

IS UNARMED UNSEAWORTHY?

MARTIN CONROY

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CHAPTER 1

Introduction.

Consider the shipmaster, entrusted by his owners with command of a small modern heavy-lifter, loading on the East Coast of the United States south of Hatteras, with cargo for the Levant, then South Asia via Suez and Singapore. He faces the age old perils of a marine adventure: weather, fire, grounding and other risks which have been the master's lot since before Noah. The twentieth century replaced the voice from the heavens with the charterer and owner in constant contact via email. He has a crew, with whom he hopes to successfully prosecute the voyage, and return to their homes in one piece. Preparation for the voyage to the Red Sea is straightforward, but as he considers the passage through the Arabian Sea, an old peril, mentioned in the Marine Insurance Act 1906, but familiar to those who followed the sea as far back as Julius Caesar, has made a resurgence - piracy. Caesar's answer to kidnapping by pirates was to return to Rome, lead a legion back, capture the pirates, and crucify them. Our shipmaster looks to prevent capture, rather than punish the pirates. What are his responsibilities, rights, options, and liabilities?

International law addresses the actions of States among themselves and their duties and rights in suppressing piracy and illegal acts against ships. The domestic law of the Flag State regulates the choices of the Master to carry additional security personnel, and the use of force to protect the ship. Coast Guard regulations require ships to carry security personnel when transiting in High Risk Waters. The Master and owners may arm the security personnel. The continuum of force which may be employed in self-defense ranges from the presence of security personnel to deter

attack, through the employment of non-lethal weapons to ascertain intent of suspected attackers, to the use of force, including deadly force, to induce attackers to end their assault.

Much of the commentary on the law of piracy tends to focus on the rights and responsibilities of states under international and municipal law. I plan to focus less on the state actors and more on the actions of the Master and his security forces, acting inside the boundaries of the ship, although sometimes using deadly force with effect on attackers who may not yet be on board the ship. The rights and responsibilities of the Master derive from his inherent right to self-defense and his responsibility to defend those persons on board from harm or death. There is currently no concise description of the liabilities and options on how to defend against pirate attacks. The Master's rights and responsibilities are a matter of the municipal law of the Flag State. The Flag State decides whether he may or must carry security personnel, and whether they may or must be armed. The Master must decide what he will do with these personnel and their equipment.

“European naval officers fighting piracy off the Somali coast have warned that with the onset of the piracy season this month and the pirates' success ratio declining, it is probably only a matter of time before a sailor gets killed during negotiations.”¹

This paper will explore the legal implications of piracy in the Indian Ocean in 2011. It will address these questions:

What are the definitions of piracy, and which is relevant to the master now?

¹ BBC News, (2010) *Growing risk of deaths' at the hands of Somali pirates*. <http://www.bbc.co.uk/BBC News - 'Growing risk of deaths' at the hands of Somali pirates.htm> accessed 7 Nov 2010

Is there an international consensus regarding piracy, and to what extent are recommendations and policy options coalescing?

What lawful actions may the master take to protect his ship and crew? What standards can he use to guide his actions, and against which their lawfulness or otherwise will be determined?

Is the level of protection against piracy a factor in determining a ship's seaworthiness? If so, to what extent does this have implications for marine insurance generally?

CHAPTER 2

Piracy definitions.

Historical definitions

Theft, fraud and piracy have been costs of doing business in sea-borne trade since that trade came into being. "Piracy is an ancient and established threat to ships, people and cargoes."² Piracy first appears in history over 2,000 years ago, when communities in the Eastern Mediterranean preyed on Roman traders. These attacks challenged the Roman hegemony which made trade possible. The Roman Senate treated the conflict against the pirates as a war against a defined and organized opposition, to be defeated in battle, with negotiations leading to peace. These communities did not consider their capture of ships, cargos and crews as criminal. Roman forces were sent to eliminate the threat, not as an attempt to eliminate illegal activity, but to facilitate the operation of trade and the expansion of Roman power. Rubin (2006) focuses on reaction to the perceived acts of the pirates as insults to the sovereign's authority. Part of the well known popular description of pirates as the common enemy of mankind is that pirates attacked anyone they could overcome, without declaring war like decent enemies.

The concept of "hostes humani generis", pirates in a permanent belligerent relationship to all people, appeared in the 17th century. Although described in popular terms as the "Barbary Pirates," the North African States operated as sovereigns and attacked only the ships of nations which did not pay tribute. This was public war, as understood between nations, not the private war of the UNCLOS definition, against

² Jones, (2006) *Maritime Security*, 12

all nations. English citizens acting under the authority of other nations' licenses were hunted as much for their allegiance to foreign princes as for their depredation against English trade.

Rubin (2006) discusses the application of the term "pirate" to those in rebellion against the sovereign. Acts under letters of marque and reprisal, as well as those under internal belligerencies such as the American Civil War, were often referred to as piracies by those who were taken or whose goods were affected.

Piracy entered the English language as applying to any interference with legal property rights, whether the interference was individual or community-based, without regard to whether the interference was sanctioned by a local prince or state. Piracy included losses of goods to those operating under commission from rulers of states at war with the English king, as well as robbers or brigands at sea. As the law of letters of marque and reprisal developed, those operating under a valid commission from a state could take prizes, and have the prize committed in a prize court, which conferred ownership of the prize to the taker. The taking of ships or goods by robbers or brigands, which fell under the label of piracy, did not transfer ownership in the goods, but only possession, and the goods would be restored to their owner should the goods be found in England, under the supervision of the English court. English subjects purporting to act under the direction of foreign princes were guilty of an offence against the authority of the sovereign, rather than guilty of property crimes.

American definitions

When the United States of America was founded and the law developed, the basic concepts were developed by lawyers trained in English law. They brought the

concept of piracy as it was understood in the late 18th century England to the writing of the United States Constitution. Article 1 Section 8 of the Constitution reserves to Congress the power “To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;”

The United States treated the conflict with the “Barbary Pirates” as a war against nation-states, in the Roman sense. The ships of the American colonies had been protected from attack by the Royal Navy. Attacks by corsairs operating from the North African states led to the foundation of the United States Navy in 1794. During the last years of the 18th century, negotiations and treaties, involving the payment of millions of dollars in tribute to Algiers and other North African states nearly led to the abolition of the fledgling American Navy.³ President Jefferson chose a course of protection of American trade, rather than payments to the Barbary powers.

After the Barbary states were subdued as a source of attacks on Western shipping the Royal Navy, and later the American Navy kept a global peace. The World Wars and Cold War meant that a large body of naval ships were on active patrol around the world. Most attacks on ships were in coastal waters, amounting to theft of mooring lines, cash, and portable stores from ships at anchor. Since the end of the Cold War, the size of Russian and American fleets have been reduced, and aid from the USSR and USA to potential client states has been nearly eliminated, except where justified by the war on terror after the attacks of the first decade of the 21st century in America, and in Europe.

³ Tull, (2006) *Six Frigates*, 43

The term piracy has been applied to many forms of forcible taking at sea. Rubin (2006) finds six different meanings for “piracy,” ranging from the vernacular or political use of the term in a derogatory manner, to the international law definition in Article 101 of the UN Convention on the Law of the Sea (UNCLOS).⁴ The UNCLOS definition includes illegal acts of violence or detention committed by private persons against a ship, outside the jurisdiction of a state.⁵ Another of Rubin’s definitions includes the idea of communities whose inhabitants band together for the purpose of capturing vessels as a form of tax or as penalties for illegal fishing and pollution.⁶ For example, some Somalis justify their attacks on fishing vessels as a result of overfishing in Somali waters, while others justify their attacks on European vessels as a result of dumping hazardous waste in Somali waters. The communities, such as Xarardheere⁷, which the pirates use as bases, have come to resemble the communities that Rubin describes as the “economic reality and undeniable vitality of the Mediterranean trade in the period 1580-1648.”⁸ These different contexts in which piracy has arisen illustrate one of the principal issues of this work: the difficulty in evolving a common, standard legal definition of the phenomenon around which an international, harmonized framework of laws can be constructed.

In the 20th century, the term piracy has been more narrowly defined as an attack by one vessel upon another, on the high seas, for private gain. Under international law

⁴ Rubin, (2006) *The Law of Piracy*, 1

⁵ UNCLOS, Article 101

⁶ Rubin, 14

⁷ Payne, (2010) *Piracy Today*, 174

⁸ Rubin, 15

piracy is a legal term of art that applies only to acts committed on the high seas or in an exclusive economic zone.⁹ Any of the described acts taking place within the jurisdiction of a state does not fall under the definition of Article 101.¹⁰ Piracy as thus described has existed in several areas of the world, off West Africa, in the Strait of Malacca, and most recently off the coast of Somalia. In order for piracy to exist, pirates have needed a safe haven to operate from, a means to control their captured ships and crews, and a mechanism by which to negotiate and receive their ransom. These needs have been best met in the Arabian Sea. Somalia has been a failed state for decades. The central government is not capable of maintaining control over the coastal areas where the pirates operate. The extensive Somali coastline offers many locations for pirates to hold ships while negotiations are conducted, and makes it nearly impossible for foreign navies to act against the dozens of ships held hostage without reprisals against crew still held.

Attacks on ships in areas of the world other than the Arabian Sea have not been as widespread, since the combination of enabling factors have not come together as they have off Somalia. In the Strait of Malacca, attacks were usually of a more limited time, where attackers would board the ship, steal what they could, and leave, often in a matter of minutes. The coasts of Brazil and West Africa have been subject to the same type of attacks, often where ships were anchored due to port congestion. These attacks do not fit the modern definition of piracy, as they occur within the confines of a country's territorial waters. This absence of consensus of

⁹ Beckman, (2002) *Combating Piracy and Robbery in Southeast Asia*, Ocean Development & International Law, 33:317–341, 2002 at 319

¹⁰ Mo, (2002) *Options to Combat Maritime Piracy in Southeast Asia*, Ocean Development & International Law, 33:343–358 at 345

definition present difficulties in the drafting of international, agreed conventions: when municipal law differs significantly from international law and norms, the issue of court processes and enforcement of judgments, as well as the legal rights and protections of victims, becomes highly problematic. For the purposes of this paper, we will concentrate on the Somali type of piracy, where ships are attacked with the intention of capture and holding for ransom the ship, cargo and crew.

