraordinary circumstance” which caused it to hold a probable cause determination beyond forty-eight hours.²²¹ The fact that the holding facility is in the middle of the ocean, thousands of miles from the United States, could qualify as an “extraordinary circumstance.” Accordingly, the military has a specific “at sea” exception to its normal procedural requirements.²²²

However, in part to mitigate uncertainty, the United States should consider extending UCMJ jurisdiction to seized pirates and availing itself of the specific “at sea” exception up front. Additionally, all the military’s procedural safeguards in most circumstances can be executed on board the larger naval vessels in which suitable brigs exist, thereby demonstrating the procedural fairness to a later court as well as to other nations. If probable cause to establish an individual’s guilt for piracy does not exist, he may be repatriated,²²³ while the others are detained until transfer to Court Martial. Finally, UCMJ jurisdiction allows a properly constituted Court Martial to try suspected pirates anywhere, including on a ship or on an overseas U.S. military base, thereby limiting the logistical and political costs of transporting them from the Indian Ocean to the United States. Civilians are already subject to the UCMJ for General Courts Martial under the “law of war,”²²⁴ and the applicable U.S. Code sections could be incorporated into the UCMJ via Article 134.²²⁵

220. *County of Riverside v. McLaughlin*, 500 U.S. 44, 53-54 (1991).

221. *Id.* at 57.

222. *See* R.C.M., *supra* note 210, at 305(m)(2).

[C]onfinement on board the vessel at sea may continue only until the [accused] can be transferred to a [brig ashore]. Such transfer shall be accomplished at the earliest opportunity permitted by the operational requirements and mission of the vessel. Upon such transfer [the command memorandum must be transmitted to the IRO and must include an explanation of the delay.]

223. Of course, repatriation to a country like Somalia is no small task. Repatriation via ship directly to Somalia would require entry into Somali waters and ports and would thus likely be prohibitively dangerous given the task. Repatriation at sea could run afoul of the obligation to assist mariners at sea under Article 12 of the High Seas Convention, *supra* note 26, and Article 98 of UNCLOS, *supra* note 25, depending on the condition of their original craft, the condition of the individuals themselves, and the distance from the shore. Based on the clan structure and the warring factions within Somalia, repatriation would also have to occur off friendly turf. Finally, repatriation through another country like Kenya or Djibouti would require heavy involvement by the Department of State followed by a dangerous overland transfer. Given the warlike state of Somalia, would repatriation involve re-arming the released individual? If not, would repatriation without re-arming be like releasing a de-clawed cat into the woods? Even after convicted Somali pirates are released from prison, assuming no life sentence, the same issue of repatriation would apply.

224. R.C.M., *supra* note 210, at 202(b), 203. It is also worth mentioning that detained persons are subject to punishment under the UCMJ and other U.S. laws,

Lastly, extending Fourth Amendment procedural guarantees, even through the UCMJ, will help improve the United States' image abroad and thereby attract more coalition support and regional accord. Doing so will also continue to educate nations on the value of the rule of law.²²⁶ Entitlement debates notwithstanding, it is certainly clear to say that not providing the full complement of procedural rights in the past has cost the United States valuable political capital and has somewhat shaded its otherwise brilliant rule of law beacon.²²⁷

B. *Affording Fifth Amendment Rights While Maintaining Effective Investigations*

Because captured pirates are criminals, not EPWs, they may face prosecution in domestic courts, including those of the United States. Do the Fifth Amendment safeguards, including the right against self-incrimination, apply?

They should. In any criminal proceeding, once the government detains an individual, the Constitution safeguards him against compelled self-incrimination.²²⁸ The accused is permitted not to testify in court,²²⁹ and while in custody, he has a right to make no

regulations, and orders in force during the time of their detention. See OPNAVINST 3461.6, *supra* note 188, ¶¶ 3-7.

225. Article 134 provides in pertinent part as follows:

Though not specifically mentioned in this chapter, . . . all . . . crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Manual for Courts-Martial, United States (2005), punitive art. 134(a).

226. See, e.g., Minna Schrag, *The Yugoslav Crimes Tribunal: A Prosecutor's View*, 6 DUKE J. COMP. & INT'L L. 187, 194-95 (1995).

There is one central point on which all of us at the Office of the Prosecutor, no matter what country or legal system we come from, agree, and for which we needed no debate: our determination that the prosecutions be, and be perceived to be, fair. . . . We hope that by convicting those most responsible for the atrocities in the former Yugoslavia we will help to demonstrate that justice is possible. We hope our work will help to restore the rule of law in that part of the world, and at the same time confirm the fundamental underpinnings for international humanitarian law that will serve us all well into the next century.

227. See, e.g., Human Rights Watch, *United States: Guantánamo Two Years on—U.S. Detentions Undermine the Rule of Law*, Jan. 9, 2004, <http://www.hrw.org/english/docs/2004/01/09/usdom6917.htm>.

228. See U.S. CONST. amend. V (“[N]or shall [any person] be compelled in any criminal case to be a witness against himself . . .”).

229. See, e.g., *Mitchell v. United States*, 526 U.S. 314, 326-27 (1999); *Griffin v. California*, 380 U.S. 609, 613-14 (1965).

statements.²³⁰ Any statements he does make while in custody have to be the product of a knowing and voluntary waiver lest they be suppressed.²³¹ The NASSAU Strike Group took great pains to explain those rights to all the Somalis it captured. The Somalis, however, had no concept of a “right,” and it was not until “right” was re-translated into “power” that they truly began to understand.

The Court in *Verdugo-Urquidez* has been interpreted by later courts to limit Fifth Amendment application to aliens in the same manner as it did the Fourth Amendment.²³² But, just as with the Fourth Amendment, once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all “persons” within the United States, including aliens, whether their presence in the country is lawful, unlawful, temporary, or permanent.²³³ At some point in their detention on sovereign U.S. territory, albeit floating, the suspected pirates will be considered “within the United States,” or to have developed “substantial connections” thereto. They will certainly be within the United States if tried by U.S. courts. Thus, for the reasons stated above, the United States should honor the Fifth Amendment with respect to captured pirates. Effective prosecutions, the rule of law example, and maximum coalition involvement are optimized by affording Fifth Amendment protections.

Of course, from a purely investigatory and law-enforcement perspective, there are familiar downsides to complying with the Fifth Amendment. With piratical terrorists, there will be an urgency to

230. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 431-35 (2000); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

231. See *Miranda*, 384 U.S. at 444. Even though a defendant may make a voluntary, knowing, and intelligent waiver of his Fifth Amendment rights as a matter of fact, the courts will still look at whether, “under the totality of the circumstances,” the challenged statement was involuntary. *Id.* at 502-03 (Clark, J., dissenting). A court may find that a defendant made a valid waiver and yet still hold that a confession was involuntary if it finds some form of coercion. *Miranda*, 384 U.S. 436; see also *Edwards v. Arizona*, 451 U.S. 477 (1981) (laying out additional safeguards to ensure the waiver of the right to counsel is knowing and voluntary); *Henderson v. DeTella*, 97 F.3d 942, 946 (7th Cir. 1996).

232. See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.”); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (holding that Fifth Amendment protections do not extend to aliens outside the territorial boundaries); *Johnson v. Eisentrager*, 339 U.S. 763, 784-85 (1950) (same).

233. *Zadvydas*, 533 U.S. at 693-94; see also *Plyler v. Doe*, 457 U.S. 202, 210 (1982); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-98 & n.5 (1953); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); cf. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (“[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”).

finding out what other information they possess. The government must often forgo the possibility of prosecuting the suspect in order to compel that individual to provide information. That said, even in the absence of a Self-Incrimination Clause violation, there are domestic limits on the government's use of coercive interrogation techniques designed to extract information from individuals—as well there should be.²³⁴

With non-terrorist pirates, there is less urgency but still great value in obtaining information beyond the individual actor and his involvement with the particular incident. Modern day piracy is a criminal enterprise.²³⁵ Captain Pottengal Mukundan, Director of the International Chamber of Commerce's Commercial Crime Services, described piratical hijacking as typically involving “a mother ship from which to launch the attacks, a supply of automatic weapons, false identity papers for the crew and vessel, fake cargo documents, and a broker network to sell the stolen goods illegally.”²³⁶ “Individual pirates,” he added, “don't have these resources. Hijackings are the work of organized crime rings.”²³⁷

On the *NASSAU*, however, concern for the perceived Fifth Amendment “voluntariness” of statements kept the *NASSAU* Strike Group intelligence department from any direct questioning that would have extended beyond the circumscribed facts. The concern was that afloat naval intelligence could be *perceived* as unduly coercive, mostly by judges or juries who view intelligence agencies as “spies” trained more in the practice of interrogation than in interviewing. Lieutenant Commander Rory Berke, the *NASSAU* Strike Group Intelligence Officer, observed the initial biographical interviews of the ten captured Somalis, which the Author conducted.

234. See, e.g., *Chavez v. Martin*, 538 U.S. 760, 774 (2003). See also THE U.S. ARMY FIELD MANUAL, HUMAN INTELLIGENCE COLLECTOR OPERATIONS, FM 2-22.3 (2006).

235. See, e.g., THE NATIONAL STRATEGY FOR MARITIME SECURITY, *supra* note 14, at 5 (“Today's pirates and criminals are usually well organized and well equipped with advanced communications, weapons, and high-speed craft.”); LANGEWIESCHE, *supra* note 12, at 46-61 (describing the “elaborate plot” of the sophisticated pirates who attacked the *ALONDRA RAINBOW* in the Strait of Malacca in October 1999); Luft & Korin, *supra* note 125, at 61; Tom Maliti, *21st Century Pirates: Well-Armed, Organized: Better-Equipped Attackers Grow More Ruthless, Violent*, CHI. SUN TIMES, Nov. 20, 2005, at A28; Zoltan Isvan, *Piracy Rises Again on the High Seas*, NAT'L GEOGRAPHIC TODAY, Dec. 19, 2002, http://news.nationalgeographic.com/news/2002/12/1219_021219_tvpiracy.html (“Pirates attack with guns, parangs (a machete common in Indonesia and Malaysia) and, on occasion, dynamite. The new breed—decidedly not the swashbuckling pirates of lore—can range from local seamen looking for quick cash to organized-crime gangs and rogue military units.”).

236. Grant Holloway, *Triads Behind Ship Hijackings*, CNN, Feb. 5, 2002, available at <http://edition.cnn.com/2002/WORLD/asiapcf/southeast/02/04/malaysia.piracy/>.

