



Piracy: A Legal Definition

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Summary

Pirate attacks in the waters off the Horn of Africa, including those on U.S.-flagged vessels, have brought continued U.S. and international attention to the long-standing problem of piracy in the region. The United States has been an active participant in piracy interdiction and prevention operations focusing on the Horn of Africa region. As part of piracy interdiction operations, the U.S. military has detained individuals accused of acts of piracy against U.S.-flagged vessels. In some instances these individuals have been released to return to land, while others have been brought to the United States for criminal prosecution in the federal courts.

The U.S. Constitution gives Congress the power “To define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of Nations.” Since 1819, U.S. law has defined piracy not as a specific act, but rather “as defined by the law of nations.” Supreme Court decisions have upheld Congress’s power to define piracy in terms of the law of nations. Contemporary international agreements, including the Convention on the High Seas, the United Nations Convention on the Law of the Sea (UNCLOS), and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention) address piracy. The United States is party to two of the agreements, and the third (UNCLOS) is generally accepted as reflecting customary international law.

A recent development in a piracy trial in federal court in Norfolk, VA, has highlighted a potential limitation in the definition of piracy under the United States Code. In ruling on the defendant’s motion to dismiss, the court stated that the act of piracy, as defined by the law of nations, requires a robbery on the high seas. Thus, it appears that absent an actual robbery at sea, individuals may not be found guilty of the act of piracy under 18 U.S.C. § 1651, but may be tried for other offenses, including the offenses of attack to plunder a vessel, or committing violence against a person on a vessel.

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Pirate attacks in the waters off the Horn of Africa, including those on U.S.-flagged vessels, have brought continued U.S. and international attention to the long-standing problem of piracy in the region. The United States has been an active participant in piracy interdiction and prevention operations focusing on the Horn of Africa region.¹ As part of operations, the U.S. military has detained individuals accused of acts of piracy against U.S.-flagged vessels. These individuals have been brought to the United States for criminal prosecution in the federal courts. A recent development in one of the piracy trials in Norfolk, VA, has highlighted a potential limitation in the definition of piracy under the United States Code.

This report first examines the historical development of the offense of piracy, as defined by Congress and codified in the United States Code. The focus then turns to how contemporary international agreements define piracy. Finally, the report highlights a recent federal district court ruling that the offense of piracy under 18 U.S.C. § 1651 requires a robbery at sea.

U.S. Legal Framework

The U.S. Constitution, Art. I, § 8, cl. 10, provides that Congress has the power “To define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of Nations.” Utilizing this authority, Congress has enacted legislation addressing piracy for over 200 years. For example, in 1790, Congress, in an act “for the punishment of certain crimes against the United States,” addressed the offense of piracy, stating:

That if any person or persons shall commit upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence which if committed within the body of a county, would by the laws of the United States be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought.²

The U.S. Supreme Court, in *United States v. Palmer*,³ examined the offense of piracy as established under the Act of 1790. The case presented a series of questions, over which the lower court was divided, including what acts constituted the offense of piracy.⁴ The primary question was whether Congress intended for actions that would constitute robbery on land but committed on the high seas be considered piracy.⁵ It was argued that because the offense of robbery committed on land would not receive the death penalty, it would not be considered piracy when

¹ For a comprehensive discussion on the U.S. approach to piracy, see CRS Report R40528, *Piracy off the Horn of Africa*, by Lauren Ploch et al.

² Act of April 30, 1790, § 8; 1 Stat. 112.

³ 16 U.S.(3 Wheat.) 610 (1818).

⁴ *Id.* at 626.

⁵ *Id.* at 627.

committed on the high seas.⁶ The argument relied on the inclusion of the qualifying statement “would by the laws of the United States be punishable with death” in the Act of 1790. After an extensive discussion of statutory interpretation, the Court held that the “meaning of the term robbery, as used in the statute, we think no doubt can be entertained. It must be understood in the sense in which it is recognized and defined at common law.”⁷ Therefore, robbery committed on the high seas constituted the act of piracy, and as such, was punishable by death.