The United States courts have returned to considering the crime of piracy after a long absence. Prior to the increase in Somali piracy “The last prosecution in the United States for piracy appears to have been in the 1885 case of *The Ambrose Light*, 25 F. 408.”¹¹ In that case the court held that insurgents cruising on behalf of an unrecognized government were piratical.¹²

US v Said

In April 2010 a skiff carrying several Somali men approached the *USS Ashland*. One of the persons on board fired a weapon in the direction of the *Ashland*. The *Ashland* returned fire, destroying the boat, and captured the survivors. Judge Jackson granted the defendants motion to dismiss Count 1 of the indictment, which alleges that they committed piracy in violation of §18 U.S.C. 1651. Judge Jackson said that “The Court must interpret a statute by its ordinary meaning at the time of its enactment.”¹³ His order states that *Smith* is the defining authority on the definition of piracy. The government contended that *Smith* did not address what other acts besides robbery might constitute piracy. He found that since the conduct by the

¹¹ *US v Hasan*, 747 F.Supp.2d 599 at 642

¹² *The Ambrose Light* (1885) 25 Fed. Rep. 408 at 445

¹³ *US v Said*, Case No: 2:10-cr-57 Document 94 at 440

defendants did not include actual boarding or taking from *USS Ashland*, “Justice Story’s use of the terms “robbery” and “forcible depredations” does not embrace the conduct charged against the Defendants.”¹⁴

“Not to extend the definition of piracy beyond that in *Smith* seems unwarranted, especially in view of the 1958 Convention on the High Seas and the 1982 UNCLOS, both of which are widely accepted as codifications of the customary international law.”¹⁵

One defendant, Jama Idle Ibrahim, has plead guilty to three of the remaining seven counts of the superseding indictment, and been sentenced to 360 months in prison. The other counts were dismissed on a motion by the United States. Ibrahim agreed to testify in any trials and proceedings, and waived any immigration rights.¹⁶ In a Statement of Facts, Ibrahim and the government stipulated that the allegations in the Superseding Indictment were true, and would have been proven had the matter gone to trial.¹⁷ The government is proceeding to the Court of Appeals on the judge’s dismissal of the count of piracy against the other five defendants.

US v Hasan

US v Hasan arose from another attack in April 2010. Three Somalis in a skiff, operating from a mother ship, came upon the *USS Nicholas*, which they believed to be a merchant ship, and thus a target. They fired upon the *Nicholas*, which returned fire and captured the three men in the skiff, as well as two on the mother ship.

¹⁴ *US v Said*, Case No: 2:10-cr-57 Document 94 at 446

¹⁵ Nanda, (2011) *Maritime Piracy:How Can International Law and Policy Address This Growing Global Menace?* 178 *Denv. J. Intl L. & Pol* 39:2 at 201

¹⁶ *US v Ibrahim*, Case No: 2:10-cr-57 *Plea Agreement* Document 97

¹⁷ *US v Ibrahim*, Case No: 2:10-cr-57 *Statement of Facts* Document 98

The definition of piracy was closely examined in *US v Hasan*. In rejecting a motion by the defendants to dismiss the count of the superseding indictment relating to piracy the Court concluded

“that the phrase "law of nations," as used in 18 U.S.C § 1651, requires application of the modern international consensus definition of general piracy. Doing so, however, does not mean that courts are somehow creating law. Instead, it means only that courts are recognizing that which has already been accepted by an overwhelming majority of countries as the definition of general piracy”.¹⁸

After a comprehensive review of statutory language and Supreme Court decisions Judge Davis concluded “that both the language of 18 U.S.C. § 1651 and Supreme Court precedent indicate that the "law of nations" connotes a changing body of law, and that the definition of piracy in 18 U.S.C. § 1651 must therefore be assessed according to the international consensus definition at the time of the alleged offense.”¹⁹ The five defendants were convicted by a jury on the fourteen counts of the superseding indictment.²⁰ They were sentenced to life imprisonment plus 960 months consecutive to the life term.²¹ They have appealed. The cases of the five have been consolidated as Court of Appeals Docket #: 11-4310, *US v Dire*. Oral arguments are calendared for 9 September 2011.

The cases together

¹⁸ *US v Hasan*, 747 F.Supp.2d 599 at 630

¹⁹ *US v Hasan*, 747 F.Supp.2d 599 at 623

²⁰ *US v Hasan*, Case No: 2:10-cr-56 *Verdict Form* Document 215

²¹ *US v Hasan*, Case No: 2:10-cr-56 *Judgement* Document 307

Both cases look to *US v Smith* as authority for the definition of piracy. They part ways in considering whether the words of the statute should be considered as they were understood at the time of the writing (Judge Jackson), or at the time of the offense (Judge Davis). Justice Story found that the conduct in *Smith* constituted piracy. He looked at the body of judicial opinions, writing on maritime law, and the common law, and declared that piracy is robbery by sea. "Offences, too, against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognised by the common consent of nations."²²

Judge Jackson focuses on the term "piracy", and contends that the definition of the term must be construed as it was at the time of the writing of the statutes, citing *Dept of Labor v Greenwich Collieries*, 512 US 267. Judge Davis looks at the term "law of nations" and finds a sufficient definition of piracy, which includes attacks which fall short of actual taking or capture. Both cases refer to the Privy Council case in which Viscount Stanlet states that "Actual robbery is not an essential element in the crime of piracy *jure gentium*. A frustrated attempt to commit a piratical robbery is equally piracy *jure gentium*."²³ Notwithstanding this direct mention of equating a frustrated attempt with actual piracy, the court in *Said* restricted the definition of piracy to require an actual taking to find an incident of piracy.

Even if Judge Jackson is to be supported in contending that the term piracy should be construed as it was at the time of the writing of the statute, it seems that the law of nations has indeed evolved since the writing of the statute. UNCLOS and the conventions regarding hostage taking and acts against ships were not in force in

²² *US v Smith*, 18 US 153 at 73

²³ *In re Piracy Jure Gentium* [1934] AC 586 at 588

1820. The United States proposed the measures which became The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention). See Appendix 1.²⁴

“In its sole reliance on *Smith*—concluding that since there is no robbery there is no piracy, despite the defendants’ *attempt* at piracy—the *Said* court misses the point”²⁵ The fact that the *Smith* ruling does not claim to restrict the definition of piracy to robbery alone has been discussed in a number of decisions and comments. “Actual robbery on the high seas is piracy under the law of nations by all the authorities, and so also is the act of cruising upon the high seas without a commission and with the intent to rob,”²⁶ In commenting upon the definition set forth in *Smith*, Lord Sankey wrote that “There was no doubt about the robbery and though the definition is unimpeachable as far as it goes, it was applied to the facts under consideration and cannot be held to be an exhaustive definition including all acts of piracy.”²⁷ I believe that the Appeals Court will find that the *Said* decision is overly restrictive. “In *Hasan*, the court used these sources to highlight the development of international norms and standards regarding piracy and thus, unlike the court in *Said*, channeled the role of scholarship as documentarian rather than as adjudicator of a certain standard or outcome.”²⁸

²⁴ IMO, *SUA Treaties*, <http://www.imo.org/About/Conventions/ListOfConventions/Pages/SUA-Treaties.aspx>, accessed 6 August 2011

²⁵ Nanda, (2011) *Maritime Piracy: How Can International Law and Policy Address This Growing Global Menace?* DENV. J. INT’L L. & POL’Y VOL. 39:2

²⁶ *Dole v New England Mutual Marine Ins*, 7 F.Cas. 837 at 847

²⁷ *In re Piracy Jure Gentium* [1934] AC 586 at 596

²⁸ McKinney, (2011) *United States v. Said & United States v. Hasan* 62 S.C. L. Rev. 577

Clay argues that both the *Said* and *Hasan* decisions are in error. “The proper course of action for Judge Davis would have been to follow the precedent established by *Said* and allow the Court of Appeals to remedy Judge Jackson’s flawed logic.”²⁹ Clay concludes that Judge Jackson erred in *Said* by incorrectly interpreting *Smith*. *Smith* held that robbery at sea was punishable as piracy. Clay argues, and I agree, that *Smith* does not restrict the crime of piracy to robbery alone. Clay states that Judge Davis in *Hasan* followed the correct reasoning in evaluating the law. However, since both cases were argued in the District Court for the Eastern District of Virginia, Judge Davis, under *stare decisis*, should have followed the precedent established in *Said*, even though he disagreed with the reasoning. The rulings in each case have been appealed. *US v Said*, 10-4970 is now in abeyance pending argument and decision in *US v Dire*, 11-4310.³⁰ The case is calendared for oral argument in the Court of Appeals for the Fourth District on 20 September 2011.³¹

While Judge Jackson may have been correct that in *Smith* Justice Story defines “piracy, by the law of nations, is robbery upon the sea”, Story does not restrict the crime to that definition alone. In the next sentence he adds “he and his associates were, at the time of committing the offence, freebooters, upon the sea, not under the acknowledged authority, or deriving protection from the flag or commission, of any government. If, under such circumstances, the offence be not piracy, it is difficult to conceive any which would more completely fit the definition.” The men who fired upon *USS Ashland* certainly fall under this definition, and are pirates.