237. *Id.*

In that short time alone, he found “immensely valuable information.”²³⁸ With his intricate knowledge of Somalia, its clan structure and dynamics, and the latest intelligence on piracy, he was able to make strong horizontal and vertical connections that outside investigators, whether from the FBI or the Naval Criminal Investigative Services (NCIS), would likely not have made, at least not so readily. However, once NCIS and the FBI took over, Lieutenant Commander Berke was not even permitted to observe the criminal interviews, only to brief the FBI and NCIS in advance.²³⁹ According to Lieutenant Commander Berke: “That cost us a lot.”²⁴⁰

Applying the Fifth Amendment should not chill criminal intelligence interviews into the vast piratical enterprise.²⁴¹ Being overly cautious, while not nearly as bad as being insufficiently cautious, is still inefficient. The United States needs to investigate this crime as if it were conducting a racketeering or terrorism investigation, not just a crime of circumscribed facts. Afloat intelligence officers are highly trained analysts who specialize in analyzing political, military, and strategic data. As the Attorney General’s Guidelines and long-standing FBI practice demonstrates, the admissibility of criminal interviews is little threatened by intelligence interrogations, so long as the laws of criminal procedure,²⁴² other applicable U.S. guidelines,²⁴³ and international due process²⁴⁴ are meticulously followed. There is no question that afloat naval intelligence officers can respect those rules and guidelines. Afloat intelligence officers on piracy missions should

238. Interview with Rory V. Berke, Lieutenant Commander, *NASSAU*, (Mar. 1, 2006) [hereinafter Interview with Berke].

239. It is useful to keep in mind that Naval vessels are not designed as floating police stations. On the *NASSAU*, there were no rooms with two-way mirrors and intercoms, so there was no way to observe unseen. There was also no way to set up a closed-circuit television. Interviews took place in the ship’s library and in the print shop office, located right by the brig.

240. Interview with Berke, *supra* note 238.

241. See, e.g., JOHN ASHCROFT, THE ATTORNEY GENERAL’S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATIONS (2002), <http://www.usdoj.gov/olp/generalcrimes2.pdf> [hereinafter GUIDELINES].

242. See cases cited *supra* note 232.

243. GUIDELINES, *supra* note 241, at 19-20.

244. See, e.g., Cairo Declaration on Human Rights in Islam art. 19(e), Aug. 5, 1990, available at <http://www.religlaw.org/interdocs/docs/cairohrislam1990.htm>; Banjul Charter on Human and Peoples’ Rights art. 7(1)(b)-(d), June 27, 1981, 21 I.L.M. 58, 60; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75, June 8, 1977, 16 I.L.M. 1391, 1423-24 [hereinafter Geneva Protocol I]; American Convention on Human Rights arts. 7(5), 8(2), 8(2)(d), 8(2)(f), Nov. 22, 1969, 1144 U.N.T.S. 123; European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 5(3)-(4), 6(2), 6(3)(c)-(d), Nov. 4, 1950, 213 U.N.T.S. 222.

receive training in criminal intelligence interviews, as distinct from the military's traditional focus on more tactical questioning. Not only will that allow for valuable intelligence gathering, but it will also help defuse future defense counsel charges of inappropriate questioning. If a prosecutor has an intelligence officer who can confidently explain the procedures and considerations of a criminal interview, as well as demonstrate that the prosecutor followed official guidance, she will have a strong position for defeating a motion to suppress.²⁴⁵

And the benefits of fusing the Navy's core intelligence capacity with its burgeoning constabulary capacity are enormous. Onboard, these highly skilled analysts specialize in counter-piracy and counter-terrorism intelligence and have the vast "maritime knowledge" the International Maritime Organization (IMO) deems "essential" to effective piracy investigations.²⁴⁶ Questioning seized suspects beyond their personal involvement in the crime will help reveal the horizontal and vertical links that will prove critical to the future detection, prevention, and prosecution of the piratical enterprise. Understanding common tactics, techniques, and protocols is critical to identifying future miscreants and to anticipating their actions. Additionally, as the IMO notes, it is "also probable that offenders will be involved in other offences such as carrying illegal immigrants, and useful intelligence may be lost if investigators are too compartmentalised in their approach."²⁴⁷

Intelligence derived from those captured not only provides details as to the nature and structure of the enterprise, but can also directly, or through statistical analysis, allow appropriate patrols to be dispatched to appropriate locations. This practice maximizes, or at least helps deter, future attacks. The IMB, for example, rightfully attributed the 16% drop in Indonesian piracy attacks from 2004 to 2005 to not only an increased "show of force," but to "several intelligence-led actions that resulted in gangs of pirates being caught."²⁴⁸

Beginning in the 1990s, New York City began to make historic strides in crime prevention through the implementation of Computer

245. It is also recommended that the interviews be videotaped to prove to the courts that all information was voluntarily obtained and that all the rules of criminal procedure and international law were followed.

246. IMO Resolution A.922(22), Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships, ¶ 5.1 (Nov. 29, 2001) [hereinafter IMO Resolution A.922(22)] ("It is essential that those employed by security force agencies to investigate piracy or armed robbery against ships shall have demonstrated investigation skills and competencies, as well as maritime knowledge/experience.")

247. *Id.*

248. 2005 PIRACY REPORT, *supra* note 4, at 16.

Comparison Statistics, or “CompStat,”²⁴⁹ which could serve as a model for the Navy’s own law enforcement missions. On a weekly basis, statistical summaries of the week’s crime complaints, arrest, and summons activity from New York City’s seventy-six precincts, nine Police Service Areas, and twelve Transit Districts were collated and fed into a city-wide database.²⁵⁰ Not only was the nature of the crime, the location, and the time fed into the statistical map, but far more detailed information about the victim, the type of attack, and other crime-specific details were as well.²⁵¹ All of those details enabled police to identify trouble spots in New York City, spot emerging patterns, and target the appropriate resources to fight crime strategically.

Maritime security operations can also benefit from this high-technology “pin-mapping” approach. By affording intelligence officers access to seized pirates, the data fed into the statistical map will be more than just radar hits and signal intelligence. The Navy will be able to more quickly identify active areas and fashion a comprehensive response. Moreover, by sharing this information with coalition partners (subject to releasability concerns of course), the United States can further a “common operating picture,” resulting in better policing of what Admiral William Fallon calls the “vast ungoverned or weakly controlled space” known as the oceans.²⁵²

C. *The Limited Role of AIS Within the SOLAS Convention*

AIS is a mandatory global system within SOLAS, designed to provide ship name, IMO number, destination, empirical data, position, course, and speed on an autonomous and continuous broadcast system operating in the VHF maritime mobile band, and it could also significantly add to that common operating picture.²⁵³ The system was primarily designed as a cheap and effective collision avoidance tool for commercial vessels and as an automatic tracking system for harbor authorities.²⁵⁴ However, through a somewhat

249. See WILLIAM BRATTON WITH PETER KNOBLER, *TURNAROUND: HOW AMERICA’S TOP COP REVERSED THE CRIME EPIDEMIC* 233-39 (1998).

250. See New York City Police Department, *COMPSTAT Process*, <http://www.nyc.gov/html/nypd/html/chfdept/compstat-process.html> (last visited Nov. 20, 2006).

251. *Id.*

252. Jim Garamone, *Piracy in Straits Highlights Need for Maritime Security*, AM. FORCES INFO. SERVICE, June 9, 2005, http://www.defenselink.mil/news/Jun2005/20050605_1559.html.

253. See U.S. Coast Guard Navigation Center, *AIS Overview*, <http://www.navcen.uscg.gov/enav/ais/> (last visited Nov. 20, 2006).

254. See generally M.J. LEWANDOWSKI & D.J. PIETRASZEWSKI, *AUTOMATIC IDENTIFICATION SYSTEM: A GENERAL DISCUSSION OF DEVELOPMENT, APPLICATION, AND IMPLEMENTATION* (2002), available at <http://www.rdc.uscg.gov/iws/pubs/ais-paper.pdf>.

manpower-intensive process, AIS information can be hand-fed into the Navy's Global Command and Control System-Maritime (GCCS-M).

On close inspection, however, the overall benefits of such a high fidelity picture for constabulary operations are limited. First, AIS is not required in all vessels, particularly those of less than 600 tons.²⁵⁵ Much of the small Taiwanese fishing dhows that are the prime targets of the Somali pirates, for example, are exempt from the SOLAS requirement, as was the *Safina al Bisarat*.²⁵⁶ Obviously, no pirate skiff would equip itself with AIS either.

Second, while all ships fitted with AIS must maintain the AIS in operation at all times (except where international agreements, rules, or standards provide for the protection of navigational information), SOLAS specifically authorizes masters to turn off the device "where continued operation of the AIS would pose a higher risk" to the safety and security of his ship.²⁵⁷ Continued use of AIS while transiting areas known for incidents of armed robbery and piracy, such as the Straits of Malacca, is specifically mentioned as a situation which may be such a high risk.²⁵⁸ Indeed, masters are concerned that pirates will better target their vessel if AIS is on, and some in fact shut the system off when going through pirate-infested seas.²⁵⁹ While there is no evidence that pirates, at least off Somalia, are using AIS to select their targets, it is certainly conceivable that they could do so by mother-shipping from their primitive skiffs to larger vessels outfitted with AIS. They would then use that ship's AIS to target even larger vessels.

Third, the global AIS picture is easily obtainable on the internet, exposing an area of vulnerability that potential pirates or terrorists can exploit to gain information and operating patterns on maritime

255. Regulation 19, Chapter V, ¶ 2.4 of the International Convention for the Safety of Life at Sea [hereinafter SOLAS] applies to all ships of 300 gross tonnage and upwards engaged on international voyages, cargo ships of 500 gross tonnage and upwards not engaged on international voyages, and all passenger ships irrespective of size. The requirement became effective for all ships by December 31, 2004.

256. *Id.*; see also discussion *supra* Part II.

257. Regulation 8 of Chapter XI-2 of SOLAS, *supra* note 255, titled "Masters discretion for ship safety and security."

258. IMO Resolution A.917(22), Guidelines for the Onboard Operational Use of Shipborne Automatic Identification Systems (AIS), ¶ 21 (Nov. 29, 2001).

259. See also ROBERT H. ALLEN, AUTOMATIC IDENTIFICATION SYSTEM: RESEARCH FROM THE BRIDGE (2004), available at <http://www.nautinst.org/ais/docs/researchFromBridge.doc>. Captain Allen of the Royal Fleet Auxiliary, U.K. found that 96% of shipmasters polled in June 2004 responded that their AIS is on most of the time, but 77% of them are concerned with the security aspects of AIS. Also, 47% consider switching their AIS off, and 19% definitely switch it off when passing through a known piracy area. *Id.*

trade.²⁶⁰ At its seventy-ninth session in December 2004, the Maritime Safety Committee (MSC) of the IMO condemned the release of AIS data on the web and urged member states to discourage those who do so, but to no appreciable effect.²⁶¹ Additionally, AIS can easily be spoofed and jammed by entering false tracks into a specific area via a laptop computer and basic handheld VHF receiver.

