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International Maritime Piracy: An Old Profession That Is Capable of New Tricks, but Change Is Possible

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A stylized world map in a light blue-grey tone, showing the outlines of continents and major landmasses. It is set against a background of a faint grid of latitude and longitude lines. The map is centered horizontally and occupies the upper half of the page.

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INTERNATIONAL MARITIME PIRACY:
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Simon Barker

INTERNATIONAL MARITIME PIRACY: AN OLD PROFESSION THAT IS CAPABLE OF NEW TRICKS, BUT CHANGE IS POSSIBLE

*Simon Barker**

For those of us living in North America, the history of piracy coincides with the history of the colonization of the New World. Today, pirates may be dressed differently but to practice their profession still requires a fast craft and a slower victim. In places like the Malacca Straits, the South China Sea, West and East Africa, the crime pays handsomely so pirates will not be disappearing any time soon. What also has not changed over the years is the law on the subject. The rules are still based upon an artificial line drawn in the water, twelve nautical miles from land. Whether the law gets reformed will depend on the world's appetite to amend the U.N. Convention on the Law of the Sea. Until then, the solution to curb maritime piracy must remain a combination of diplomacy, military force, continued vigilance, and a desire to treat the matter as nothing more than a law enforcement problem.

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I. INTRODUCTION

The term “piracy” today is one that is frequently misused. While reading the daily news, whether via hard or electronic copy, it is common to find the term used in a loose, popular sense to refer to acts of violence or lawlessness at sea, no matter where the piratical act takes place, whether inshore or offshore.

It is important to realize that there is nothing particularly romantic about the crime of piracy. The term “pirate” is defined in the Oxford English Dictionary as meaning a sea-robber, or a

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marauder.¹ A marauder, simply put, is someone that goes about pilfering. Thus, in effect, pirates are nothing more than common thieves—but that is not how Hollywood has characterized them. Today, characters such as Captain Jack Sparrow, portrayed by Johnny Depp, have done much to make the life of a pirate look both cool and stylish. It was, and is, anything but that.

For those of us living in North America, especially those of us residing on the Eastern side of the continent, the history of piracy coincides with the history of the colonization of the New World.² By understanding the evolution of piracy, from the changing modus operandi of pirates and the motivations driving their actions, the international community can work to first amend existing legal instruments, as well as to create a modern and comprehensive solution to piracy both on and offshore.

II. THE WAY PIRACY USED TO BE COMMITTED³

It has been said that looking back at the history of piracy can provide part of the explanation for why the term itself is so misused today and why there is a widespread misunderstanding of the essential purpose of the rules of international law on piracy.⁴ From stealing Spanish galleons to the taking of simple cargoes of furs, the romantic definition of piracy stems from a Golden Age during which pirates freely roamed the open seas with little or no regulations.

On the heels of the Spanish thrust into Central America came the fishing fleets of the English, French and Portuguese. Fishery in the Canadian provinces of Nova Scotia and Newfoundland grew quickly, employing hundreds of ships and thousands of men and women; all resided and worked in a land with no government closer than Europe and no authority higher than that of a “fishing admiral.”⁵ As a result,

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1. CONCISE OXFORD ENGLISH DICTIONARY 873, 1091 (12th ed. 2011) (defining “piracy” as the “practice of attacking and robbing ships at sea” and “maraud” as the act of going about “in search of things to steal or people to attack”).
 2. The crime of piracy has been said to be the world’s third oldest profession, with medicine being the second. *See Weekly Pirate Activity Update – 12 Aug*, OCEANUS LIVE (Aug. 13, 2011), <http://www.oceanuslive.org/main/viewnews.aspx?uid=00000297>.
 3. References in this section are drawn from HAROLD HORWOOD, *PLUNDER AND PILLAGE: ATLANTIC CANADA’S BRUTAL & BLOODTHIRSTY PIRATES & PRIVATEERS* (2011) and Paul Dalby, *Canada’s Pirate Queen*, 90 CANADA’S HISTORY 20 (2010).
 4. E.D. Brown, *Maritime Commercial Malpractices and Piracy Under International Law*, 8 MAR. POL’Y & MGMT. 99, 99 (1981).
 5. *See* JERRY BANISTER, *THE RULE OF THE ADMIRALS: LAW, CUSTOM, AND NAVAL GOVERNMENT IN NEWFOUNDLAND, 1699–1832*, at 38 (2003).