²⁹ Clay, (2011) *A Tale of Two Judgments: United States v. Said and United States v. Hasan*, SSRN: <http://ssrn.com/abstract=1783681>, accessed 1 August 2011

³⁰ *US v Said*, 10-4970

³¹ *US v Dire*, US Court of Appeals Docket 11-4310

BMP4 definitions

More than twenty industry organizations, including the International Chamber of Shipping, and the International Maritime Bureau, have produced “Best Management Practices for Protection Against Somali Based Piracy”. The guide is now in its fourth edition, referred to as BMP4. BMP4 is supported by UKMTO and EU NavFor Somalia. It is the most widely quoted and referenced guide to precautions to be taken by shipowners and shipmasters transiting the Arabian Sea.

- A piracy attack may include, (but is not limited to), actions such as the following:
 - The use of violence against the ship or its personnel, or any attempt to use violence.
 - Attempt(s) to board the vessel where the Master suspects the persons are pirates.
 - An actual boarding whether successful in gaining control of the vessel or not.
 - Attempts to overcome the Ship Protection Measures by the use of:
 - Ladders.
 - Grappling hooks.
 - Weapons deliberately used against or at the vessel³²

Our first research question is “What are the definitions of piracy, and which is relevant to the master now?” The BMP4 definition is the most recent internationally supported definition of piracy. BMP4 is supported by shipping industry organizations, insurance trade groups, the European Union Naval Force, and the Combined Maritime Forces, a 25 nation coalition which includes the United States Navy. Until the Fourth Circuit Court of Appeals provides a decision in *US v Dire* shipmasters will be well served by the BMP4 definition.

³² ICS et al, (2011) *Best Management Practices for Protection Against Somali Based Piracy*, 57

CHAPTER 3

Evolving international legislative responses to piracy.

Current state off Somalia

Attacks off Somalia numbered 35 in 2004.³³ In the first seven months of 2011, 166 incidents occurred off Somalia, including 21 hijackings, with 362 crewmembers held hostage, and 7 killed.³⁴ Twenty ships and 398 hostages are held in Somalia. For the first five years of the attacks, roughly 2005 through 2010, the pirates were careful to release ships and crews without major physical harm. In 2011, four American sailors were killed on a yacht.³⁵ Several officers and seamen were removed from their ship, the *Asphalt Venture*, and are still being held ashore after the ship was released on 15 April 2011.³⁶ Maps of current incidents of piracy reported to the IMB Piracy Reporting Centre are shown in Appendix A.

Emergence of the international law of piracy

International law relating to piracy covers the rights and duties of nations with regard to piracy. Under the classic law of nations, pirates, if encountered on the high seas, could be attacked and slain. Modern human rights and humanitarian law prohibits extrajudicial killing of civilians except in self-defense. “While the Geneva Conventions do not necessarily apply to conflicts with pirates on the high seas, the

³³ Jones, (2006) *Maritime Security*, 13

³⁴ International Maritime Bureau, *Piracy News and Figures*, <http://www.icc-ccs.org/piracy-reporting-centre/piracynewsfigures>, accessed 28 July 2011

Chapter 1³⁵The Telegraph, *Somali pirates kill four kidnapped American sailors*, <http://www.telegraph.co.uk/news/worldnews/piracy/8341376/Somali-pirates-kill-four-kidnapped-American-sailors.html>, accessed 21 April 2011

Chapter 2³⁶ International Maritime Organization, *IMO expresses concern over mistreatment of seafarers held hostage by pirates*, accessed 1 May 2011, <http://www.imo.org/MediaCentre/PressBriefings/Pages/IMO-expresses-concern-over-mistreatment-of-seafarers-held-hostage-by-pirates.aspx>

minimal obligations of Common Article 3 are widely thought to be generally applicable to all uses of military force as a matter of customary law.³⁷ The League of Nations undertook a codification of the international community's understanding of international law in 1924.³⁸ The draft codification held piracy to be a crime committed on the high seas, by a private ship, for financial gain. Every warship was said to have the right to stop and capture the pirate ship on the high seas. Jurisdiction in piracy belonged to the State of the ship making the capture. Comments of the various governments stated that piracy was no longer a "sufficient real interest in the present state of the world".³⁹ Nothing further came of this attempt to set down the international understanding of the state of the law of piracy.

The next attempt to ascertain the state of the law of piracy was driven by the United Nations General Assembly, which asked the International Law Commission to research the law of the sea.⁴⁰ After years of international legal and diplomatic discussion, the Law Commission's draft article on piracy appeared as Article 15 of the 1957 Geneva Convention of the High Seas.⁴¹ Substantially the same wording was adopted in the United Nations Convention on the Law of the Sea, at Montego Bay, December 10, 1982. Since the definition of piracy under the Law of the Sea requires an attack by one ship on another, on the high seas, for private gain, other attacks fall outside this definition. Rubin discusses the definition of piracy,

³⁷ Kontorovich, (2010) "*A Guantánamo on the Sea*":*The Difficulty of Prosecuting Pirates and Terrorists* 98 Calif. L. Rev. 243 at 257

³⁸ Rubin (2006), *The Law of Piracy*, 305

³⁹ League of Nations Doc. C.254.1927.V, reproduced in 22 AJIL *Spec. Supp.* 216 at 222 (1928), quoted in Rubin, *The Law of Piracy*, 350, note 59

⁴⁰ Rubin, 319

⁴¹ Rubin, 332

particularly the inclusion of the modifier “illegal”.⁴² Attacks such as the *Achille Lauro* hijacking, not falling under the definition of UNCLOS, have led to the adoption of several other conventions.

Other conventions

The International Convention Against the Taking of Hostages addresses attacks meant to influence governments, as opposed to pirate attacks for private gain.

The Hostage Convention requires States to make the hostage taking subject to penalties under the municipal law of the State, ease the plight of the hostages, and take measures to prevent or prosecute acts of hostage taking.

The Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation requires states to provide “penalties which take into account the grave nature of these offences”⁴³. It is the responsibility of each state to provide for these offenses under the municipal law of the state. As is many facets of interpreting his legal position, our shipmaster has to reference the laws of the many littoral and trading states, and the different ways states have implemented the conventions.

Attackers who are not soldiers are subject to the normal criminal laws of the state into whose hands they fall, and will not be subject to prosecution as pirates unless the municipal law of the trying state recognizes that offence.⁴⁴ But the growth of international legal norms that limit state authority and provide greater protections for

⁴² Rubin, *Is Piracy Illegal?* Vol. 70, No. 1 (Jan., 1976), pp. 92-95 <http://www.jstor.org/pss/2200565>

⁴³ SUA Convention, Article 5

⁴⁴ Rubin, *The Law of Piracy*, 294

individuals make it harder for nations to perform the oldest and perhaps most basic law enforcement function in international law: preventing piracy.⁴⁵

Naval response

A tremendously difficult problem naval powers face with piracy is not a lack of operational resources to counter the threat, but what to do with the perpetrators once caught.⁴⁶ Ships of states operating against pirates have been reluctant to exercise powers by prosecuting the pirates arrested. They seem concerned by the human rights implications of exercising jurisdiction.⁴⁷ “The U.K. has so far refused to bring pirates to its territory out of fear they will raise asylum or *non-refoulement* claims.”⁴⁸

A Dutch court sentenced five Somali men to five years in prison for attacking a Dutch Antilles-flagged cargo ship in the Gulf of Aden in 2009.⁴⁹ “Kenya first stopped accepting new prosecution cases, then later ruled that it could not prosecute many existing cases that involved attacks outside its territorial waters.”⁵⁰ The U. S. Navy and the navies of several European states practiced “catch and release”, where suspected pirates are captured, fed, given medical attention, and released. The United States Navy has taken direct action against pirates who fired on U. S. Navy ships, or vessels under the American flag. Where navy ships did not witness pirate activity there has been reluctance to hold and prosecute. Legal and logistical issues

⁴⁵ Kontorovich, (2010) “*A Guantánamo on the Sea*”: *The Difficulty of Prosecuting Pirates and Terrorists* California Law Review, Vol. 98:243 at 246

⁴⁶ Kraska and Wilson, (2009) *Fighting Pirates: The Pen and the Sword* World Policy Institute Winter 2008/2009 at 45

⁴⁷ Treves, (2009) *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, EJIL 20 (2009), 399 – 414 at 408

⁴⁸ Van Schaack, (2009) *The Return of Piracy* http://intlawgrrls.blogspot.com/The_Return_of_Piracy.htm accessed 3 November 2010

⁴⁹ BBC News, *What do you do with a captured pirate?*, <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/africa/8664623.stm> accessed 28 February 2011

⁵⁰ Younger, (2009) *Testing the Waters* Maritime Risk International Vol 24 No 10

inherent in capture and custody of accused pirates may run afoul of municipal legal structures. Persons held on board navy ships may not have access to representation within the time frames required by municipal procedures. Evidence, chain of custody and availability of witnesses in the home country provide obstacles to successful prosecution. To prepare the legal ground for a successful prosecution, a ship recovered by force from pirates must immediately become a crime scene. Six suspected Somali pirates were arrested after an attempted hijacking of a cargo ship in which one of the gang was shot dead by private security guards have been released by the EU Naval Force. Commander John Harbour, the anti-piracy force spokesman, said the men were freed because the Pakistani captain of the ship, the *MV Almezaan*, would not give evidence. The men were captured by a Spanish frigate after guards on the cargo ship returned fire. The release underscores the difficulty of bringing suspected pirates to justice despite the presence of warships.⁵¹ Few warships have personnel with the law enforcement training and authorization to collect evidence, interview witnesses, and package the knowledge obtained to facilitate the prosecutors efforts. These difficulties have been recognized for two hundred years. The Offences At Sea Act 1806 noted that “whereby not only great charges and expenses are incurred, but offenders do often times escape unpunished by reason of the delay and difficulties attending such prosecutions.”⁵² The Act enabled the prosecution of piracies at the island or colony where such pirates might be found. In this age, colonies and possessions where the flag state of a naval ship might land and try a pirate are few. Thus pirates have been brought to the

⁵¹ The Sunday Times, *EU Naval Force frees captured pirate suspects after MV Almezaan attack* 26 March 2010 <http://www.timesonline.co.uk/tol/news/world/africa/article7076576.ece> accessed 5 August 2011

⁵² The Offences At Sea Act, 1806 46 Geo. 3, c. 54

Netherlands and the United States for trial, with attendant costs and delays.