Therefore, while many commercial and regulatory benefits of AIS exist, reliance on the system to provide much help in the realm of MSO is misguided. More fruitful would be to encourage shipping companies to install the relatively inexpensive LOJACK for ships known as ShipLoc.²⁶² It is discrete, can provide an accurate location to ship owners of their vessels' locations, complies with SOLAS XI-2/6 and is endorsed by the IMB.²⁶³ It is also secure and confidential. Most important, it can be equipped to sound an instantaneous alarm simultaneously to the ship owner, IMB, and flag state authority.²⁶⁴

D. Adding Greater Law Enforcement Training to VBSS Teams

In the discharge of its constabulary functions, the Navy must think, and train, more like the Coast Guard—even as it thinks and trains more like the SEALs. The NASSAU Strike Group was among the first strike groups to deploy with VBSS teams trained by former SEALs to conduct non-compliant boardings, formerly the exclusive province of Special Forces.²⁶⁵ In their enhanced curriculum, prospective VBSS members learned the basics of long gun control and small arms handling, day and night defensive tactics, mission planning, shipboard team close quarters combat (CQC), and insertion and extraction techniques. However, the training was severely

260. See AISLive.com, Live Ship Info, <http://www.aislive.com> (last visited Nov. 20, 2006).

261. See IMO, AIS transponders, http://www.imo.org/Legal/mainframe.asp?topic_id=754 (last visited Nov. 20, 2006).

262. See ShipLoc, About ShipLoc, http://www.shiploc.com/html/about_shiploc.html (last visited Nov. 20, 2006).

263. See 2005 PIRACY REPORT, *supra* note 4, at 29.

264. See ShipLoc, How It Works, http://www.shiploc.com/html/how_it_works.html (last visited Nov. 20, 2006).

265. While a compliant boarding involves (1) a suspect vessel's full compliance with the directions of the on-scene commander (OSC), (2) no apparent passive or active resistance measures, and (3) no intelligence to indicate a threat, a noncompliant boarding involves a suspect vessel that fails to comply with OSC directions and employs "passive measures" to delay, impede, or otherwise complicate the boarding. See Maritime Interception Operations, NTTP 3-07.11, 1.5 (Nov. 2003) [hereinafter Maritime Interception Operations]. There is no intelligence to indicate a threat in a noncompliant boarding. *Id.* The most dangerous boarding is an "opposed boarding," which involves possible threats and the suspect vessel has demonstrated an intent to actively oppose the boarding team, and resistance is "clearly intended to inflict harm." *Id.* Piracy operations will likely fall into either of the two latter categories.

lacking in evidence handling and crime-scene preservation.²⁶⁶ LT Robert Hainline of the VBSS team from the USS *CARTER HALL* (LSD 50) described only “one small lecture” during their training on evidentiary issues, which “raised more questions than anything else.”²⁶⁷ Those questions, he further explained, could not be answered because “the instructors weren’t lawyer-types or investigators; they were ex-SEALs.”²⁶⁸

More significantly, he explained the evidence lecture was focused on collecting evidence for intelligence purposes, not for criminal admissibility purposes.²⁶⁹ Indeed, the evidentiary sections of *Naval Tactics Techniques and Protocols* (NTTP) 3-07.11, the Navy and Coast Guard’s doctrine on Maritime Interception Operations (MIO) which is used to train VBSS teams, also concern themselves with evidentiary issues for “maritime target development,” not for court.²⁷⁰ Either NTTP 3-07.11 needs to be revised to accommodate naval constabulary missions, as distinct from MIO and Coast Guard-led law enforcement operations under 14 U.S.C. § 89,²⁷¹ or a new guideline must be created for this burgeoning mission set.

Either way, more training is needed. It is no use to have VBSS teams wait for criminal investigators, since shore-based investigators could be a long way off and certainly cannot be at the ready on all deployed vessels. As the IMO notes: “Law enforcement officials first attending a scene must appreciate the importance of their role in gathering and passing on as quickly as possible relevant evidence.”²⁷² While the *WINSTON S. CHURCHILL* VBSS team followed its training and the doctrine of NTTP 3-07.11, it did not bag and tag the three pieces of evidence it seized, nor did it conduct a crime scene

266. See, e.g., IMO Resolution A.922(22), *supra* note 246, ¶ 4.1.3 (ranking the securing of evidence third behind rescuing hostages and arresting the pirates).

267. Interview with Robert Hainline, Lieutenant, onboard USS *CARTER HALL* (Mar. 15, 2006).

268. *Id.*

269. *Id.*

270. Maritime Interception Operations, *supra* note 265, at 5.6.3.4.

271. See *id.* at 2.2.4.

The basis and mission of law enforcement operations (LEO), however, is far different from MIO. LEO, as defined under 14 U.S.C. 89, gives the USCG statutory authority to make inquiries, examinations, 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 the laws of the United States. MIO by warships is authorized under international law to support international policy objectives. Navy ships carrying LEDET support Federal law enforcement efforts, but Navy and other Department of Defense (DOD) personnel are generally prohibited from direct involvement in law enforcement activity, such as boarding, arrest, or seizure. Counterdrug and alien migrant interdiction operations are examples of LEO.

272. IMO Resolution A.922(22), *supra* note 246, ¶ 6.8.

analysis of the *Safina al Bisarat*. At the Kenya trial, it was very difficult to admit the AK-47, the cell phone and charger, and the magazine clip without the proper evidence custody documents (ECDs), which all the other evidence had. I successfully explained to the court why the U.S. military creates ECDs, how we would not backdate an ECD, and how the enormity of the initial operation and the safety of everyone on the boarding team precluded such a step in this instance. However, cases will be considerably stronger in the future if boarding teams handle evidence the same way that trained investigators do.

Along the same lines, the recent Kenyan trial strongly indicated the desirability of limiting the number of U.S. naval personnel who come into contact with evidence, thereby limiting the number of potential witnesses in the chain. Generally, a person can only testify to facts within his or her personal knowledge.²⁷³ The prosecution was able to convince the court that since the *NASSAU* Strike Group “directed the entirety of the operation,” the Author could establish a solid chain merely by stating, “I and my team.” That strategy worked in this instance, keeping many people from having to make an in-person appearance. However, such may not always be the case. Operational considerations will often determine who encounters evidence, but operational considerations will also be impacted when those same people are subpoenaed to distant courts. As a general rule, therefore, the fewer people the better.

Additionally, the Kenyan trial experience highlighted the need to devote *one* photographer to document the trial-bound evidence. In Kenya, photographic evidence is apparently inadmissible without calling the actual photographer. While not the rule in U.S. federal courts,²⁷⁴ it could be the rule in other countries besides Kenya. Given the need to limit the number of potential witnesses, the photographer could be someone already heavily involved with the investigation, like the ship’s Security Officer or the JAG, recognizing that he or she will likely be summoned to testify. It would also be advisable to take one set of photographs with a traditional film camera, not a digital camera, to forestall any claims of manipulation at trial.²⁷⁵

273. See, e.g., FED. R. EVID. 602.

274. See, e.g., *United States v. Mojica*, 746 F.2d 242, 245 (5th Cir. 1984) (affirming the admission of a photograph where the defendant did not overcome the presumption that government officials had acted properly in taking the photograph).

275. See, e.g., Jill Witkowski, *Can Juries Really Believe What They See? New Foundational Requirements for the Authentication of Digital Images*, 10 WASH. U. J.L. & POL’Y 267 (2002) (examining the legal system’s treatment of digital images).

E. Exploring the Q-Ship Option

Militarily, the United States could explore a tactic employed by the British in World War I. In 2002, “pirates in the Strait of Hormuz mistook the USNS *Walter H. Diehl* for a merchant vessel and attempted to attack [it].”²⁷⁶ As Harold Hutchison has written, this type of encounter leads to the “possibility of using [a] 21st-century version of the ‘Q-ship’ to lure pirates in and to destroy them.”²⁷⁷ Assume then that the *Safina al Bisarat* was not manned by Indian crewmembers but rather by U.S. Marines, who engaged the ten suspected Somalis as they swarmed the dhow and attempted to board by force. The Q-Ship was U.S.-flagged, and the Marines disguised themselves as civilian mariners. This floating Trojan horse was designed, as Hutchison would have it, to “kill off pirates,” as well as to “provide a deterrent effect (pirates would wonder if the container ship was really just a container ship, or if it was bristling with enough firepower to blow them out of the water).”²⁷⁸

Is the Q-Ship operation as outlined above legal?

It depends. Any ship designed to look like a merchant vessel but which springs to life with an exceptionally robust self-defense capability would have to be very carefully designed to avoid running afoul not only of the Law of the Sea, but of the Law of Armed Conflict as well, even though the latter technically does not apply.

First, the mission would have to be conceived as a self-defense operation, based upon the inherent right of self defense and the UNCLOS authority to repress and capture pirates on the high seas. It could not be an offensive ambush. An ambush, in which opposing forces lie in wait, is a permissible tactic under the laws of war.²⁷⁹ The underlying target, however, has to be a legitimate one. In this situation, there are typically no forces declared hostile—there are not even forces, only individuals who could, or could not be, pirates. It is only by committing an illegal act against the Q-Ship on the high seas (e.g., approaching at high speed with guns drawn or actually firing at the ship) that the attackers become lawful targets, and only under the rubric of self-defense.

U.S. doctrine on self-defense, enunciated by the JCS Standing Rules of Engagement for U.S. Forces (SROE), provides that the use of force in self-defense against armed attack, or the threat of imminent armed attack, rests upon two elements, the first of which would

276. Harold C. Hutchison, *Sea Transportation: The Pirates have Evolved*, Dec. 2, 2005, available at <http://www.strategypage.com/htm/w/htseamo/articles/20051202.aspx>.

277. *Id.*

278. *Id.*

279. J. Ashley Roach, *Ruses and Perfidy: Deception During Armed Conflict*, 23 U. TOL. L. REV. 395, 398 (1992).

certainly be triggered by fast-approaching, gun-pointing pirates on the high seas:

- (1.) Necessity—The requirement that a use of force be in response to a hostile act or demonstration of hostile intent.
- (2.) Proportionality—The requirement that the use of force be in all circumstances limited in intensity, duration, and scope to that which is reasonably required to counter the attack or threat of attack and to ensure the continued safety of U.S. forces.²⁸⁰

In other words, the Q-Ship would be a bait ship. Once individuals reveal themselves as international criminals by going after the bait, they have positively identified themselves as *hostis humani generi* and can be captured or engaged as necessary.

But what of the second element? Putting aside the obvious dangers to those on the bait ship, what measure of force may be used against the attackers? Can the Q-Ship ruse be used to “kill off pirates”?

No. The ruse must be designed to flush out pirates in order to capture them. There is no provision in international law authorizing the killing of pirates except in self-defense. That said, the very nature of the Q-Ship operation will likely mean death, or at least serious injury, for some of the pirates. If an attacker revealed himself as such within weapons-release range of the Q-Ship, those Marines on board would have to counter the threat, and deadly force is proportional to deadly force. The fact that the Marines will have better aim and better equipment is of no moment—if you illegally bring a knife to a gunfight, you do so at your own peril.

That said, the force the Marines employ could only extend to that necessary to neutralize the threat against them, as determined by the Q-Ship commander. While force employed in self-defense can never be used with the view of inflicting punishment for acts previously committed, since the necessity element under the SROE and Caroline Case would not be met, it is important to point out that even a fleeing skiff could pose a very real threat until it is well out of their weapons-release range. However, pursuing a vessel solely for the purposes of remaining in its weapons-release range cannot justify continued application of lethal force in “self-defense.”

280. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTRUCTION 3121.01A, STANDING RULES OF ENGAGEMENT ¶ 5f. The classic international law formulation of the doctrine of self-defense derives from U.S. Secretary of State Daniel Webster's 1841 articulation to the British government in the Caroline case, requiring that a government show a “necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation.” Leo Van den hole, *Anticipatory Self-Defence Under International Law*, 19 AM. U. INT'L L. REV. 69, n.133 (2003) (quoting Letter of Mr. Webster to Mr. Fox (Apr. 24, 1841), in 29 BRITISH AND FOREIGN STATE PAPERS, 1840-1841 1137-38 (1857)).

Pursuing the vessel to capture pirates, of course, would keep the Q-Ship within range, and thus necessitate return-fire if the fleeing pirates continued to exhibit hostile intent. But under *international* law, a Q-Ship cannot capture pirates; only a "clearly marked" warship can.²⁸¹ According to UNCLOS, one of the features of a warship is one "bearing the external markings distinguishing such ships of its nationality."²⁸² In fact, UNCLOS Article 107 specifically strengthened the discernability requirement, adding the phrase "clearly marked and identifiable" to the Geneva Convention's far leaner formulation.²⁸³ As Bernard H. Oxman explains, what is "too rarely understood" about the law of piracy is that "most of its rules are designed to refine and circumscribe the universal enforcement and adjudicative jurisdiction it confers."²⁸⁴ The object is to "create just enough universal jurisdiction to respond to the practical problem posed by murder and mayhem on the high seas, but not so much as to threaten random violence or unwarranted interference with freedom of navigation and the liberty interests associated with that freedom."²⁸⁵ UNCLOS Article 106, for example, explicitly provides for "[l]iability for seizure without adequate grounds."²⁸⁶ A covert Q-Ship shark would run afoul of UNCLOS's carefully prescribed enforcement zone.

However, were it not for an 1819 U.S. Statute, that would be the end of the story. According to Title 33, Section 383 of the U.S. Code, merchant vessels and other non-public vessels *are* permitted to "subdue and capture" pirates.²⁸⁷ Additionally, under U.S. law, if self-

281. See UNCLOS, *supra* note 25, at art. 107 ("A seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.").

282. UNCLOS, *supra* note 25, at art. 29.

283. High Seas Convention, *supra* note 26, at art. 21 ("A seizure on account of piracy may only be carried out by warships or military aircraft, or other ships or aircraft on government service authorized to that effect."). If this article were to trump UNCLOS Article 107, the Q-Ship would of course be "on government service authorized to that effect."

284. Bernard H. Oxman, *Human Rights and the United Nations Convention on the Law of the Sea*, 36 COLUM. J. TRANSNAT'L L. 399, 403 (1997).

285. *Id.*

286. UNCLOS, *supra* note 25, at art.106.

287. 33 U.S.C. § 383 (2000).

The commander and crew of *any merchant vessel* of the United States, owned wholly, or in part, by a citizen thereof, may oppose and defend against any aggression, search, restraint, depredation, or seizure, which shall be attempted upon such vessel, or upon any other vessel so owned, by the commander or crew of any armed vessel whatsoever, not being a public armed vessel of some nation in amity with the United States, and may subdue and capture the same; and may also retake any vessel so owned which may have been captured by the

defense permits proportional lethal responses, would not the greater power include the lesser?

In U.S. courts, explicit U.S. law tends to trump customary international law.²⁸⁸ Thus, there is a choice of law issue. According to the Second Circuit in *United States v. Yousef*:

It has long been established that customary international law is part of the law of the United States to the limited extent that "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."²⁸⁹

In that case, there was a controlling legislative act. *Yousef* limited the Supreme Court's well-known directive that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," to only those cases where no ambiguity exists: "If a statute makes plain Congress's intent . . . , then Article III courts . . . must enforce the intent of Congress irrespective of whether the statute conforms to customary international law."²⁹⁰

However, U.S. piracy statutes incorporate the law of nations, and it is at least arguable that as the law of nations changes, so too must U.S. municipal law. Chapter 7 of U.S. Code Title 33, under which § 383 falls, entitled "Regulations for the Suppression of Piracy," and pursuant to Title 18 §1651, piracy is "defined by the law of nations."²⁹¹ After comparing Congress's incorporation by reference of the law of nations for piracy with the "law of war" for military commission jurisdiction in *Ex Parte Quirin*, the Supreme Court alluded to the organic nature of the reference: "Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and

commander or crew of any such armed vessel, and send the same into any port of the United States." (emphasis added).

288. See, e.g., *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003).

289. *Id.* at 92 (citing *In re The Paquete Habana*, 175 U.S. 677, 700 (1900)); see also *Oliva v. U.S. Dept. of Justice*, 433 F.3d 229, 233-34 (2d Cir. 2005) (referring to *In re The Paquete Habana* and *Yousef* to demonstrate the limited circumstances under which it is appropriate for the United States to resort to customary international law); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir.1986) (noting that "public international law is controlling only" in the absence of controlling positive law or judicial precedent).

290. *Yousef*, 327 F.3d at 86, 93 (citations omitted); see also *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 939 (D.C. Cir. 1988) (stating that "under domestic law, statutes supersede customary international law" and "no enactment of Congress can be challenged on the ground that it violates customary international law").

291. 33 U.S.C. § 383; 18 U.S.C. § 1651 (2000).

deemed applicable by the courts.”²⁹² As the Court concluded, “It chose the latter course.”²⁹³

Even assuming *arguendo* that §1651 only incorporates UNCLOS Article 101, not the enforcement provision of Article 107 and the limiting factor of Article 106, the U.S. law nevertheless indicates an attempt to incorporate international law, not preempt it.²⁹⁴

In an extremely important case on the role of international law in domestic jurisprudence, the Supreme Court in *Sosa v. Alvarez-Machain* suggested that there may be a fill-in-the-blank quality to piracy.²⁹⁵ The Court held that a “narrow set” of international law violations are directly actionable under the otherwise purely jurisdictional Alien-Tort Statute (ATS) enacted by the First Congress.²⁹⁶ Through historical analysis, the Court concluded that Congress passed the ATS assuming it could be used without further legislation to hear a “very limited set of claims” alleging violations of the specific law of nations norms that were also part of common law, including piracy.²⁹⁷

Sosa acknowledged that Congress may “at any time” preclude the application of customary international law to a particular situation “by treaties or statutes that occupy the field,” but it added that “nothing Congress has done is a reason for us to shut the door on international law.”²⁹⁸ Quite the opposite appears true in the specific case of piracy after *Sosa*—the door to international law appears open.

Thus, since the early U.S. law of piracy incorporates the “law of nations,” it is possible that any pirates captured by the Q-Ship itself could be set free by U.S. courts citing customary international law and the 1958 High Seas Convention, to which the United States is a party. Put another way, the adage “it is easier to seek forgiveness than ask permission,” does not often apply in law. Actually using the Q-Ship to capture the pirates, as opposed to stopping them in the water for ultimate capture by a warship over the horizon, risks subverting successful prosecution. Besides, with universality allowing prosecution in any nation, the risk of having no domestic law to potentially trump Article 107 is even greater.

Three other points on the legality of a Q-Ship operation are worth mentioning. Even though Geneva Protocol I²⁹⁹ and the

292. *Ex parte Quirin*, 317 U.S. 1, 29-30 (1942).

293. *Id.*

294. *See, e.g., United States v. Smith*, 18 U.S. (5 Wheat.) 153, 164-80 (1820) (Livingston, J., dissenting) (discussing the specificity with which the law of nations defined piracy).

295. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

296. *Id.* at 715.

297. *Id.* at 720.

298. *Id.* at 731.

299. *Supra* note 244.

customary law of naval warfare do not apply to constabulary functions, it is important to nevertheless honor the following rules for all the reasons stated above. First, flying false colors is still a permissible ruse under customary international law, but the correct flag should be raised at the moment of engagement.³⁰⁰ Second, the Q-Ship should avoid “sweetening the trap” by flying a white flag, otherwise feigning surrender, or feigning distress, all of which are considered perfidy.³⁰¹ Third, donning regular civilian attire threatens the civilian-combatant distinction³⁰² and should be avoided in favor of a “discrete” uniform with a subdued flag.

Ultimately, the Q-Ship is an available arrow in the quiver of military responses on the high seas, so long as it is carefully designed to accord with international law, and so long as it does not progress too far along the Y-axis to threaten coalition participation and increase the opportunities for terrorism. Making pirates fear that their next victim may be heavily armed Marines or SEALs will certainly increase the deterrence value as Hutchinson states.³⁰³ However, whatever slight advantages are gained by not fully abiding by international law, for example, are not worth the costs, both to the

300. See 2 L. OPPENHEIM, INTERNATIONAL LAW 509 (H. Lauterpacht ed., 1952).

The ruse which is of most practical importance in naval warfare is the use of the false flag. It now seems to be fairly well established by the custom of the sea that a ship is justified in wearing false colours for the purpose of deceiving the enemy, provided that she goes into action under her true colors. . . . It is equally permissible for a warship to disguise her outward appearance in other ways and even to pose as a merchant ship, provided that she hoists the naval ensign before opening fire. Merchant vessels themselves are also at liberty to deceive enemy cruisers in this way.

H. SMITH, THE LAW AND CUSTOM OF THE SEA 115-16 (1959) (citing 1 CORBETT, NAVAL OPERATIONS 350 (1920)).

301. Geneva Protocol I, *supra* note 244, arts. 37(1)(a)-(b), 38(1); see also OPPENHEIM, *supra* note 300, at 342; San Remo Manual on International Law Applicable to Armed Conflicts at Sea, ¶ 111, June 12, 1994, available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JMSU#5>. Perfidy was first defined in treaty law by Geneva Protocol I Article 37(1): “Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy.”

302. Geneva Protocol I, *supra* note 244, at art. 37(1)(c). Since civilians are not lawful objects of attack as such in armed conflict, it follows that disguising combatants in civilian clothing in order to commit hostilities constitutes perfidy. See Geneva Protocol I, *supra* note 244, at art. 48 (“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”).

303. This is especially true if the fact of a lurking Q-Ship is publicized by the series of handbills normally distributed in the course of Maritime Security Operations. See *infra* Part III.G (discussing Information Operations).

pending prosecution and to the United States' long-term strategic interests.

F. *Limited Authorization for Entry Within Twelve Nautical Miles of Somalia*

A similar cost-benefit analysis militates in favor of only a limited authorization for surface entry within twelve nautical miles of the Somali coast. Purposefully entering the maritime "Nebraska" of Malaysia without its permission would certainly cause a serious international incident. The United States, however, can enter within twelve nautical miles of Somalia with relative direct impunity, and it is arguably legally entitled to do so. However, there are broader prosecutorial implications, as well as diplomatic and strategic consequences, that caution against an overt policy of blanket entry.