Newfoundland quickly became a haven for pirates. The reward was wealth and, for some, social status. At a time when the annual wage for the working man was five to ten pounds Sterling, a pay-off of 1,000 dollars at the end of a pirate voyage was quite the prize. Some pirates, upon retirement, were actually able to buy their way into the European nobility; one retiree even became a judge!⁶

The “gold medal” of piracy was said to be the taking of a Spanish treasure ship.⁷ Yet equally as popular were French cargoes of wine and English cargoes of shore-cured fish and furs from Hudson Bay and the St. Lawrence River.⁸ The pirates favored no one particular state, and there was no shortage of cargoes to sell on the black market in the “free ports” of Southern France and years later in the colonies, from New England down to the Carolinas.⁹ Thus, the need for every state to act against piracy on the high seas was simply a reflection of the common interests of European powers to protect their fleets, which were the lifeline of their colonial empires. The need was styled as a duty of every state, not a right.

Piracy in the “Golden Age” was not something that was easily accomplished. It was a complex undertaking. To do it properly required a fast, well-armed ship, a navigator, and a large crew, none of which came cheap. Piracy depended upon constant recruitment: seamen were being “taken,” either at sea as a prize, or on land, or they were recruited either voluntarily or through force by the use of a press gang. Further, piracy was very much a young man’s game, with the age of most pirates ranging from 18 to 30 years.¹⁰ Even boys as young as ten years old were known to serve on a pirate crew¹¹ and, reportedly, some of them escaped the hangman simply because of their youth.

Regardless of age, there was always the risk of capture and punishment. The first Vice-Admiralty Court outside England was established at Trinity in Newfoundland in 1615 to deal with piracy in the New World,¹² and the last person hanged under piracy laws in

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6. Garry W. Potter, *The Antecedents of Organized Criminality in Kentucky*, KY. JUST. & SAFETY RES. BULL. (E. Ky. Univ. Coll. of Justice & Safety, Richmond, Ky.), May 2000, at 2.
 7. See LAWRENCE A. PESHKIN & EDMUND F. WEHRLE, *AMERICAN AND THE WORLD: CULTURE, COMMERCE, CONFLICT* 34 (2012) (stating that “the major target for pirates and privateers in the sixteenth century was the Spanish treasure fleet carrying silver and other valuables”).
 8. HORWOOD, *supra* note 3, at 10.
 9. *Id.*
 10. *Id.* at 12.
 11. *Id.*
 12. *Id.* at 13.

Canada was executed in Halifax in 1809.¹³ However, it was not until the Royal Navy began patrolling the high seas with fast sloops of war, specifically outfitted for capturing pirates, that an effective remedy for suppressing maritime piracy in the North Atlantic was discovered.¹⁴

Getting caught as a pirate appears to have been an occupational hazard, but receiving punishment as a pirate was another matter and appears to have been the exception rather than the rule. Governments often issued pardons to those who wanted to “come home,” and if war broke out (as it often did), whole flotillas of “legal” pirates, known as privateers, could volunteer their services with all past sins forgiven.¹⁵ Furthermore, those pirates that had money could always help the coffers of a nation by buying themselves pardons.¹⁶

III. THE WAY THAT PIRACY IS CONDUCTED TODAY

Piracy today still requires a fast craft and a slower victim. However, instead of swords, modern pirates carry automatic weapons and communication devices. Further, given the poverty in certain parts of the world today, there is no shortage of recruits willing to go to sea, young or old.

In recent years, the deployment of multinational forces in the waters around the Horn of Africa, particularly off the coast of Somalia, has created the perception that maritime piracy is exclusively a Somali problem. This is far from the case. Pirates also currently operate in places like Bangladesh, Indonesia, the Malacca Straits, the South China Sea, West Africa and South America.¹⁷ Therefore, piracy is still an international affliction on maritime trade.

Most recently, the number of Somali pirate attacks has decreased significantly.¹⁸ This has been partly attributed to the presence of

13. *Id.* at 14.

14. *Id.*

15. *Id.* at 12.

16. *Id.*

17. Simon Barker, *Solution to Piracy Is Born on the Land, Not the Sea*, PORT OF CALL (Can. Bar Ass’n Nat’l Mar. Law Section, Ottawa, ON), Nov. 2011, available at http://www.cba.org/CBA/sections_maritime/newsletters2012/piracy.aspx; *accord Piracy & Armed Robbery Prone Areas and Warnings*, ICC COM. CRIME SERVS., <http://www.icc-ccs.org/piracy-reporting-centre/prone-areas-and-warnings> (last visited Oct. 26, 2013).