Identification by victims can be difficult, as the multinational crews of foreign-flagged vessels would have to be either detained or returned from their homes around the world.⁵³ In the event of a failed prosecution, questions arise as to the immigration status of the now-acquitted foreign national. In a plea agreement in a recent American case, the pirate agreed not to challenge the extradition process, or claim that he would be subject to persecution if returned to Somalia. The traditional trading nations of the European Community seem to be accentuating the human and legal rights of the pirates at the expense of the right of seamen to life, liberty and the pursuit of making a living.

The conventions do not address the actions of persons on board a ship which may be attacked. The conventions describe the duties and responsibilities of the states, not of individuals acting against states flagging the ships. Piracy is by our definition an individual crime. The rights of the ship's crew to self-defense and the restraints on use of force are governed by the Flag State. United States military officials have already warned that any action against the pirates on land will likely result in civilian deaths.⁵⁴

Federal legislation

The United States Constitution gives Congress the power "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of

⁵³ Kontorovich, (2010) "*A Guantánamo on the Sea*":*The Difficulty of Prosecuting Pirates and Terrorists* 98 Calif. L. Rev. 243 at 265

⁵⁴ Kontorovich, (2009) *International Legal Responses to Piracy off the Coast of Somalia* ASIL V 13 No 2

Nations”⁵⁵. The Federal Courts have jurisdiction over admiralty and maritime cases.⁵⁶Title 18 USC Sections 2280 and 2281, which became effective on March 6, 1995, are the results of the International Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and its accompanying Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf. The Convention was in response to the hijacking of the *Achille Lauro* cruise ship in the Mediterranean Sea in 1985. Section 2280 provides for ships the same protection under international law against violent activity that earlier had been developed for aircraft under the Hague Convention against aircraft piracy and the Montreal Convention against the sabotage of aircraft. There is extraterritorial jurisdiction, that is, jurisdiction by the Federal District court over activities which occur outside the United States, whenever the prohibited activity is directed against a United States flagged ship, a perpetrator is a national of the United States, a national of the United States is seized, threatened, injured, or killed during the commission of the prohibited activity, or the offender is subsequently found in the United States. Section 2281 provides similar coverage for such prohibited activity directed against off-shore fixed platforms.”⁵⁷

On May 18, 2010, Abduwali Abdukhadir Muse, the only pirate to survive the attack on the *Maersk Alabama*, and subsequent rescue by *USS Bainbridge*, plead guilty in the United States District Court, Southern District of New York to six counts of a ten

⁵⁵ Article I, sec. 8, cl. 10

⁵⁶ Article III, sec.2, cl. 1

⁵⁷ Department of Justice, *Criminal Resource Manual*, Violence against Maritime Navigation and Maritime Fixed Platforms (18 U.S.C. § § 2280, 2281) http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00000.htm, accessed 3 Nov 2010

count indictment. In the plea agreement the government chose not to proceed on Count One, piracy, which carries a mandatory life sentence. Muse plead guilty to six of the ten counts, and was sentenced to 405 months in prison.⁵⁸ The government agreed to drop a charge of piracy, which carries a mandatory life sentence.⁵⁹ Pirates in the attack on the American yacht *Quest* were captured by U.S. naval forces, and arraigned in Norfolk, Virginia. They were charged with piracy, conspiracy to commit kidnapping and using a weapon in an act of violence.⁶⁰ As of this writing, seven of the fifteen men in custody in that case have plead guilty to the charges.⁶¹

In the first sentencing in Norfolk for acts of piracy in more than 150 years, a Somali pirate was sentenced to 30 years in prison for acts of piracy against the *USS Ashland*, which he believed was a merchant vessel that he intended to seize and hold for ransom. Ibrahim had pleaded guilty to the charges in August. The sentencing follows a conviction the previous week, in the same court, of five Somalis who attacked another Navy ship, the *USS Nicholas*, in the belief that it was a merchant vessel.⁶²

The Maritime Transportation Security Act of 2002 (MTSA)⁶³ was passed after the terrorist attacks of September 11, 2001, to establish a program to ensure greater security for United States seaports. As with many congressional actions after major

⁵⁸ *U.S. v. Muse*, Indictment Case 09-cr-00512-LAP, Document 31

⁵⁹ Weiser, *Somali Pirate Sentenced to Nearly 34 Years*
<http://cityroom.blogs.nytimes.com/2011/02/16/somali-pirate-sentenced-to-nearly-34-years/?hp>,
accessed 28 July 2011

⁶⁰ Washington Post, *US jury indicts 14 in fatal pirate attack on yacht*,
<http://www.washingtonpost.com/wp-dyn/content/article/2011/03/10/AR2011031001992.html>,
accessed 1 June 2011

⁶¹ Reuters, *Two more Somali pirates plead guilty in U.S. court*,
<http://www.reuters.com/article/2011/05/24/us-somalia-pirates-usa-idUSTRE74M6Y220110524>,
accessed June 1, 2011

⁶² Maritime Risk International, (2010) *Somali Pirate Jailed for 30 years by US court*, 22 Dec 2010

⁶³ Public Law 107–295

disasters, the MTSA was a knee jerk reaction to show that Congress was “doing something”. Like the Oil Pollution Act of 1990 (OPA90), this was an American attempt to legislate a solution to a problem common to all littoral and ocean-going nations, and complicated international attempts at a coherent solution. The international process was seen by Congress as too slow and restrictive on American prerogatives. Kontorovich (2010) discusses the fact that the United States has been active in taking Somali pirates and trying them in domestic courts. An alternative is to bring them before military courts, which brings up the specter of Guantanamo. Neither alternative looks appetizing to Western governments.⁶⁴

State legislation and cases

Since the United States Constitution gives Congress the power over piracy offenses, and the Federal Courts have jurisdiction over admiralty and maritime cases, the oversight by American state courts with reference to piracy is minimal. State statutes and court decisions do give some indication of the generally accepted limits on the use of deadly force. Evaluation of each state’s laws and cases with regard to the use of deadly force is beyond the scope of this paper. The laws of the several states with regard to self-defense and deadly force have been examined as a representative sample.

In New York law, under the defense of justification, “conduct which would otherwise constitute an offense is justifiable and not criminal”.⁶⁵ In a case which attracted a great deal of public attention, a subway passenger, Bernhard Goetz, shot four young

⁶⁴ Kontorovich, (2010) “*A Guantánamo on the Sea*”:*The Difficulty of Prosecuting Pirates and Terrorists* 98 Calif. L. Rev. 243 at 275

⁶⁵ New York Penal Law, S 35.05, <http://ypdcrime.com/penal.law/article35.htm>, accessed 19 February 2011

men who approached him on a subway train. The New York Court of Appeals described the law of New York with relation to the use of deadly force:

Thus, consistent with most justification provisions, Penal Law § 35.15 permits the use of deadly physical force only where requirements as to triggering conditions and the necessity of a particular response are met (see, Robinson, *Criminal Law Defenses* § 121 [a], at 2). As to the triggering conditions, the statute requires that the actor "reasonably believes" that another person either is using or about to use deadly physical force or is committing or attempting to commit one of certain enumerated felonies, including robbery. As to the need for the use of deadly physical force as a response, the statute requires that the actor "reasonably believes" that such force is necessary to avert the perceived threat.⁶⁶

"Perhaps it should be said that any unoffending person may intervene for the purpose of preventing the commission or consummation of any crime if the person does so without resorting to measures which are excessive under all of the facts of the particular case."⁶⁷

A Massachusetts case concerned a man who stabbed another to death. The Massachusetts Supreme Judicial Court said that "In order to create a right to defend oneself with a dangerous weapon likely to cause serious injury or death, it must appear that the person using the weapon had a reasonable apprehension of great bodily harm and a reasonable belief that no other means would suffice to prevent such harm."⁶⁸

In describing the law of self defense in the State of Washington, the Washington Supreme Court quoted *State v Miller* "If the appellants, at the time of the alleged assault upon them, as reasonably and ordinarily cautious and prudent men, honestly believed that they were in danger of great bodily harm, they would have the right to resort to self defense, and their conduct is to be judged by the condition appearing to

⁶⁶ *People v. Goetz*, 68 NY 2d 96 - NY: Court of Appeals 1986 at 106

⁶⁷ Boyce, (2010) *Criminal law and Procedure*, 916

⁶⁸ *Commonwealth v Houston* 127 NE 2d 294 at 690

them at the time, not by the condition as it might appear to the jury in the light of testimony before it.”⁶⁹

Coast Guard regulations

The Coast Guard published Maritime Security (MARSEC) Directive 104-6, *Guidelines for U.S. Vessels Operating in High Risk Waters*, providing direction to owners and operators of U.S. vessels to respond to emerging security threats. The MARSEC Directive applies to U.S. flagged vessels operating in certain areas determined to be high risk.⁷⁰ Several Port Security Advisories provide guidance for ship security and self-defense.

The United States claims sovereign immunity for ships under long term time charter, but not for most ships under short term time or voyage charters. The Navy reserves the right to embark armed U.S. Armed Forces personnel to protect U.S. Armed Forces personnel, cargo or equipment onboard the Vessel, or to protect the Vessel itself.