If Somalia is truly a failed state, with no functioning government,³⁰⁴ it would appear to follow that Somalis cannot have a territorial sea. Only a *state* can have a territorial sea under UNCLOS, a treaty among contracting *states*. The Restatement (Third) of the Foreign Relations Law of the United States defines a "state" as an "entity that has a defined territory, and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities."³⁰⁵ Somalia has not had an effective government for a long time, and it is too early to tell whether the Ethiopian assistance to the TFG will be sufficient.³⁰⁶ Somalia itself admits to four internal secessions and claims that three-fourths of its 1990 territory has been "gripped by civil war at some point up until this date."³⁰⁷ Up until very recently, Islamists opposed to the TFG controlled Mogadishu and large swaths of Somali territory. They also would likely have taken Baidoa, the seat of Somalia's transitional government, had it not been for outside military assistance.³⁰⁸ Finally, on January 13, 2007, the Somali Parliament declared a state of emergency due to the growing insurgency.³⁰⁹

304. See Background Note: Somalia, *supra* note 69.

305. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (emphasis added).

306. Jonathan Stevenson, *A Fleeting Victory in Somalia*, N.Y. TIMES, Jan. 8, 2007.

307. Permanent Mission of Somalia to the United Nations, Country Facts, http://un.cti.depaul.edu/cgi-bin/spider.py?_request=1&country=Somalia&language=English (last visited Nov. 20, 2006).

308. Jeffrey Gettleman, *Somalia Trio to Rise from Chaos*, N.Y. TIMES, Jan. 8, 2007.

309. *Somalia Declares a Crisis*, N.Y. TIMES, Jan. 14, 2007.

The fact that an entity named Somalia became a party to UNCLOS on July 24, 1989,³¹⁰ and that that entity laid claim to an excessive 200 nautical mile territorial seas in 1972,³¹¹ is of no moment because that entity has legally ceased to exist. Additionally, the transitional government has yet to file a notification of succession.

One point should be made clear about this argument—it does not turn on whether the United States or any other nation likes or approves of a government. The argument turns simply on objective observations of whether a government, and thus a country, exists.

But even if it were a functioning state, it is up to that state to affirmatively declare its territorial waters: “Every State has the *right* to establish the breadth of its territorial sea *up to a limit not exceeding* 12 nautical miles, measured from baselines determined in accordance with this Convention.”³¹² UNCLOS empowers the signatory states, but it does not create a twelve nautical mile default provision, nor does it create an affirmative duty on states to establish territorial seas. Accordingly, UNCLOS also does not create an automatic obligation on other states to stay beyond twelve nautical miles of any coastal nation. UNCLOS only provides that coastal nations may lawfully extend the breadth of claimed territorial seas up to twelve nautical miles.³¹³ No such declaration has been made by the post-1991 transitional governments.

Additionally, UNCLOS and the Territorial Sea Convention grant a right of innocent passage through territorial seas—they do not prohibit other types of entry.³¹⁴ Just as espionage during armed conflict is not a violation of international law—and spies are not entitled to prisoner-of-war treatment³¹⁵—violations of innocent

310. U.N. Division for Ocean Affairs and the Law of the Sea, Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as at 02 November 2006, http://www.un.org/Depts/los/convention_agreements/convention_agreements.htm (follow “Chronological list of ratifications/accessions/successions” hyperlink).

311. Law No. 37 on the Territorial Seas and Ports, of 10 September 1972, art. 1, available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/SOM_1972_Law.pdf; see also TABLE OF CLAIMS TO MARITIME JURISDICTION (AS AT 30 JUNE 2006), available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/claims_2005.pdf [hereinafter TABLE OF CLAIMS] (providing a review of all claims to the U.N. for maritime jurisdiction).

312. UNCLOS, *supra* note 25, at art. 3 (emphasis added).

313. In fact, a number of states claim less than twelve nautical miles for their territorial seas, including Jordan, Singapore, Palau, Norway, Dominican Republic, Greece, and Turkey (though only in the Aegean Sea). See TABLE OF CLAIMS, *supra* note 311.

314. UNCLOS, *supra* note 25, at arts. 17-18; Territorial Sea Convention, *supra* note 64, at arts. 14.1-.2.

315. Hague Regulation Respecting the Laws and Customs of War on Land art. 30, Oct. 18, 1907, 36 Stat. 2227.

passage are only offences under domestic law. Coastal states, through municipal legislation or practice, must affirmatively bar non-innocent passage through their waters,³¹⁶ which Somalia has not done.

Thus, for both definitional purposes under UNCLOS Article 101 and universal enforcement purposes under UNCLOS Article 105, the waters off Somalia could constitute the “high seas,” or at least “any other place outside the jurisdiction of any State.” Under this argument, authorization to enter Somalia’s putative seas would be legally sound.

However, there are strong policy arguments against such a tack. It is important to re-emphasize that recognition of statehood is a political decision made by individual nations,³¹⁷ and that prosecution is in the hands of foreign judges who possess their own interpretations of political questions and international law. Somalia, after all, is still listed as a Member of the United Nations,³¹⁸ and nations around the world have entered into formal debates over whether to recognize Somalia, Somaliland, or both.³¹⁹ In May 2006, the Transitional Parliament was formed³²⁰ and began to assert itself within Somalia. In March 2006, the European Union resolved to “enhance and broaden its relations with Somalia,”³²¹ while the IMO specifically mentions that it is “respecting fully the sovereignty, sovereign rights, jurisdiction and territorial integrity of Somalia and the relevant provisions of international law, in particular UNCLOS.”³²² In Kenya, the magistrate entertained, though ultimately rejected, a motion to dismiss based on Somalia’s claimed 200 nautical mile territorial sea.³²³ Had the attack occurred less

316. Under customary international law, the appropriate remedy is to first “inform the ship of the reason why [the coastal nation] questions the innocence of the passage, and [to] provide the ship an opportunity to clarify its intentions or correct its conduct in a reasonably short period of time.” Uniform Interpretation of Rules of International Law Governing Innocent Passage, U.S.-U.S.S.R., ¶ 4, Sept. 23, 1989, reprinted in 89 DEPARTMENT OF STATE BULLETIN, Nov. 1989, at 26.

317. See discussion *supra* Part 2.B.

318. United Nations, List of Member States, <http://www.un.org/Overview/unmember.html> (last visited Nov. 20, 2006).

319. *The British Parliament Debate on Somaliland*, SOMALILAND NET, Feb. 4, 2005, http://www.somalilandnet.com/somaliland_news/somaliland/2002/12343.shtml.

320. *Somalia Declares a Crisis*, *supra* note 309.

321. *Council conclusions on Somalia (adopted as an A-item): 2718th GENERAL AFFAIRS Council meeting, Brussels, 20 March 2006*, RELIEFWEB, Mar. 20, 2006, <http://www.reliefweb.int/rw/RWB.NSF/db900SID/LSGZ-6N3JBE?OpenDocument>.

322. IMO Resolution A.979(24), Piracy and Armed Robbery Against Ships in Waters off the Coast of Somalia, at 4 (Nov. 23, 2005).

323. See *Piracy Suspects Challenge Court*, NEWS 24.COM, Feb. 6, 2006, http://www.news24.com/News24/Africa/News/0,,2-11-1447_1875997,00.html (reporting that the piracy suspects moved to dismiss the charges because the Kenyan court had no jurisdiction over the matter); see also *Somali Pirates Face Death Penalty in Kenya*,

than twelve nautical miles out to sea, it would have been interesting to see what she would have held.

The United States' view on Somalia vis-à-vis international law may not accord with the views of other prosecuting nations, restricting the United States' ability to find a cooperating third-party state to prosecute. Even if the United States could forum shop for the state, it could not forum shop for the judge.³²⁴ On one level, the uncertainty of successful prosecution may outweigh the benefits of entry to capture those responsible for piratical acts occurring within twelve nautical miles of Somalia.

It is important to note at this point that a piratical act on the high seas, however, does not magically transform itself into maritime crime just because the pirates flee into territorial waters. Once the act qualifies as piracy under UNCLOS 101, coalition navies should feel free, both legally and politically, to pursue the pirates within twelve nautical miles of Somalia since universal jurisdiction will still attach. Normally the United States may pursue fleeing pirates into any nation's territorial waters so long as it makes all efforts to obtain prior consent from the coastal state, break off the chase if later instructed to do so, and afford the coastal state the first right of prosecution.³²⁵ There is no real way for Somalia to grant or deny permission at this point. The United States may also pursue pirates into internationally recognized straits without permission, so long as the pursuit is continuous and expeditious and does not unduly interfere with the transit rights of others.³²⁶

Thus, in addition to hot pursuit, the United States should only conduct selective and limited incursions into Somalia's coastal waters for intelligence preparation of the environment (IPE) and deterrence operations. The benefits of a fuller maritime picture and the removal of any perceived twelve nautical mile safe haven outweigh the minimal dangers to personnel and risks to prosecution.³²⁷ As will be discussed further below, Somalia benefits as much as the international shipping community does in keeping its waters free from piracy.

CNN.com, Oct. 26, 2006, <http://www.cnn.com/2006/WORLD/africa/10/26/somali.kenya.pirates.ap/>.

324. Of course, the United States could also look to the possibility of prosecution based on one of the other four grounds of jurisdiction under customary international law. See discussion *supra* note 52.

325. COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, *supra* note 66, ¶ 3.5.3.2.

326. *Id.*

327. It is doubtful that a court would strain itself to develop a "fruit of the poisonous tree" doctrine for intelligence leading to capture derived from a non-innocent passage through what the court would have to determine are Somalia's legitimate territorial waters.

But an overt and routine policy of entry carries serious diplomatic and strategic costs. Does the United States want to appear as if it is unilaterally exerting its military presence in yet another poor, Islamic country? Does it want to give regular Somalis possible grounds to resent the United States, thereby helping to kindle an anti-American fire that export-oriented terrorists could exploit? Domestically, does the United States want to take on yet another role as the global police force, especially in Somalia, a nation for which such a role already failed so publicly?

Of course, broad coalition agreement and participation, as well as a United Nations Security Council Resolution specifying multi-lateral entry within twelve nautical miles of Somalia, could alleviate much of this concern. The African Union has already resolved to send troops this past year.³²⁸

Express Somali permission would also help—although only in a sense. On April 17, 2006, the BBC reported that the Somali Prime Minister, Ali Mohammed Ghedi, told ministers that he had worked out a deal with the U.S. Ambassador to Kenya to include granting permission for U.S. patrols in Somali waters.³²⁹ Again, a U.S. or coalitional presence is very much in Somalia's maritime interests. However, the United States should be mindful of the implications involved in accepting that permission, lest the United States de facto recognize Somalia as a state, as well as effectively acknowledge its claim to territorial waters. Political recognition has far-reaching consequences that need to be carefully evaluated.

Additionally, any arguably piratical acts within those acknowledged Somali waters would then become mere maritime crime. Universal jurisdiction would not attach, and the United States would be forced to turn over the suspects to Somalia (however that could be safely accomplished) or to the victim-ship's flag state.³³⁰

Having Somalia and the world see U.S. efforts for what they are—an attempt to assist in maintaining order over the oceans—is valuable. But the U.S. Navy was justified in denying that any such agreement was made. It should, however, always take a diplomatic tack.³³¹ As discussed immediately below, words often matter as much as might.