18. *See Somali Pirate Clampdown Caused Drop in Global Piracy*, ICC COMMERCIAL CRIME SERVS. (Jan. 15, 2014), <http://www.icc-ccs.org/news/904-somali-pirate-clampdown-caused-drop-in-global-piracy-imb-reveals> (finding that piracy has reached its lowest level in six years).

military forces in the region, the deployment of private armed guards, and the use of the shipping industry's Best Management Practices.¹⁹

The piracy problem in Africa has now shifted to the African West coast, off Nigeria, in the Gulf of Guinea.²⁰ Although, sea robbers operating off the coast of Nigeria is not a new activity. Nigeria is Africa's most populous country and top oil producer, and the country is said to have a strong network of criminal organizations that have always targeted ships carrying valuable cargoes, including oil.²¹ The majority of attacks on ships have occurred in the Niger Delta, an oil rich region, and lax government allows the land-based criminal organizations to not only survive, but also *thrive*.²²

While Somali pirates focused primarily on hostage-taking for ransoms, and lately on transporting weapons and providing "security" for ships illegally plundering Somalia's fish stocks,²³ Nigeria's pirates have focused mainly on stealing cargoes.

IV. THE LEGAL FRAMEWORK THAT THE INTERNATIONAL COMMUNITY AND THE PIRATES ARE WORKING WITHIN TODAY

Piracy under international law should not be confused with piracy under any system of national law. One of the lessons that we learned from the shipping industry's experience of the piratical attacks off the coast of Somalia was the need for some clarity over the interpretation

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19. BRITTA RINEHARD, Civil-Military Fusion Ctr., ARMED GUARDS ON MERCHANT VESSELS 2 (2011), *available at* https://www.cimicweb.org/Documents/CFC%20Anti-Piracy%20Thematic%20Papers/CFC_Anti-Piracy_Report_Armed%20Guards%20October%202011_Final_rmb.pdf.
 20. Timothy Walker, *African Coastal Piracy in 2013 – The Beginning of the End or the End of the Beginning?*, INST. FOR SEC. STUDIES AFR. (Jan. 28, 2013), <http://www.issafrica.org/iss-today/african-coastal-piracy-in-2013-the-beginning-of-the-end-or-the-end-of-the-beginning>.
 21. See BRUCE A. ELLEMAN ET AL., PIRACY AND MARITIME CRIME: HISTORICAL AND MODERN CASE STUDIES 16 (2010), *available at* <http://www.virginia.edu/colp/pdf/Piracy-and-Maritime-Crime-NWC-2010.pdf>. In 1958 the price of a barrel of oil hovered at about \$3.00, while today the price of a barrel of oil is in the three figure range—making a cargo of oil a rich prize for any Nigerian robber. *Oil Price History and Analysis*, WTRG Economics, <http://www.wtrg.com/prices.htm> (last visited Mar. 14, 2014).
 22. Georgina Nicoll, *Combating Piracy and Oil Theft in Nigeria*, 2 BC SHIPPING NEWS 50–52 (2012), *available at* <http://www.bcshippingnews.com/magazine/bc-shipping-news-june-2012-highlights>.
 23. Jason Straziuso, *Somali Pirates Now Protecting Illegal Fishing Biz*, YAHOO! NEWS (July 25, 2013), <http://news.yahoo.com/somali-pirates-now-protecting-illegal-fishing-biz-152835584.html>.

of international law, which was complicated by the breakdown of a functioning Somali state.²⁴

Lawyers consider international piracy as an exception to the exclusiveness of a flag state's jurisdiction on the high seas. Currently however, an act of piracy may still take place within the 200 nautical miles of an exclusive economic zone.