It is important to note that the authority of the embarked military personnel derives from their military chain of command. Use of force by the military detachment is not subject to the Master’s authority, but is derived from the sovereign right of use of military force of the United States.

The MARSEC Directive and the four Port Security Advisories provide the Coast Guard’s answers to our third set of research questions – what can the master legally do to protect his ship. Taken together with this review of state cases, the master

⁶⁹ *State v Wanrow* (1977) 559 P. 2d 548 at 240

⁷⁰ USCG, *Port Security Advisory 2-09* May 12, 2010

must train his people that any action they take, or force they use must meet the standards for self-defence. The terms that appear repeatedly in American and English law are necessary, proportional and reasonable. The pirate's right to life under Article 3 of the United Nations Universal Declaration of Human Rights does not stand against his being justifiably killed by a person on board a ship he is attacking.⁷¹

⁷¹ Oberdiek, (2008) *Specifying Rights Out of Necessity* OJLS 2008 28 (127)

CHAPTER 4

Seaworthiness

Black's defines seaworthy as "Properly equipped and sufficiently strong and tight to resist the perils reasonably incident to the voyage for which the vessel is insured."⁷²

Many other definitions will be found, particularly as applied to marine insurance and charter parties. The basic concept of seaworthiness is ancient. The modern marine insurance industry is based on the Marine Insurance Act 1906. The United States has no comparable statute. Most contracts of marine insurance are governed by the Marine Insurance Act, or take their lead from the principles which the Act, and over a century of judgments which have interpreted the rights and responsibilities of those involved in a contract of insurance.

"Seaworthiness' is a relative and flexible term. It varies according to the nature of the voyage contemplated. Thus, a ship may be seaworthy for one voyage, but not for another. There is no fixed or absolute standard of seaworthiness, and the wording of s. 39(1) itself makes this clear: it states that the ship shall be seaworthy for 'the purpose of the particular adventure insured'."⁷³

The shipowner has a "bounden legal duty towards the mariners for the safety of their lives, and towards the merchants who load their goods, 'that the ship should be tight, staunch, and strong, and in every way fitted for the voyage,' or, in other words, 'seaworthy;'"⁷⁴

⁷² Garner, (2009) *Black's Law Dictionary*, 1380

⁷³ Hodges, (1996) *Law of Marine Insurance*, 127

⁷⁴ *Gibson v Small*, (1853) 4 HL Cas 353 at 370

The responsibility of the shipowner to ensure that his ship be seaworthy can be considered in stages. The requirement for a ship to carry an armed guard may be necessary on the passage from Suez to the Bay of Bengal on a round the world liner service, but not on the trans-Atlantic leg. At the completion of each stage ⁷⁵she must have the degree of fitness which is required for the next stage.

Seaworthiness is also an obligation of the carrier in contracts of carriage. From the Hague Rules in 1924, through the Rotterdam Rules, the carrier has been bound

“before, at the beginning of, and during the voyage by sea to exercise due diligence to:

- a) Make and keep the ship seaworthy;
- b) Properly crew, equip and supply the ship”⁷⁶

Failure to maintain the seaworthy condition of the ship may make the shipowner liable in various ways, depending upon the nature of the contract, the breach of the warranty of seaworthiness, and when the breach is discovered. In a contract of marine insurance, unseaworthiness is a peril not insured against, and a loss due to unseaworthiness is not recoverable. Under a charterparty, the carrier could be liable to a shipper for delay and damage to the cargo.

Marine Insurance

The Marine Insurance Act 1906 states that “A ship is deemed seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the sea of the

⁷⁵ Boyd, (2008) *Scrutton on Charterparties*, 91

⁷⁶ Rotterdam Rules, Article 14, <http://www.rotterdamrules.com/images/convention.pdf>, accessed 2 July 2011

adventure insured.”⁷⁷ Piracy has been a peril covered by marine insurance since the earliest days of insurance. Under the International Hull Clauses (01/11/02), piracy is an insured peril under clause 2.1.5. Depending upon the shipowner’s insurance requirements, cover may also be provided by War Risk Insurance. In the event of coverage under both types of policy, one of the insurers will take the lead in a claim, and the two insurers will share the loss on agreed terms.⁷⁸ For cargo, piracy will not be covered unless an all risks policy is used.⁷⁹ Kidnap and ransom insurance is also available. The owner’s Protection and Indemnity (P&I) Club is an excellent source of guidance for planning and conduct of passages through high risk waters. Masters and owners should note that the implied warranty of legality cannot be waived by underwriters. If actions taken by the vessel are found to be illegal, the underwriters will automatically be discharged from liability from the moment of the breach.⁸⁰ Some P&I Club rules provide an exception to liability where the directors of the club find that the carriage, trade voyage or any activity on board is imprudent, unsafe, unduly hazardous, or improper.⁸¹ This may cut both ways against the interests of the shipowner. On one end of the spectrum, the club may find that the failure of a shipowner to properly protect the ship by the use of trained, equipped and led guards may be unsafe or unduly hazardous. At the other extreme, actions taken by improperly trained, equipped and led guards may be found to be improper or illegal. In both instances the club may be unwilling to pay claims under the cover.

⁷⁷ *Marine Insurance Act 1906*, 39(4)

⁷⁸ Michel, (2004) *War, Terror and Carriage by Sea* p. 127

⁷⁹ Todd, (2010) *Maritime Fraud and Piracy* p. 18

⁸⁰ Zavos and Salmon, (2009) *Watching Your Back* Maritime Risk International 10 November 2009

⁸¹ Hazelwood, (2010) *P&I Clubs Law and Practice*, 12.6

If a ship is captured by pirates, and a ransom is paid by the shipowner, he may have two avenues of recourse. If the ship is carrying cargo, the shipowner may claim that the payment of ransom is a voluntary act subject to contribution by the cargo as a general average act. A separate question would be what insurance cover the owner may have to compensate him for losses, without regard to the existence of a general average claim. "A ransom paid for the purposes of releasing a ship from pirates (the ransom can also be characterized as theft) as long as it is legal, reasonable and expended for the purposes of minimizing a damage covered by the policy, can be recoverable as general average expense or a sue and labour expense."⁸² *Barnard v Adams* 51 U.S. 270 [1850] saw the Court enunciate that "the ransom from pirates is to be contributed for; the loss is inevitable, and indeed actual."⁸³ Under Rule D of the York Antwerp Rules, contending a General Average means demonstrating unseaworthiness. As more ships carry armed security, and it is proven that ships with armed security are not hijacked, it can be argued that failure to carry armed guards in waters where pirates are known to operate is failure to man and equip the ship for the intended voyage

Should the ship be captured, and the owner be unwilling or unable to pay the ransom, and the ship lost, the owner would have to resort to a claim under his Hull or War Risk insurance. The International Hull Clauses contain a War Exclusion which covers war, civil insurrection and strife, derelict mines and detainment, but specifically excepts piracy from the exclusion. As ransoms continue to escalate, a case may appear where the pirates demand a ransom in excess of the value of the

⁸² Gauci, (2010) *Piracy and its Legal Problems* 41 J. Mar. L. & Com. 541 at 552

⁸³ Spencer, (2009) *Hull Insurance and General Average-Some Current Issues* 83 Tul. L. Rev. 1227 at 1264

ship. This has not yet occurred, but seems to be the worst case situation from the standpoint of the crew. Costs associated with protection from piracy are general running costs of the ship. Ransom and other costs of recovery of the vessel and crew invoke contributions from cargo interest through General Average, and are often recoverable from insurance, either from P&I, or hull cover. "It is also to be noted that payments of a ransom are recoverable as a sue and labour expense."⁸⁴ This allocation of expenses has made some owners reluctant to spend their own money to protect their crews, when costs in case of capture would be reimbursable. "Hull and Cargo insurers are now also putting pressure upon P&I Clubs to help fund piracy ransoms, on the basis that the P&I Clubs have a vested interest in the safe recovery of the crew. Presently, P&I Clubs will reimburse their members for *sue and labour* (or *mitigation*) costs, but usually only where approved in advance or determined by the P&I Club Board of Directors at its discretion to have been reasonably incurred."⁸⁵ In London, for example, piracy has been treated as a marine risk in the standard hull and machinery forms since 1983 and in the all risks cargo policy. In standard AIMU forms, it is treated as a war risk.⁸⁶

American remedies

American maritime law recognized the unseaworthiness remedy long before the Jones Act. It would seem that a seaman's claim for punitive damages arising from an unseaworthy ship would be viable in American courts.⁸⁷

⁸⁴ *The Bunga Melati Dua* [2010] All ER (D) 210 at 18

⁸⁵ Hong Kong International Piracy Conference, *Piracy: The Legal Issues*, <http://www.nautinsthk.com/archive/documents/PiracyHKG09/PRESENTATIONS/incc.htm> accessed June 2, 2011

⁸⁶ Spencer, (2009) *Hull Insurance and General Average-Some Current Issues* 83 Tul. L. Rev. 1227 at 1260

International law has had at best a marginal impact on the individual Somali pirate. It seems that the pirates know that they will not be detained for long, if at all, as long as they are not caught in the act of murder. Even then, few nations have been politically willing to bring the pirate home and incarcerate him. Until the cost to trade mandates the carriage of effectively led armed guards, the law will not provide a solution. The long term solution to Somali piracy is a functioning Somalia. That question is beyond our scope.