328. Daniel Flynn, *African Union Agrees Peace Mission for Somalia*, Reuters, July 2, 2006, available at http://www.benadir-watch.com/2006%20News/0702_AU_agrees_peace_mission_to_Som.pdf.

329. *Tackle Somali Pirates*, *supra* note 71.

330. Jurisdiction under the passive personality principle could also attach via any of the victims.

331. See *U.S. Navy Denies Deal to Battle Somali Piracy*, REUTERS, Apr. 18, 2006 (revealing that although the Somali Prime Minister asked for help from the United States, a spokesman for the U.S. navy denied any agreement had been made).

G. *The Information Operations Campaign*

While often overlooked, the timely design and dissemination of information is critical to effective maritime security operations, as it is to the war on terrorism as a whole.

First, IO assists in maximizing deterrence by increasing the perceived probability that illicit actions will be caught and punished. In fact, given the desperate state of Somalia the financial incentives for piracy, and the relative security of sea-borne activities as compared to land-based activities, increasing the perceived probability of capture will likely have more of a deterrent effect than would increasing the severity of the penalties.³³² If the United States and its coalition patrol the vast waters off Somalia, but those efforts are not widely known, deterrence suffers. Furthermore, even if the United States and its coalition partners cannot be in all places at all times, it can create the appearance of greater presence by handing out leaflets and broadcasting over the radio. The substance of that communication would be to announce coalition presence and its intent to vigorously repress piracy. It could also announce the presence of a Q-Ship, while reassuring legitimate mariners.

Second, IO can spread the message that upholding the rule of law is beneficial to all, especially to Somalis. After all, U.N. World Food shipments will enter safely, more cargo will enter Somali ports, and more trade will occur. Additionally, an IO campaign that stresses U.S. resolve to enforce the mutually beneficial rule of law over the seas will help educate countries like Somalia on the rule of law in general and the value of adhering to it. As President Bush has said: "Developed nations have a duty not only to share [their] wealth, but also to encourage sources that produce wealth: economic freedom, political liberty, the rule of law and human rights."³³³ The message can be summed up as: "Your rights and obligations are our rights and obligations, for the law of the sea applies equally to all of us who take to the seas—adhering to the rules benefits you just as it does the rest of the world."³³⁴ A finely tuned IO campaign along similar, self-interested lines would also benefit the coastal nations of the Straits of Malacca.

332. See, e.g., UNDERSTANDING AND PREVENTING VIOLENCE 6 (Albert J. Reiss, Jr. & Jeffrey A. Roth, eds., 1993) (proposing that an increase in the prison population has not caused a reduction in the level of violent crime); see also Jeffrey Grogger, *Certainty vs. Severity of Punishment*, 29 ECON. INQUIRY 297, 335 (1991) (discussing conflicting findings concerning the connections between economic factors and crime).

333. President George W. Bush, Remarks at the International Conference on Financing for Development in Monterrey, Mexico (Mar. 22, 2002), available at <http://www.un.org/ffd/statements/usaE.htm>.

334. It is not necessary to discuss the fine points of Somalia's statehood in an information operations campaign.

But most important, a maritime security IO campaign can prove invaluable in the overall war on terror. As World War I, World War II, and the Cold War, respectively, pitted monarchism, fascism, and communism against democracy, the current war against terror has both military and ideological components. As the Report of the 9/11 Commission appropriately advised, in our battle against “a radical ideological movement in the Islamic world, inspired in part by al Qaeda” we need to “define what the message is, what it stands for . . . [and] offer an example of moral leadership in the world.”³³⁵ Naval constabulary missions to enforce the rule of law over the sea offer the United States that opportunity. As the 9/11 Commission described: “To Muslim parents, terrorists like Bin Ladin have nothing to offer their children but visions of violence and death. America and its friends have an advantage—we can offer these parents a vision that might give their children a better future.”³³⁶ It is truly amazing how little it takes to affect the unexposed, to vaccinate them against radical Islamic pathogens. The Somalis that were captured in January 2006, detained, and delivered for prosecution emerged (to the Author’s astonishment) with remarkable respect for the firm fairness of the United States. The United States should seize upon this truth and seek to gain adherents. The alternative is much worse: “If the United States does not act aggressively to define itself in the Islamic world, the extremists will gladly do the job for us.”³³⁷

But the encounter with the ten suspected pirates indicates that the United States is not doing all that it can to ensure that its vision reaches the widest possible audience. After the ten Somalis were caught, word of their excellent treatment on *NASSAU* spread, albeit reluctantly, among African papers.³³⁸ There was no Navy press release. The *NASSAU*’s refueling, replenishing, and escorting of the freed *Safina al Bisarat* also received no Navy press attention. An underway refueling is a sight to behold, especially between an enormous naval vessel and a comparatively tiny dhow, to say nothing of the tens of thousands of dollars that the U.S. Navy spent in freeing it. Such humanitarian efforts are not as exciting as firing warning shots, but they are nonetheless important.

The Commander of the Joint Task Force Horn of Africa has the right idea. “We are trying to dry up the recruiting pool for Al Qaeda by showing people the way ahead,” Major General Timothy Ghormley explained to the Christian Science Monitor as he pointed his eyeglasses at recent pictures of African children celebrating gushing

335. THE 9/11 COMM’N, THE 9/11 COMMISSION REPORT 363, 376 (2004).

336. *Id.* at 376.

337. THE 9/11 COMM’N, *supra* note 335, at 377.

338. *See supra* note 184.

water from a new well that his troops built.³³⁹ “Look at those kids. They’re gonna remember this. In 25 years they’ll say, ‘I remember the West—they were good.’”³⁴⁰

Maritime Security Operations are just one facet of the overall global strategy. Publicly doing good, while firmly enforcing the law, counters Al Qaeda propaganda in Africa and in other Muslim nations like Indonesia. As Fareed Zakaria wisely pointed out right after the September 11th attacks: “During the cold war the West employed myriad ideological strategies to discredit the appeal of communism, make democracy seem attractive and promote open societies. We will have to do something on that scale to win this cultural struggle.”³⁴¹ Such a strategy also helps recruit other nations to join Western security coalitions.

The stakes in this struggle are high. A 2004 Zogby International poll indicates that fewer than 10% of those surveyed in Egypt, Jordan, Lebanon, Morocco, Saudi Arabia, and the United Arab Emirates approved of U.S. policy on Arabs, Iraq, or the Palestinians.³⁴² When asked to indicate their “first thought” about the United States, the most common response was “unfair foreign policy.”³⁴³ As ill-informed as these opinions are, the fact remains that those are widely-held opinions, thus indicating that the United States is obviously losing the information war.

“If we don’t succeed, Somalia will become a home to Islamic extremists, to terrorists,” Somalia’s President Abdullahi Yusuf stated.³⁴⁴ However, this former warlord also expressed that his own goal was to “establish Islamic government in Somalia, then other countries. . . . [I]f it’s possible to handle it by peaceful means we’ll do it that way. . . . If not, we’ll do it the jihadi way.”³⁴⁵ The Black Plague spread among poverty and ignorance; so too does terrorism.

IV. REGIONAL PROPOSALS

Today’s strategic landscape dictates that U.S. naval orientation should be less about sinking navies than about building navies.

339. James Brandon, *To Fight Al Qaeda, US Troops in Africa Build Schools Instead; More than 1,500 US Troops are on a Hearts and Minds Mission*, CHRISTIAN SCI. MONITOR, Jan. 9, 2006, at 1.

340. *Id.*

341. Fareed Zakaria, *The Politics of Rage: Why Do They Hate Us?*, NEWSWEEK, Oct. 15, 2001, at 22.

342. Walt, *supra* note 16.

343. *Id.*

344. Aidan Hartley, *Somalia’s Nomad Government Pleads for Help to Quell Terrorists*, LONDON SUNDAY TELEGRAPH, Sep. 4, 2005, at 34.

345. *Id.*

While the sun may never set on U.S. naval might, the United States still cannot physically and legally defend the vast waterways of the world against asymmetric piratical and terrorist threats by itself. As the National Strategy for Maritime Security has articulated: "Security of the maritime domain can be accomplished only by seamlessly employing all instruments of national power in a fully coordinated manner in concert with other nation-states consistent with international law."³⁴⁶

While the United States may at times scoff at multilateralism and decry the apparent strictures of international law, regular maritime security operations will simply not succeed through unilateral actions alone. Furthermore, any attempts to do so not only undercut maritime security, but hamstringing other military, political, and diplomatic efforts around the world as well. Fortunately, the reverse is also true. Greater multilateral involvement in this one realm helps enlist followers for the United States' leadership endeavors in others.

The situation is ripe for multilateral efforts with U.S. leadership. Economic incentives, for example, are well aligned. As discussed, global piracy already costs transport vessels \$13-15 billion a year.³⁴⁷ With maritime agencies warning that piracy along the coast of southern Somalia to Kenya is increasing, local ports like Mombasa are also feeling the pinch.³⁴⁸ "The World Food Program has been forced to suspend shipments of aid to war- and drought-ravaged Somalia after two consignments were hijacked."³⁴⁹ The Joint War Committee (JWC) of Lloyd's Market Association declared Somalia and the Straits a "high risk zone," enabling underwriters to charge extra premiums to vessels traversing those waters.³⁵⁰ Finally, if the Straits of Malacca were closed down by a maritime terrorist attack, or even significant threat thereof, almost half the world's ocean-going vessels would have to sail further, increasing freight rates, forcing up shipbuilding costs, and jolting economies around the world, to say nothing of the devastating financial, humanitarian, and economic costs if the terrorist strike were successful.³⁵¹

The United States is well poised to provide what regional powers cannot, but that is where interests critically diverge. While Malaysia

346. THE NATIONAL STRATEGY FOR MARITIME SECURITY, *supra* note 14, at 13.

347. Ryan, *supra* note 7.

348. Crilly, *supra* note 70.

349. *Id.*

350. See, e.g., Zurich Financial Services, The Growing Menace of Piracy: Taking Cover—and Joint Action, http://www.zurich.com/main/productsandsolutions/industryinsight/2006/march2006/industryinsight20060301_003.htm (last visited Nov. 20, 2006).

351. As an example of the economic impact, "[w]hen the oil tanker *Limburg* was attacked off the coast of Yemen in October 2002, insurance costs for calls to the country's ports rose by some \$150,000 per ship." Elegant & Sepetang, *supra* note 117.

and Indonesia, for example, are happy to receive U.S. resources, they are loathe to permit direct U.S. military presence in the Straits. "We may need a thousand ships, but not the Americans. . . . These are our straits."³⁵² The United States can, however, help assuage their sovereignty suspicions and concerns by diminishing its naval footprint, while at the same time maximizing its effect.