International piracy is defined as an illegal act committed on the high seas, outside the jurisdiction of any state,²⁵ a part of the world that governments regard as no-man's land. The rationale for this definition is that pirates, described as "enemies of the human race," are seen as a threat to the shipping and commerce of all maritime states indiscriminately. Accordingly, international law recognizes that all states, regardless of their flags, may exercise extraordinary jurisdiction over pirate vessels.²⁶

The Geneva Convention on the High Seas ("High Seas Convention") required states to cooperate to the fullest extent possible in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state.²⁷ Article 15 of the High Seas Convention defines piracy as:

- (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 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 State²⁸

Under this Article, the High Seas Convention contains a requirement that at least two vessels be involved to qualify as an act of piracy: a pirate ship and a victim ship. Hijacking a ship that you are on board is not an act of international piracy, nor is any act of violence by a mutinous crew against its own vessel. However, once

24. Int'l Chamber of Shipping [ICS], *Lessons Identified Through Somali-Based Piracy*, at 4, ICS(13)37 (July 18, 2013), available at <http://www.ics-shipping.org/icsorange/icscirculars13/allmembers.htm>.

25. Convention on the High Seas art. 15, *opened for signature* Apr. 29, 1958, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962) [hereinafter High Seas Convention].

26. *Id.*

27. *Id.* art. 14, at 90.

28. *Id.* art. 15.

hijacked, a mutinous crew or the hijacked ship might go on to commit acts of piracy on other ships.

Further, the activities of robber bands operating in the inshore waters of places like Nigeria are also not acts of piracy, so long as the robbers continue to operate within territorial waters. If they do, their apprehension and punishment are within the sole jurisdiction of the government of the coastal state. In addition, to be piratical, the act needs to be committed for private ends.

In 1982, the Final Act of the Third U.N. Conference on the Law of the Sea added little to no change to the piracy provisions of the High Seas Convention.²⁹ This is unfortunate, as some of the problems that the international community has with the words today are the same as those of the 1970s and early 1980s, when the third U.N. Convention on the Law of the Sea (UNCLOS) was being negotiated.

Under international law today, an act of maritime piracy cannot be committed landward of the outer limit of the territorial sea: that is, less than twelve miles offshore—and yet that is exactly where many of today's piratical acts take place using small boats.³⁰ In the 1600s, when the clear distinction that we have today between the "territorial sea" and the "high sea" did not exist, it would have been quite proper to describe illegal acts in ports or in coastal waters as acts of piracy.

As mentioned previously, armed robbers operating on small boats in coastal waters are not pirates in the strict legal sense of the term. However, when these same attackers are backed by larger "mother ships" that can extend operations out into the high seas, the crews on the smaller boats can be legitimately regarded as pirates. Similarly, armed robbers gaining access to a victim ship from shore are not technically pirates within the legal definition, but if those same criminals board the ship at sea from another ship, they are regarded as pirates.

Much has happened around the world in the fifty-five years since the High Seas Convention. For example, in 1958, Fidel Castro was a

29. Compare U.N. Convention on the Law of the Sea art. 101, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS], with High Seas Convention, *supra* note 25, art. 15, 450 U.N.T.S. at 90 (showing that the definition of piracy in both conventions is substantively identical).

30. See, e.g., Alexander Holmgren, *Pirates on the Other Side: Maritime Piracy in the Gulf of Guinea*, CONSULTANCY AFR. INTELLIGENCE (Oct. 23, 2013), http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=1358:pirates-on-the-other-side-maritime-piracy-in-the-gulf-of-guinea&catid=60:conflict-terrorism-discussion-papers&Itemid=265 (stating how many pirate attacks in the Gulf of Guinea occur within twelve nautical miles offshore, and are thus subject to domestic law, not international law).

rebel attacking Havana, the State of Alaska had just joined the Union as the forty-ninth state, and the first parking meter was installed in England!

Once again, lawyers can rightly be accused of not keeping up with the changing pace. Today, the piracy provisions of UNCLOS are in need of amendment to broaden the scope of the term “piracy” and account for it in its contemporary form. The optimist in me would like to think that change is possible. However, the problem is compounded by the fact that UNCLOS was negotiated as a “package,” which some saw as its most significant quality, creating a balanced text to provide a basis for universality. The difficulty with having a package though is its “all or nothing” nature, which has resulted in some states declining to ratify UNCLOS.

UNCLOS allows any state to arrest a pirate ship on the high seas and deal with the attackers before their own courts, if and only if an act of international piracy has been committed.³¹ In all other cases, jurisdiction lies with the flag state. But what if there is no flag state? What if the flag state is unable to police its own citizens and waters, like Somalia was and still is, due to its internal political situation? In the event that a coastal state cannot police an adjacent waterway, should the “world” take on that obligation?