The Bunga Melati Dua, a tanker, was seized by pirates in August 2008, and was ransomed and released in late September. While the vessel was being held, a claim was made that the capture of the ship and cargo became a total loss when captured. The court ruled that the claimant had not made out the claim for a total loss.⁸⁸

In *The Saldanha* the court denied the appeal of an arbitrator's decision which held that a ship, seized by pirates in 2010 was not off hire for the duration of the hijacking. Gross J added that "Should parties be minded to treat seizures by pirates as an off-hire event under a time charterparty, they can do so straightforwardly and most obviously by way of an express provision in a "seizures" or "detention" clause."⁸⁹ The court found that the charterer took the risk of having the full working of the vessel being prevented due to seizure by pirates. Since the charterers assume the risk, will they insist on their vessels being suitably protected?

⁸⁷ deGravelles, (2011) *The Deepwater Horizon Rig Disaster: Issues of Personal Injury and Death* 85 Tul. L. Rev. 1075 at 1095

⁸⁸ *The Bunga Melati Dua* [2010] All ER (D) 210

⁸⁹ *The Saldanha* (2010) 1 Lloyd's Rep 187 at 194

Container lines, including CMA CGM, Maersk, and MOL have also announced surcharges blamed on extra expenses due to piracy.⁹⁰

The maritime trade magazines carry updates on the latest news in pirate actions.

“The pirates pretty much back down once they are confronted with people with weapons onboard the ships. We believe security teams are beneficial to the security procedures over there,” said Coast Guard Commandant Adm. Robert J. Papp.⁹¹ The Commandant said that ships with security teams have yet to be hijacked.

Other nations

Some traditional maritime nations which are large shipowning countries are against providing armed guards. The UK Government strongly discourages the carriage and use of firearms onboard UK registered ships for the protection of personnel or for the protection of the ship and/or its cargo. The carriage of firearms may escalate an already dangerous situation, and any firearms on board may themselves become the target or purpose of an attack.⁹² “The Ernst Komrowski shipping company will now have its 20 ships protected by armed guards. When the German Interior Ministry told the Hamburg-based company that it could not deploy armed men on a container ship registered in Germany, the company registered the ship under a flag of convenience. Now the laws of Liberia apply on board.”⁹³

Many armed guards may be former members of the armed services of the flag state, or another state. It is important for the master, in determining his legal rights to

⁹⁰ Maersk Line, Implementation of Emergency Risk Surcharge, <http://www.maerskline.com/globalfile/?path=/pdf/advisories/11/20110531>

⁹¹ Seapower, *Expanding Their Reach*, April 2011

⁹² UK MCA, (2011) *Marine Guidance Note 420(M)*

⁹³ Spiegel Online, *German Shipowners Turn to Mercenaries to Protect against Pirates*, <http://www.spiegel.de/international/world/0,1518,742685-2,00.html>, accessed June 2, 2011

action, to make sure that the armed guards are trained in the differences between their former status as members of a military force under the sovereign status of the national armed service, and their current status as civilian guards under the master's authority. The rules of engagement under which they operated as military personnel no longer apply.

Best Management Practices

BMP4, *Best Management Practices for Protection against Somalia Based Piracy* is the industry standard for ships transiting the Arabian Sea. It is produced and supported by over 20 international organizations, representing industry, crewing and military organizations. The three fundamental requirements of BMP are Register at MSCHOA, Report to UKMTO, and Implement SPMs. Registration with MSCHOA enables naval ships to maintain an accurate picture of ships in High Risk Waters and respond quickly in case of attack. Reporting to UKMTO gives the military response forces accurate information as to the ship's capabilities, precautions and vulnerabilities. Implementing Ship Protection Measures (SPMs) is an internationally acknowledged minimum standard for ships transiting the Arabian Sea area. BMP4 says the listed measures are the most basic that are likely to be effective. Owners who fail to implement the measures are at the greatest risk of being found to have failed to make their ships fit for the intended voyage.

CHAPTER 5

Use of Force

The shipmaster and crew have a right to defend themselves against attack. The United Nations General Assembly adopted the Universal Declaration of Human Rights in 1948. Article 3 of the Declaration states that “Everyone has the right to life, liberty and security of person.” “There will inevitably exist circumstances in which certain essential rights of the individual can only be protected by conceding to the individual the right to take initial measures of protection”.⁹⁴

“Prevailing manning levels and the demanding nature of shipboard life are also factors that limit the options available to ship crews in dealing with security threats.”⁹⁵ We can look to the United States Armed Forces for guidance on self-defense. The Joint Chiefs of Staff have issued Standing Rules of Engagement for U. S. Forces.⁹⁶ The Rules of Engagement define Individual Self-Defense as “The inherent right to use all necessary means available and to take all appropriate actions to defend oneself and US forces in one’s vicinity from a hostile act or demonstrated hostile intent is a unit of self-defense.”⁹⁷

“Application of force in self-defense requires the following two elements:

(1) Necessity. Exists when a hostile act occurs or when a force or terrorist(s) exhibits hostile intent.

⁹⁴ Bowett, (1958) *Self-Defence in International Law*, 3

⁹⁵ Schröder, Jens-Uwe, *Potential consequences of imprecise security assessments*. <http://solomonchen.name/download/7ms/1-012-s2-shroeder.pdf>, accessed 8 August 2011

⁹⁶ CJCSI 3121.01A, Standing Rules Of Engagement For US Forces, 15 January 2000

⁹⁷ *ibid*, A-4

(2) Proportionality. Force used to counter a hostile act or demonstrated hostile intent must be reasonable in intensity, duration, and magnitude to the perceived or demonstrated threat based on all facts known to the commander at the time.

To answer our question of what actions a master may legally take to protect his ship and crew, the master must consider a range of appropriate actions in self-defense from attempts to de-escalate the situation, through the use of proportional force to control the situation, to attacks to disable or destroy the hostile force. Use of force is authorized only while the hostile force continues to commit hostile acts or exhibit hostile intent. If the pirates stop attacking, the ship must stop defending.

Pirates are not interested in a pitched battle. They are looking for the highest ransom at the lowest cost to them in time and risk. As in any escape from a predator, the prey does not have to be the fastest of those trying to escape, but needs to ensure that they are not the slowest. In a similar fashion, ships transiting high risk waters need to make themselves a target that is not worth the effort the pirates will have to expend to capture the ship.

“To prevent attacks or boarding, ships captains rely upon increased speed, maneuvering, water hoses, sound cannons or newer passive systems such as electrified boarding nets, alarm systems, or lubricant foams.”⁹⁸

The level of defense must be carefully calibrated to be appropriate to the level of threat perceived. The force continuum starts with the alert watch mentioned above. The ship’s security posture will be increased in planned steps as the level of threat in

⁹⁸ Winn and Govern, (2008) *Maritime Pirates, Sea Robbers, and Terrorists: New Approaches to Emerging Threats* 2 Homeland Security Rev. 131 at 144

the area of transit increases. Lookouts will be added, defensive lighting measures employed, and physical barriers to boarding may be employed. Once in the area where pirates are known to operate, armed watches will be stood. Company procedures of the shipping company and the armed security company must be negotiated well before the high risk area. "(S)ecurity personnel must understand that, when confronted with a situation where force may be required, the response they select must be appropriate to the perceived threat. Continuum of force training must emphasize the concept that the decision to employ a particular level of force must be predicated on a "reasonable perception" of the threat."⁹⁹ English law regards self-defence as a justification rather than an excuse at common law. In *Beckford v The Queen* [1988] AC 130, Lord Griffiths said 'the test to be applied for self-defence is that a person may use such force as is reasonable in the circumstances as he honestly believes them to be in the defence of himself or another' and 'a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike'.¹⁰⁰

The primary function of security personnel is to prevent pirates from boarding the ship. Posting lookouts, lighting the ship, using firehoses, and razor wire may convince a pirate to seek easier targets. This is the best possible outcome for the ship, crew, shipmaster and shipowner. If a passive security posture does not deter an approach by pirates, "personnel to take all reasonable steps to avoid the use of force. If force is used, it should be in a manner consistent with applicable law. In no

⁹⁹ U. S. Marine Corps, *Law Enforcement Manual*, MCO 5580.2B, 27 August 2008 at 6-6

¹⁰⁰ *Blackstone's Criminal Practice 2011*, A3.31

case should the use of force exceed what is strictly necessary, and in all cases should be proportionate to the threat and appropriate to the situation.”¹⁰¹

Deadly force

Use of deadly force is justified only under conditions of extreme necessity and as a last resort, when all lesser means have failed or cannot reasonably be employed.

Deadly force may be used in self-defense when necessary to protect personnel who reasonably believe themselves to be in imminent danger of death or serious bodily harm. “(P)roof of self-defense constitutes an absolute defense in that it renders the homicide justifiable.”¹⁰²

Whenever a person employs deadly force, there is risk of personal liability for the harm or injury inflicted. Using deadly force in foreign jurisdictions may entail the risk of being subjected to foreign civil or criminal charges or suit. There is no law which would ensure immunity from trial or suit in foreign jurisdictions. The generally applicable standard for acceptable force is the same as that which will sustain a defense of "self-defense," that is, whether the nature, amount and use of the force was reasonably justified in light of all the relevant circumstances.