A. Regional Security Arrangements with Direct U.S. Participation

The United States should certainly do what it can to help promote and support the essential regional cooperation in anti-piracy and anti-terrorism. Since the turn of the most recent century, the East Asian nations have increasingly come together to figure out regional solutions to their maritime problems. In November 2002, for example, the Joint Declaration of ASEAN (the Association of Southeast Asian Nations) and China on Cooperation in the Field of Non-Traditional Security Issues was adopted.³⁵³ The Joint Declaration specifically included among its priorities sea piracy and armed robbery at sea.³⁵⁴

One year later, the ASEAN Regional Forum Statement on Cooperation against Piracy and Other Threats to Maritime Security was issued on June 17, 2003 in Phnom Penh, Cambodia during the Tenth ASEAN Regional Forum (ARF).³⁵⁵ The Statement recognized that effective anti-piracy and anti-terrorism efforts require "regional maritime security strategies and multilateral cooperation in their implementation."³⁵⁶ The ARF nations resolved to undertake an exchange of information and to consider and discuss IMB proposals on prescribed traffic lanes for large supertankers with coastguard or naval escort, provisions of technical assistance, and capacity-building infrastructure for countries that need help.³⁵⁷ They also committed themselves to "endorse the ongoing efforts to establish a legal

352. *Strait Talks on Oil Tanker Terror Fear*, supra note 87; see also Keyuan, supra note 31, at 48 (explaining that "other countries such as Malaysia and Indonesia are doubtful about whether the [Regional Maritime Security Initiative] can really play a positive role in curbing piracy and maritime terrorism. They are also suspicious of the American intentions; namely, whether it would infringe upon their national sovereignty and territorial integrity"); supra notes 84-89 and accompanying text (discussing Malaysia's perspective).

353. Joint Declaration of ASEAN and China on Cooperation in the Field of Non-Traditional Security Issues, 6th ASEAN-China Summit (Nov. 4, 2002), available at <http://www.aseansec.org/13185.htm>.

354. *Id.*

355. Tenth ASEAN Regional Forum: ARF Statement on Cooperation Against Piracy and Other Threats to Maritime Security (June 17, 2003), available at http://www.dfat.gov.au/arf/statements/10_piracy.html.

356. *Id.* ¶ 1(h).

357. *Id.* ¶ 4(b).

framework for regional cooperation to combat piracy and armed-robberies against ships.”³⁵⁸ The ARF countries, Indonesia and Malaysia included, also expressed their desire to “endeavour to achieve effective implementation.”³⁵⁹

November 2004 witnessed the conclusion of the Japanese-led Regional Co-Operation Agreement on Combating Piracy and Armed Robbery against ships in Asia (ReCAAP).³⁶⁰ ReCAAP provides for the Information Sharing Centre (ISC) for facilitating the exchange of piracy-related information.³⁶¹ Singapore, Japan, Laos, Cambodia, Thailand, the Philippines, and South Korea have all ratified the Agreement, while key nations like India, Malaysia, and Thailand have signed onto the accord but have not ratified it.³⁶² Three more participating states will need to ratify before ReCAAP can enter into force.³⁶³

In 2005 Sana’a, Yemen hosted the first sub-regional meeting to discuss anti-piracy efforts in the Red Sea and Gulf of Aden areas.³⁶⁴ Kenya’s Ministry of Transportation hosted a piracy conference as well in February 2006.³⁶⁵ The Meeting on the Straits of Malacca and Singapore: Enhancing Safety, Security and Environmental Protection, held in Jakarta, Indonesia in September 2005 also addressed the issues of piracy and armed robbery against ships.³⁶⁶ According to the IMO, further initiatives under this program were scheduled “for the Caribbean, South Asia, Asia Pacific, and West and Central Africa in early 2006.”³⁶⁷

Militarily, Indonesia, Malaysia, and Singapore have launched coordinated surface offensives “against piracy and terrorism on the high seas” starting in July 2004.³⁶⁸ Indonesia’s mobilization of four warships and two maritime patrol aircraft to recover a hijacked

358. *Id.* ¶ 4(i).

359. *Id.* ¶ 2. Note, however, that the final section of the statement reads: “Nothing in this statement, nor any act or activity carried out in pursuant to this statement, should prejudice the position of ARF countries with regard to any unsettled dispute concerning sovereignty or other rights over territory.” *Id.* ¶ 4(k).

360. Bradford, *supra* note 84, at 69.

361. *Id.*

362. Donald Urquhart, *Regional Anti-Piracy Accord Gets Three More Countries on Board*, *BUS. TIMES* (Sing.), Apr. 8, 2006, available at 2006 WLNR 5899816.

363. *Id.*

364. IMO, Piracy and Armed Robbery Against Ships, http://www.imo.org/Safety/mainframe.asp?topic_id=362 (last visited Nov. 20, 2006).

365. *Id.*

366. *Id.*

367. *Id.*

368. Leo Lewis, *Navies Join Forces for War on Pirates: Indonesia and its Neighbours have Launched an Offensive against Raiders in the Malacca Strait*, *LONDON TIMES*, July 21, 2004, at 15; *Indonesia, Malaysia, Singapore Launch Coordinated Patrol of Malacca Strait*, *JAKARTA POST*, July 20, 2004, available at <http://yaleglobal.yale.edu/display.article?id=4271>.

Singaporean tug in December 2004 highlights the benefits of those coordinated surface offensives.³⁶⁹ However, it is important to note that these are only coordinated patrols, not joint patrols, which would permit entry into one another's territorial seas. Trilateral coordinated air patrols ("eyes in the sky") began in 2005 among the littoral states with Thailand as an observer.³⁷⁰ In February 2006, "Malaysia's armed forces chief . . . said [that] Indonesia, Malaysia, and Singapore would sign a pact in Indonesia's Batam Island . . . on standard operating procedures" for "joint air patrols."³⁷¹ While aerial patrols can "fly for up to three nautical miles inside the territorial waters of participating states," the sea patrols still do not allow any nation to transgress into any other nation's territorial waters.³⁷² Current efforts, however, have proved sufficiently successful to cause Lloyd's to drop the Straits from its high risk list as of August 2006.³⁷³

Since Admiral Thomas Fargo, then head of U.S. Pacific Command, announced his intention for a Regional Maritime Security Initiative, the United States has wisely sought to involve itself directly, or indirectly, in these patrols.³⁷⁴ While misreporting of Admiral Fargo's plans led to great skepticism within Malaysia and Indonesia, his successor, Admiral William J. Fallon, has persevered, albeit cautiously. In March 2006 he flew to Jakarta in order to "solidify our relationship and to see where we go from here."³⁷⁵ In Malaysia, he hinted towards providing direct resources to the coordinated air patrols.³⁷⁶ Already under his watch, U.S. SEALs have trained Indonesian maritime forces for anti-piracy and anti-maritime terrorism,³⁷⁷ and Admiral Fallon is not only encouraging a "rapid, concerted infusion of assistance" to the Indonesian military,

369. See Bradford, *supra* note 84.

370. See Catherine Zara Raymond, *Piracy in Southeast Asia: New Trends, Issues and Responses*, 4 HARV. ASIA Q. (2005), available at http://www.asiaquarterly.com/index2.php?option=com_content&do_pdf=1&id=30; see also INT'L INST. FOR STRATEGIC STUDIES, *Sky Eye Opens: Asean Nations Join Forces to Patrol Malacca Straits by Air*, Sept. 9, 2005, <http://www.iiss.org/whats-new/iiss-in-the-press/press-coverage-2005/september-2005/sky-eye-opens-asean-nations-join-forces>.

371. *US, Japan to Help Malaysia Boost Strait Security*, REUTERS, Feb. 27, 2006.

372. Raymond, *supra* note 370.

373. See generally Jonathan Gardner, *Strait of Malacca off High Risk List*, BUS. INS., Aug. 14, 2006.

374. The text of Admiral Fargo's March 31, 2004 testimony before the House Armed Services Committee can be found at <http://www.house.gov/hasc/openingstatementsandpressreleases/108thcongress/04-03-31fargo.html>.

375. Richard Halloran, *Admiral Visits a Front Line in Anti-Terror War*, HONOLULU ADVERTISER, Mar. 5, 2006, available at <http://myadvertiser.com/article/2006/Mar/05/op/FP603050307.html>.

376. *US, Japan to Help Malaysia Boost Strait Security*, *supra* note 371.

377. *U.S. Navy SEALs in Indonesia Anti-Terrorism Drill*, REUTERS, May 9, 2005.

but has already earmarked \$1million in Foreign Military Financing to support Indonesia's maritime security infrastructure.³⁷⁸

"For the recalcitrants—organized gangs and die-hard independence fighters—international assistance in developing indigenous patrols in Southeast Asian nations would enhance regional security and minimize the sensitive presence of foreign naval vessels."³⁷⁹ By strengthening the naval and coast guard forces, there is also less of a chance that the military resources would be used toward any repression of human rights. However, the United States should press for a physical presence in these patrols, both because it brings the most force to bear, and because it has a tremendous amount at stake. Sole reliance on other nations would be misplaced. Officers directly involved in the trilateral patrols state privately that those patrols are often matters more of "show" than of real utility.³⁸⁰ The United States can obtain a more direct presence by attaining a politically palatable, but still militarily powerful, presence.

Understanding that sovereignty concerns are those nations' first priority, the United States should look to re-tool its MSO task forces to achieve what Bruce Stubbs of the Heritage Foundation calls "acceptable presence."³⁸¹ Large, gray U.S. Navy warships, designed for high intensity war against major opponents, are often "too menacing" for maritime security operations in "regions sensitive to sovereign rights."³⁸² They may not always be the "most politically acceptable means for duty against maritime criminals and terrorists."³⁸³ Moreover, large, gray U.S. warships are targets, as was seen in Yemen and more recently in Jordan. Building up a regular presence rightfully concerns some officials lest U.S. patrols make their country less secure by attracting more terrorists.³⁸⁴

Finally, as was demonstrated numerous times throughout this Article, typical naval warships are not primarily designed for constabulary missions. While they have proven that they can conduct

378. Admiral William J. Fallon, Admiral, U.S. Navy Commander, U.S. Pac. Command, Statement Before the House Armed Services Committee on U.S. Pacific Command Posture 7, 17 (Mar. 9, 2006), *draft available at* <http://www.house.gov/hasc/schedules/3-9-06Fallon.pdf>.

379. Adam Young & Mark J. Valencia, *Piracy, Terrorism Threats Overlap: Joint Patrols Urged in Southeast Asia*, WASH. TIMES, July 7, 2003, at A14.

380. Bradford, *supra* note 84, at 70.

381. Bruce B. Stubbs, *Smarter Security for Smaller Budgets: Shaping Tomorrow's Navy and Coast Guard Maritime Security Capabilities*, HERITAGE LECTURES, May 17, 2005, at 5, *available at* http://www.heritage.org/Research/NationalSecurity/upload/78385_1.pdf (lecture delivered Apr. 27, 2005).

382. *Id.* at 4.

383. *Id.*

384. *See Malaysia Rejects Patrols for Malacca Strait, supra* note 89; *see also* Luft & Korin, *supra* note 125, at 5.

effective MSO, it does not follow that they are the most efficient and most cost-effective vehicles to do so.

What is needed may be smaller, faster craft equipped with Special Forces or certified Marine units operating in conjunction with a larger deck over the horizon beyond territorial seas.³⁸⁵ These craft will not only be highly effective operationally and relatively inexpensive, but they will also be politically subtle. Furthermore, they will lack the full complement of intelligence collection equipment that causes trepidation among the coastal nations.