Further, which is the best forum to prosecute those captured on the high seas and charged with the crime of international piracy? The days of a court on board a ship are a thing of the past. The U.S. jailed three Somalis for the deaths of four Americans in February 2011³² and the year 2013 saw reports of Kenya jailing nine Somalis found guilty of piracy.³³ Does justice favor one location over another?

UNCLOS covers acts “committed for private ends by the crew or the passengers,”³⁴ and there is no doubt that would include acts committed for personal financial gain. But what of acts committed for political purposes? Is the act of hijacking a commercial ship, such as an oil tanker, an act of piracy, an act of commercial malpractice, or an act of terrorism? The U.S. Court of Appeals for the Ninth Circuit has recently defined the phrase “committed for private ends” to

31. UNCLOS, *supra* note 29, art. 105, 1833 U.N.T.S. at 437.

32. *Press Statement: Sentencing of Somali Pirates Involved in the Attack on the S/V QUEST*, U.S. DEP’T OF STATE (Aug. 7, 2013), <http://www.state.gov/r/pa/prs/ps/2013/08/212809.htm>; *Jury Recommends Life for ‘S/V Quest’ Somali Pirates*, BBC (Aug. 2, 2013), <http://www.bbc.com/news/world-us-canada-23556256>.

33. *See Somali Men Found Guilty of Piracy in Kenya*, ALJAZEERA, <http://www.aljazeera.com/news/africa/2013/07/2013730195055730990.html> (last modified July 30, 2013).

34. UNCLOS, *supra* note 29, art. 101, 1833 U.N.T.S. at 436.

include those ends pursued on personal, moral or philosophical grounds, such as professed environmental goals.³⁵ Therefore, a person who believes that he is simply taking a political stand and serving the public good may still be regarded as committing acts of piracy for *private* ends.³⁶

V. CONCLUSION

In a statement made on December 10, 1982, at the final session of the Law of the Sea Conference, the then Secretary-General of the U.N., Javier Pérez de Cuéllar, said:

It is easy to understand the state of mind which prevailed when the Conference opened almost nine years ago. It oscillated between hope and fear, between the concern to agree on new ways of peaceful coexistence and the constraints imposed by national interests . . . and in some cases by undue attachment to traditional principles and concepts.³⁷

Those words are as applicable today as they were back in 1982. It is time though to re-think the crime of international piracy and put it in a modern context. Pirates still operate in differing parts of the world, but now they do so from small fast crafts that tend not to stray too far from shore. This evolving method of piracy makes an artificial line in the waterway at the twelve nautical mile mark—the wrong place to start defining what is, or what is not, international piracy.

Despite the recent decline in piracy incidents, pirates are not going away anytime soon. The crime pays handsomely, especially when slow-moving cargo vessels sail past within arm's reach. The crime of piracy is but a symptom of a deeper problem on land that needs to be addressed before there can be a permanent end to piracy at sea. In the interim, the solution today, as it was in years past, must continue to be a combination of diplomacy, legal reform, military force, continued vigilance, and a desire to treat the matter as a law enforcement problem. Whether the needed legal reform is an international response or a regional response, like the recent Code of

35. *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 725 F.3d 940, 942, 944 (9th Cir. 2013) (“You don’t need a peg leg or an eye patch. When you ram ships; hurl glass containers of acid . . . and point high-powered lasers at other ships, you are, without doubt, a pirate, no matter how high-minded you believe your purpose to be.”).

36. *Id.*; see also D. Jones, *Violent Acts Against Whaling Ships to Protect Whales: Piracy?*, BC SHIPPING NEWS 46–48 (2013).

37. Third United Nations Conference on the Law of the Sea, Montego Bay, Jamaica, 1973–1982, *193rd Plenary Meeting*, at 134, U.N. Doc. A/CONF.62/SR.193 (Dec. 10, 1982).

Conduct signed by twenty-two states to address the prevention of piracy, armed robbery against ships, and illicit maritime activity in West and Central Africa,³⁸ depends very much on the world's appetite to amend UNCLOS.

38. See Economic Community of West African States [ECOWAS] et al., *Code of Conduct Concerning the Repression of Piracy, Armed Robbery Against Ships, and Illicit Maritime Activity in West and Central Africa* (June 25, 2013), available at http://www.ecowas.int/publications/en/maritime_security/code_of_conduct.pdf.



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