“The right reasonably to use a nondeadly force, such as one's fists, in self-defense, arises at a somewhat lower level of danger (a reasonable concern for personal safety) than the right to use a dangerous weapon.”¹⁰³

¹⁰¹ IMO, *MSC.1/Circ.1405*, <http://www.imo.org/OurWork/Security/SecDocs/Documents/Piracy/MSC.1-Circ.1405.pdf>, accessed 23 July 2011

¹⁰² *Wynn v Mahoney*, 600 F. 2d 448 at 450

¹⁰³ *Commonwealth v Bastarache*, 414 NE 2d 984 at 105

“In order to create a right to defend oneself with a dangerous weapon likely to cause serious injury or death, it must appear that the person using the weapon had a reasonable apprehension of great bodily harm and a reasonable belief that no other means would suffice to prevent such harm.”¹⁰⁴

“The fact that one is threatened in his own home or in a place where he has exclusive right to be is one of the more important factors in making such determination, but this factor is not without limitations in its application.”¹⁰⁵

The purpose of use of force is to prevent the attackers from causing bodily harm or death to persons on the ship. If the pirates are able to board, increased levels of force may be needed to protect the lives of the crew. Security forces will be at risk of retaliation should pirates get aboard, if force is used, especially if use of force leads to death among the pirates. There is no international law which prohibits the use of weapons in self defense. The challenge for our shipmaster is that his actions may be second guessed after the fact by littoral states at which the vessel might call after an action against pirates. Not all states will exonerate a person who kills a pirate on the basis of self defense. The increasing criminalization of ships' officers has been decried in pollution incidents. I can find no instance where a person has been prosecuted by a non-flag state for acts performed in self-defense against piracy. As this paper shows, a master or armed guard acting in self-defense must be able to justify his actions under Federal and State laws. The question which is impossible for the master to answer in advance is what standards an unknown legal system in an unnamed jurisdiction might hold him or his people to. An international standard of

¹⁰⁴ *Commonwealth v Houston*, 127 NE 2d 294 at 690

¹⁰⁵ *Commonwealth v Shaffer*, 326 NE 2d 880 at 512

self-defense against pirates does not seem achievable in any foreseeable time frame.

Training for civilian merchant seamen on commercial ships is costly, and requires continuous retraining to keep a sufficient number of weapons qualified personnel on board. The Gun Control Act of 1968 makes it a felony for a person to possess or receive firearms or ammunition if that person has been convicted of a crime of domestic violence.¹⁰⁶ Most civilian ships do not carry sufficient personnel to stand armed pirate watches in addition to their normal operational duties. The passage across the Arabian Sea require several days of heightened vigilance. I believe that only highly trained, professional armed guards can meet the required level of force and restraint needed to keep the ship safe, and limit the owner's liability for excessive use of force. International organizations are belatedly realizing that armed guards are needed to deter pirates. Guidance on the employment of privately contracted armed security personnel on board ships has been developed by IMO's Maritime Safety Committee.¹⁰⁷ The International Chamber of Shipping reversed its long-standing opposition to armed guards in a press release on May 20, 2011.¹⁰⁸

Many firms offer their services in the maritime protection field. Before selecting a security company, the shipowner should consult their legal advisers, and P&I Club.

The International Maritime Organization has issued several documents which provide guidance to companies and masters. These should be closely studied by the

¹⁰⁶ 18 USC 922

¹⁰⁷ IMO, *Press Briefing*, <http://www.imo.org/MediaCentre/PressBriefings/Pages/27-MS-89-piracy.aspx>, accessed 2 June 2011

¹⁰⁸ ICS, *Global Shipping Industry Meets in Hamburg* <http://www.marisec.org/pressreleases.htm#27May11>, accessed June 2 June 2011

shipmaster, and others involved in security planning. The International Chamber of Shipping (ICS) and the European Community Shipowners Associations (ECSA) have compiled a matrix of flag states and their stated policy on the use of armed guards.¹⁰⁹ The resulting hodge podge certainly does not show any sign of the convergence in international consensus regarding piracy, or any sign that recommendations and policy options coalescing. If the owner and charterer decide that the ship is to be supplied with armed guards, weapons and ammunition will have to be arranged.

Littoral State laws

There is a conflict between the private interest of a company to protect its vessels and seamen by carrying armed security guards on board, and the public interests of a coastal state to ensure its national security.¹¹⁰ UNCLOS reserves jurisdiction over ships to the flag state. Coastal states may not exercise jurisdiction against ships flying a foreign flag, unless the consequences of the crime extend to or disturb the peace of the coastal state.¹¹¹ “If a pirate is killed during a defensive operation by a merchant ship, coastal states may consider that the seafarer’s defensive action would fall within either of these categories.”¹¹² Weapons and ammunition may complicate port visits in some countries. South Africa requires advance notice of

¹⁰⁹ International Chamber of Shipping, *Combined ICS/ECSA Table* http://www.marisec.org/icsorange/icscirculars11/MLC_11_21%20AND%20IC_11_07%20FLAG%20STATE%20RULES%20AND%20REQUIREMENTS%20ON%20ARMS%20AND%20PRIVATE%20ARMED%20GUARDS%20ICS%20AND%20ECSA%20TABLE.pdf, accessed 24 August 2011

¹¹⁰ Mo, (2002) *Options to Combat Maritime Piracy in Southeast Asia*, *Ocean Development & International Law*, 33:343–358 at 351

¹¹¹ UNCLOS Article 27

¹¹² Zavos and Salmon, (2009) *Watching Your Back* *Maritime Risk International* 10 November 2009

visits by ships carrying defensive weapons.¹¹³ Egypt requires that weapons and ammunition be removed from ships transiting the canal, carried by Egyptian government authorities, and returned to the ship at the completion of the canal transit.¹¹⁴ Conversations with security teams indicate that many ships do not declare weapons in the Suez Canal. The UK has implemented rules for the treatment of firearms on board vessels calling at UK ports and these are set out in Government Circular C2-25A 'Firearms: Imports: Overall controls and policy'.¹¹⁵

Who is in charge? Under SOLAS, "The owner, the charterer, or the company, as defined in regulation IX/1, operating the ship or any other person, shall not prevent or restrict the master of the ship from taking or executing any decision which, in the master's professional judgment, is necessary for safe navigation and protection of the marine environment."¹¹⁶ The International Safety Management Code requires the Company to establish that "the master has overriding authority and the responsibility to make decisions with respect to safety".¹¹⁷ The International Ship & Port Facility Security Code (ISPS Code) also states that "The Company shall establish in the ship security plan that the master has the overriding authority and responsibility to make decisions with respect to the safety and security of the ship"¹¹⁸ The U. S. Coast

¹¹³ UK P&I Club, *Armaments on Merchant vessels*, <http://www.ukpandi.com/loss-prevention/article/750-03-11-armaments-on-merchant-vessels-update-south-africa-2419/> accessed 2 June 2011

¹¹⁴ American Shipper, *Suez gun law catches carriers in crosshairs*,

http://www.americanshipper.com/newweb/FC/FLC_story.asp?news=165758

¹¹⁵ Zavos and Salmon (2009) *Watching your back*, Maritime Risk International Vol 23 No 9

¹¹⁶ IMO, *SOLAS Consolidated Edition 2009*, p. 269

¹¹⁷ IMO, *ISM Code 2010 Edition*, p. 14

¹¹⁸ IMO, *ISPS Code 2003 Edition*, p. 11

Guard offers the guiding principle “Vessel masters retain control of and authority over their vessels, crewmembers, and embarked security personnel at all times.”¹¹⁹

It would seem that the authority of the Master is well established. Two competing lines of authority intervene. First is the case of armed forces personnel placed on board for the purpose of safeguarding the ship and her cargo. These military security detachments serve under their parent organization’s Rules of Engagement. They draw their authority from the sovereign powers of the United States, and their weapons are not under the Master’s control. Second, each person has a right of self-defense. The Master may not order a person who feels that his life is in danger not to defend himself.

However, “under the contract between owner and security provider, the master may not have control or the final decision in whether weapons will be deployed and used. That decision may rest with the security team, on terms that the master only need be consulted “if there was time”.”¹²⁰ I would argue that the company does not have the right to remove the Master’s statutory authority by virtue of a contract with a third party. In answering our question about what lawful actions a master may take to defend his crew, the shipowner and shipmaster must assure that all contracts with private security guard companies delineate the role of the master in setting the conditions under which force may be used by those on board.

¹¹⁹ USCG, *Port Security Advisory 03-09*, <http://homeport.uscg.mil/mycg/portal/ep/contentView.do?contentType=2&channelId=-18389&contentId=189973&programId=63715>, accessed 27 July 2011

¹²⁰ Ince & Co., (2011) *Issues arising from the use of armed guards* <http://incelaw.com/documents/pdf/Strands/Shipping/Article/piracy-issues-arising-from-the-use-of-armed-guards.pdf> accessed 25 August 2011

CHAPTER 6

Conclusion.

What are the definitions of piracy, and which is relevant to the master now?

The basic framework of the crime of piracy is not in dispute. An attack by one vessel on another, on the high seas, for private profit is piracy under U. S. municipal law, and under the law of nations. The relevant act, from the master's standpoint, is an approach with apparent intention to do harm to those on board his ship.

What are the recommendations of international organizations? Are the recommendations changing?

International organizations continue to oppose arming of crewmembers. Until 2011, the International Maritime Organization and industry bodies opposed the carriage of private armed security personnel. In the past year, the recognition that private armed security personnel were the sole effective measure in protecting crews from kidnapping has led to the issuance of international guidance on the carriage of private armed security personnel.

What actions may the master take to protect his ship and crew? What standards can he use to guide his actions?

The master, with his owners, may take on board weapons and ammunition to protect those on board from kidnapping, bodily harm, or death. Any actions taken by those on board must be proportional to the threat faced by the crew.

Is protection against piracy a factor in a ship's seaworthiness?

A ship which is not fit for the intended voyage is unseaworthy.

Shipmasters and shipowners have a right and a responsibility to protect their ships, crews, and cargoes. Failure to protect the ships may lead to hijacking, kidnap for ransom, or death of crewmembers. As costs of ransoms escalate, insurance interests may decide that continuing to pay ransoms is no longer cost-effective.

Shipowners who fail to exercise an appropriate standard of care to protect their ships may find themselves without insurance cover, as ships are found not fit to pursue the intended voyage, leading to loss of insurance cover due to unseaworthiness.