What about the DD(X), the Navy's future multi-mission surface combatant? Weighing in at 14,000 tons, the DD(X), according to its program manager in the Program Executive Office for Ships and its requirements officer in the Office of the Chief of Naval Operations, is an:

advanced, expeditionary combatant for a new age of naval warfare . . . combining revolutionary land-attack capability with the ability to protect itself in all environments, especially in the littorals. It will deliver both high-volume, precision surface fires and pinpoint Tomahawk strikes. In addition, DD(X) will dominate the battle space like no other surface combatant with dual-band, active-array radar and a fully integrated undersea warfare system.³⁸⁶

Would Indonesia or Malaysia really want this shark less than two miles from their shores? What about a flotilla of such beasts, however sleek their design?

While certainly the answer to many of the Navy's needs, the DD(X), a warship promising to "destroy more targets, at greater ranges, with fewer munitions than any warship in history,"³⁸⁷ will likely not be opening any doors to joint patrols in the Straits of Malacca.

Its smaller, faster, and more maneuverable cousin, the Littoral Combat Ship (LCS), may one day sail through an open door, but its ultra-modern, stealthy, and lethal mien, to say nothing of its 400-foot length, will likely still prove too imposing for Malaysia and Indonesia at the outset.³⁸⁸ It would, however, be an ideal vessel off the coast of Somalia, especially since it can exist for extended periods of time on the high seas; deploy SEALs; provide intelligence, surveillance, and reconnaissance (ISR), especially through the use of helicopters and

385. See discussion *supra* Part III.E.

386. Captain C.H. Goddard & Commander C.B. Marks, *DD(X) Navigates Uncharted Waters*, U.S. NAVAL INST. PROC., Jan. 2005, at 30.

387. *Id.* at 32.

388. Stubbs, *supra* note 381, at 4.

unmanned aerial vehicles (UAVs); and reach speeds in excess of forty-seven knots.³⁸⁹ It is also very cheap “by Navy standards.”³⁹⁰

For constabulary missions in the Straits of Malacca, what really matters is the personnel more than the vessel. A complement of Marines or SEALs on smaller, faster (and obviously far less expensive) armored patrol boats would be the ideal anti-piracy and anti-maritime terrorism weapon. Special Forces could also undertake the opposed boardings and the hostage situations which normal VBSS teams could not.

In July 2005, Indonesia, Malaysia, and Singapore announced joint patrols using commandos, frigates, and swift patrol boats.³⁹¹ At the launch ceremony, General Endriartono Suarto, Indonesia’s top military commander, left the door open for nations beyond the original trio to join their “Neighbourhood Watch”: “Now there are many countries having a [sic] interest in the security of the Strait of Malacca. We lack ships, so probably if they have ships they can offer help to us. We lack detecting skills, while they have such abilities, so they can complement us.”³⁹²

Thus, the United States has a golden opportunity to provide that assistance, so long as its vessels and detection abilities speak softly and carry that big stick.

B. Regional Courts

A great complement to regional enforcement would be regional adjudication. Instead of an ad hoc trial of ten suspected Somali pirates in a Mombasa court with scant judicial resources, a tremendous backlog of cases, a magistrate who is forced to transcribe witness testimony by hand, and prosecutors without sufficient time and resources to adequately prepare their witness, the pirates could have been tried in a regional piracy court. That specialized court, properly designed, would have enjoyed the benefits of economies of scale in resources, knowledge, and experience. It could also provide benefits in three other areas.

As Professor William Burke-White has pioneered, regional adjudication offers an attractive alternative to the two traditional international law enforcement mechanisms of supranational tribunals (e.g., the International Criminal Court), and the

389. See Dave Ahearn, *Winter Decries Industry Focus on Near Term Profit, Sees Downsizing*, DEF. TODAY, Apr. 5, 2006 (discussing Secretary of the Navy Donald Winter’s comments in praise of the LCS); see also PEOShips, LCS, <http://peoships.crane.navy.mil/lcs/> (official U.S. Navy website on the LCS).

390. PEOShips, LCS, *supra* note 389.

391. Lewis, *supra* note 368.

392. *Id.*

domestication of international law in national courts (e.g., through universal jurisdiction).³⁹³ A regional piracy court in coastal Africa and another in Asia would combine the advantages of both traditional mechanisms, while minimizing their disadvantages, to form what Burke-White calls an “ideal compromise.”³⁹⁴

First, a piracy court situated in Kenya, for example, could draw on the legal experience of the region, ensuring that judges and attorneys have sufficient training and experience in international and maritime law. Such a court would also be able to pool resources from across the entire region and be capable of receiving specifically earmarked funds from the international community, thereby making it even more attractive to affected states. The court need not even be an actual courtroom, only a circuit judge or judges with a dedicated support staff of court reporters, clerks, and funds. Thus, no matter where the proceeding were held, the trial would, for example, enjoy actual court transcription.

Second, a piracy court could also develop and utilize the most efficient and fair rules of evidence and procedure, especially in light of the unique nature of law enforcement on the high seas. Naval constabulary missions have a peculiar set of challenges that need to be considered. Sometimes those challenges require that life-at-sea take precedence over the sanctity of the case. For example, the *NASSAU* took into its well deck a pirate skiff full of weapons and other evidence. Unfortunately, the skiff was also full of “roaches the size of leopards and all manner of other pestilence,” as well as other biohazards pooling on its base.³⁹⁵ Great care was taken to photo-document everything prior to jettisoning the skiff for health reasons. At trial, however, none of those photos were admissible without calling the personnel who actually took them. Doing so would have involved sending numerous people to Kenya, costing large sums of money and negatively impacting operations. As discussed above, the U.S. Federal Rules of Evidence, which only require authentication, could serve as a model for a piracy court’s evidentiary guidelines. Additionally, evidentiary rules such as Kenya’s proscription against admitting photocopies could be updated. Most important, as they do in many nations (but not in Kenya), rules against self-incrimination could leave room for the admissibility of knowing, willing, and voluntary admissions, so long as strict procedural and substantive rules are followed.

393. See generally William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Inquiry*, 38 *TEX. INT’L L.J.* 729 (2003).

394. *Id.* at 734.

395. Michael Bahar, Testimony at Trial of the Ten Suspected Somali Pirates (Feb. 23, 2006).

Third, the regional court also reinforces the view, critical to nations like Somalia, of the effectiveness and attractiveness of the rule of law, while diminishing the risks that the rule of law be seen as a U.S. or Western imposition.³⁹⁶ With respect to sub-Saharan Africa, South Africa could take the lead in this regional effort, furthering its regionalist project to “bind the region together under South African leadership,” and furthering Thabo Mbeki’s goal of bringing “to an end the practices as a result of which many throughout the world have the view that as Africans, we are incapable of establishing and maintaining systems of good governance.”³⁹⁷

Fourth, regional cooperation in adjudication could limit jurisdictional conflicts among nations. While under UNCLOS the capturing state gets to decide upon disposition, there is no guarantee that it wants to undertake such an obligation (as the United States did not), and it may be that no other neighboring nation is willing either. Alternatively, nations may fight over the right to prosecute. Extending universal jurisdiction over only those who “acknowledge the authority of no State,”³⁹⁸ may have been “shorthand for the idea that [universal jurisdiction] only applies when it will not lead to interstate conflict because other nations will not stand up for the defendants,”³⁹⁹ but there are many states that may want to stand up for the victims. There are also states, like Kenya, who may want to stand up for their economic and strategic interests.

Currently, however, there are no set rules for resolving such jurisdictional conflicts. Under universal jurisdiction any nation may prosecute—so long as it has the appropriate domestic legislation—but it does not provide guidance as to the nation that *should* or *must* prosecute. Thus, when Augusto Pinochet was arrested in the United Kingdom in 1999, there was no clear hierarchy of jurisdiction to determine which state seeking extradition was entitled to prosecute him. The Princeton Principles on Universal Jurisdiction is an attempt by leading scholars in international law to develop a set of principles for prioritizing claims under universal jurisdiction. The Principles direct states to resolve jurisdictional conflicts based on:

an aggregate balance of . . . (a) multilateral or bilateral treaty obligations; (b) the place of commission of the crime; (c) the nationality connection of the alleged perpetrator to the requesting state; (d) the nationality connection of the victim to the requesting state; (e) any other connection between the requesting state and the alleged

396. See Note, *The Promises of International Prosecution*, 114 HARV. L. REV. 1957, 1966 n.57 (2001).

397. Thabo Mbeki, *The African Renaissance, South Africa and the World*, Address at the United Nations University (Apr. 9, 1998), cited in Burke-White, *supra* note 393, at 750.

398. *United States v. Klinton*, 18 U.S. (5 Wheat.) 144, 152 (1820).

399. *Kontorovich*, *supra* note 51, at 150-51.

perpetrator, the crime, or the victim; (f) the likelihood, good faith, and effectiveness of the prosecution in the requesting state; (g) the fairness and impartiality of the proceedings in the requesting state; (h) convenience to the parties and witnesses, as well as the availability of evidence in the requesting state; and (i) the interests of justice.⁴⁰⁰

Regional adjudication agreements could go a long way to resolving jurisdictional disputes and could supplement the prosecutor-extradite provisions of the SUA Convention. Regional adjudication also allows nations to either share the glory of prosecution, or distance themselves, as appropriate. This last consideration is especially important when prosecutions involve more politically active and visible defendants. Such courts are best established at the regional level via resolutions, such as from African Union summits, or via bi- or multi-lateral treaties.

VI. CONCLUSION

None the less [sic], he knew that the tale he had to tell could not be one of a final victory. It could be only the record of what had had to be done, and what assuredly would have to be done again in the never ending fight against terror and its relentless onslaughts, despite their personal afflictions, by all who, while unable to be saints but refusing to bow down to pestilences, strive their utmost to be healers.⁴⁰¹

Military planning, like litigation, is a chess game—success depends on seeing many moves in advance. Thus, it should be surprising that when military operations and litigation are joined, as they are during naval constabulary missions, this maxim remains true. A complete legal theory with its political, military, and due process implications is an essential component of any successful strategy.

Since, and perhaps because of, the demise of the Soviet Union, asymmetric and law-enforcement type threats have dominated the strategic landscape. All indications are that they will continue to do so in the near term. The lessons of history have proven that fighting the previous war is a sure way to struggle in, if not lose, the current one. The United States should embrace maritime security operations and seek to equip and accommodate the new mission to the fullest extent possible. As this Article has demonstrated, maritime law enforcement cannot be an ancillary capacity, and anti-piracy cannot be an ad hoc adventure. Anti-piracy, and especially anti-piratical

400. PRINCETON PROJECT ON UNIVERSAL JURISDICTION, PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 32 (2001). The Commentaries make clear that this list “is not intended to be exhaustive,” but rather is designed “to provide states with guidelines for the resolution of conflicts.” *Id.* at 53.

401. CAMUS, *supra* note 1, at 278.

terrorism, is part and parcel of an effective global strategy, integral facets that could help tremendously in the war on terror or just as easily hurt it.