Masters and owners who fail to have a planned response to pirates may, on the other hand, be at risk of improper use of force by improperly trained crewmembers or insufficiently controlled and supervised armed security forces. While lawsuits from injured pirates are unlikely, and dead men tell no tales, lawsuits by crewmembers injured by security personnel are almost certain to develop if security forces are not properly screened and trained before embarkation, and properly led while on board.

Weapons provided for use by armed security teams must be legally obtained, exported from the country of origin, properly manifested and controlled through customs in transit countries, and properly controlled while in the Master's custody on board. The Suez Canal prohibits commercial vessel transits when weapons and ammunition for ship security are on board. The weapons must be discharged to bond and transported to the other end of the canal by shore security. The US State Department has sent a demarche to ports in regions deemed at high risk in order to compile a list of similar requirements by port states for weapon control during port visits.¹²¹

¹²¹ USCG, *Port Security Advisory (08-09)*. <http://homeport.uscg.mil>

I hope to have addressed these competing demands upon the shipmaster, to enable Masters to perform their duties with the least possible risk to themselves and their ships, not only from pirates, but also from security personnel, port states, and owners' expectations.

I have decided that I will not command an unarmed ship through the Arabian Sea while the pirate threat exists. Others disagree, as ships transit daily without protection. At this writing, dozens of ships manned by hundreds of seamen are being held for ransom along the coast of Somalia. Merchant seamen of all nations have a right to ply their trade while being protected from kidnap, torture, loss of liberty and death. The only measure which is working in the Arabian Sea is the provision of properly trained, equipped and led armed guards. Their presence should be required on every ship.

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APPENDIX A

Piracy Maps

IMB Live Piracy Map 2011

This map shows all the piracy and armed robbery incidents reported to the IMB Piracy Reporting Centre during 2011.

 = Actual Attack  = Attempted Attack  = Suspicious vessel



Figure 1 - World Piracy map¹²²

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¹²² <http://www.icc-ccs.org/piracy-reporting-centre/imb-live-piracy-map>, accessed 27 July 2011

IMB Live Piracy Map 2011

This map shows all the piracy and armed robbery incidents reported to the IMB Piracy Reporting Centre during 2011.

 = Actual Attack  = Attempted Attack  = Suspicious vessel



Figure 2 - Arabian Sea Piracy Map¹²³

¹²³ <http://www.icc-ccs.org/piracy-reporting-centre/imb-live-piracy-map>, accessed 27 June 2011

APPENDIX B

Research Trail

I began this research process as an academic work, as part of my LLM studies. The topic was chosen since Somali piracy was in the industry and general news, and there seemed to be a lack of guidance for shipmasters.

I began by reading books specific to the law of piracy, maritime security, journals and web research. Professor Alfred Rubin traces the origin of the law of piracy, its evolution in English and American law, and its development into the 20th century in *The Law of Piracy*. This is the most scholarly, intensively annotated volume I found on the subject. The book focuses on the origins of the crime of piracy and how pirates have come to be seen by the international and municipal law from the tenth century BC to the present.

I gathered Advice to Masters from P&I Clubs, Flag State Advisories, International Maritime Organization, the International Chamber of Commerce, the Nautical Institute, and other shipmaster's organizations. I explored of works on international law, then moved to the domestic law of the United States, and recommendations from the United States Coast Guard, and maritime industry publications.

The body of opinion on arming ships against piracy is very fluid. There is nearly universal opposition to arming crews. Provision of armed, trained personnel has been effective in keeping ships safe. Industry opinion was nearly universally opposed to the presence, and expense, of armed guards, but their success in protecting ships is winning support. The United States has mandated the provision of extra security personnel, and supported arming the additional persons.

Searching the Lexus library for “piracy” brought many leads, but often lead to cases involving music piracy and theft of intellectual property. The addition of “self-defense”, and “deadly force” narrowed the field to cases more in line with the focus of this research. Cases are developing in the United States courts in which pirates have been tried and convicted. I am unable to find any cases at this time which concern the actions of ship’s force attempting to protect their ships against piracy. With the increased number of ships carrying armed guards, and the continued attacks on shipping, such a case will come about eventually.

Since no cases directly concerning use of force by ships in self-defense were found, I looked at state cases involving deadly force, and U. S. Navy guidance to shipboard force protection personnel.

Internet use was key to my research. Since I was at sea for most of the research period, access to the University on line legal resources made this paper possible.

As the international attitude towards armed guards evolves, the International Maritime Organization has presented guidance to flag states and shipowners. This guidance is interim, and will continue to be amended as the situation changes.

The piracy environment in the Arabian Sea continues to change. As ships change their tactics, pirates will change in response. Until the Somali region has a functioning government capable of keeping order in their territory, piracy will exist in the region. Continued research will be required, by and on behalf of shipmasters, to provide them with the information, techniques, tactics and procedures they need to keep their ships and crews safe.

APPENDIX C

Treaties and Statutes.

Convention on the High Seas

Article 15

Piracy consists of any of the following acts:

- (1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (3) Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article.

UNCLOS

Article 101

Definition of piracy

Piracy consists of any of the following acts:

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

Article 105

Seizure of a pirate ship or aircraft

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

Article 107

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

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.

Hostage Convention

ARTICLE 1

1. Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention.
2. Any person who:
 - a. attempts to commit an act of hostage-taking, or
 - b. participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking likewise commits an offence for the purposes of this Convention.¹²⁴

Suppression of Unlawful Acts Against the Safety of Marine Navigation Convention

ARTICLE 3

1. Any person commits an offence if that person unlawfully and intentionally:
 1. seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
 2. 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
 3. 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
 4. places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
 5. 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
 6. communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
 7. injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).
2. Any person also commits an offence if that person:
 1. attempts to commit any of the offences set forth in paragraph 1; or
 2. abets the commission of any of the offences set forth in paragraph 1 perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or

¹²⁴ International Convention Against the Taking of Hostages, G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46 (1979)

3. threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question.

Title 18 - Crimes and Criminal Procedure, Part I – Crimes, Chapter 81 – Piracy and Privateering.

§ 1651. Piracy under law of nations

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.¹²⁵

§ 1652. Citizens as pirates

Whoever, being a citizen of the United States, commits any murder or robbery, or any act of hostility against the United States, or against any citizen thereof, on the high seas, under color of any commission from any foreign prince, or state, or on pretense of authority from any person, is a pirate, and shall be imprisoned for life.¹²⁶

§ 1653. Aliens as pirates

Whoever, being a citizen or subject of any foreign state, is found and taken on the sea making war upon the United States, or cruising against the vessels and property thereof, or of the citizens of the same, contrary to the provisions of any treaty existing between the United States and the state of which the offender is a citizen or subject, when by such treaty such acts are declared to be piracy, is a pirate, and shall be imprisoned for life.

§1655. Assault on commander as piracy

Whoever, being a seaman, lays violent hands upon his commander, to hinder and prevent his fighting in defense of his vessel or the goods intrusted to him, is a pirate, and shall be imprisoned for life.

§1659. Attack to plunder vessel

Whoever, upon the high seas or other waters within the admiralty and maritime jurisdiction of the United States, by surprise or open force, maliciously attacks or sets upon any vessel belonging to another, with an intent unlawfully to plunder the same, or to despoil any owner thereof of any moneys, goods, or merchandise laden on board thereof, shall be fined under this title or imprisoned not more than ten years, or both.

§ 1201. Kidnapping

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when—

¹²⁵ Federal Register June 25, 1948, ch. 645, 62 Stat. 774.

¹²⁶ Federal Register June 25, 1948, ch. 645, 62 Stat. 774.

- (1) the person is willfully transported in interstate or foreign commerce, regardless of whether the person was alive when transported across a State boundary, or the offender travels in interstate or foreign commerce or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense;
- (2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;

§ 1203. Hostage taking

(a) Except as provided in subsection (b) of this section, whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts or conspires to do so, shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.

(b)

(1) It is not an offense under this section if the conduct required for the offense occurred outside the United States unless—

(A) the offender or the person seized or detained is a national of the United States;

(B) the offender is found in the United States; or

(C) the governmental organization sought to be compelled is the Government of the United States.

(2) It is not an offense under this section if the conduct required for the offense occurred inside the United States, each alleged offender and each person seized or detained are nationals of the United States, and each alleged offender is found in the United States, unless the governmental organization sought to be compelled is the Government of the United States.

(c) As used in this section, the term “national of the United States” has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act¹²⁷

New York Penal Law

Section 35.15 Justification; use of physical force in defense of a person

1. A person may, subject to the provisions of subdivision two, use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person, unless:

(a) The latter's conduct was provoked by the actor with intent to cause physical injury to another person; or

(b) The actor was the initial aggressor; except that in such case use of physical force is nevertheless justifiable if the actor has withdrawn from the

¹²⁷ U.S. Code, Title 18, Part 1, Chapter 55

encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened imminent use of unlawful physical force; or

(c) The physical force involved is the product of a combat by agreement not specifically authorized by law.

2. A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless:

(a) The actor reasonably believes that such other person is using or about to use deadly physical force. Even in such case, however, the actor may not use deadly physical force if he or she knows that with complete personal safety, to oneself and others he or she may avoid the necessity of so doing by retreating; except that the actor is under no duty to retreat if he or she is:

(i) in his or her dwelling and not the initial aggressor; or

(ii) a police officer or peace officer or a person assisting a police officer or a peace officer at the latter's direction, acting pursuant to section 35.30; or

(b) He or she reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible criminal sexual act or robbery; or

(c) He or she reasonably believes that such other person is committing or attempting to commit a burglary, and the circumstances are such that the use of deadly physical force is authorized by subdivision three of section 35.20.¹²⁸

¹²⁸ New York Penal Law, S 35.15, <http://ypdcrime.com/penal.law/article35.htm>, accessed 19 February 2011