A second question in *Palmer* addressed whether the crime of robbery committed by a non-U.S. citizen on the high seas and on a vessel belonging to the subjects of a foreign state could be considered piracy.⁸ The Court stated “[t]he constitution having conferred on congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States. The only question is, has the legislature enacted such a law?”⁹ Again examining the intent of Congress in enacting the legislation, the Court concluded that nations provide for offenses and punishments based on their own policies, but that no general words of a statute should be construed in a manner to make acts by foreigners against a foreign government as unlawful under U.S. law.¹⁰ As such, the Court held that:

The court is of the opinion that the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging exclusively to subjects of a foreign state, is not a piracy within the true intent and meaning of the act for the punishment of certain crimes against the United States.¹¹

Thus, after *Palmer*, piracy was the act of robbery, as recognized and defined by common law, committed on the high seas. However, the crime of robbery by a non-U.S. citizen committed on the high seas on board a vessel owned by subjects of a foreign state was not considered piracy under the Act of 1790, and as such, was not punishable in the courts of the United States.

In 1819, arguably in response to *Palmer*, Congress passed an act “to protect the commerce of the United States, and punish the crime of piracy,” which stated:

That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders, shall afterwards be brought into or found in the United States, every such offender or offenders shall, upon conviction thereof, before the circuit court of the United States for the district into which he or they may be brought, or in which he or they shall be found, be punished with death.¹²

⁶ *Id.*

⁷ *Id.* at 630.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 632.

¹¹ *Id.* at 633-34.

¹² Act of March 3, 1819, § 5; 3 Stat. 510. (The footnotes accompanying the Act include a reference to *Palmer*: “Footnote (a): The decisions of the courts of the United States upon prosecutions for piracy, have been: Piracy.-A robbery committed on the high seas, although such robbery, if committed on land, would not, by the laws of the United States, be punishable with death, is piracy, under the act of Congress of 1790 ; and the circuit courts have jurisdiction thereof. *United States v. Palmer*, 3 Wheat. 610; 4 Cond. Rep. 352. The crime of robbery, as mentioned in the act, is the crime of robbery as recognised and defined at common law. *Ibid.* The crime of robbery, committed by a person who is not a citizen of the United States, on the high seas, on board of a ship belonging exclusively to subjects of a foreign (continued...)”)

The new language included a significant departure from the Act of 1790; the crime of piracy was defined not in specific terms, but rather “as defined by the law of nations.” Shortly after enactment of the new piracy statute, the Supreme Court had opportunity to address the constitutionality of the statute and definition in *United States v. Smith*.¹³ Smith, a member of a crew of a private armed vessel, was charged with piracy by the plunder and robbery of a Spanish vessel on the high seas.¹⁴ A jury found a special verdict that if “plunder and robbery” constituted piracy under the Act of 1819, then Smith was guilty of piracy; but if “plunder and robbery” did not constitute piracy, then Smith was not guilty. The circuit court, on the question of whether “plunder and robbery” constituted piracy by the law of nations and thus punishable under the Act of 1819, was divided and the question was certified to the Supreme Court.¹⁵ The question before the Supreme Court was whether the Act of 1819 was “a constitutional exercise of the authority delegated to Congress upon the subject of piracies.”¹⁶ The Supreme Court held that an act punishing “the crime of piracy, as defined by the law of nations” was within Congress’s constitutional authority to “define and punish” since it adopted by reference the sufficiently precise definition of piracy under International Law, that is, the act of “robbery upon the sea.”¹⁷

In 1820, Congress reenacted parts of the 1819 Act, including the definition of piracy in Section 5, quoted above.¹⁸ The next statutory changes to the offense of piracy concerned the authorized punishment. The death penalty was replaced by “imprisonment at hard labor for life” in 1897,¹⁹ and then “imprisonment for life” in 1909 when the offense was stated as:

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.²⁰

The 1909 definition remains unchanged and is currently codified at Title 18, Section 1651 of the United States Code.

International Agreements

Several United Nations instruments address the problem of piracy, including the Convention on the High Seas,²¹ the Convention on the Law of the Sea (UNCLOS),²² and the Convention for the

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state, or on persons in a foreign vessel, is not piracy under the act, and is not punishable in the courts of the United States. *Ibid.*”).

¹³ 18 U.S. (5 Wheat.) 153 (1820).

¹⁴ *Id.* at 154.

¹⁵ *Id.* at 155.

¹⁶ *Id.* at 153.

¹⁷ *Id.* at 153, 160, 162.

¹⁸ Act of May 15, 1820; 3 Stat. 600 (An act to continue in force “An Act to protect the commerce of the United States, and punish the crime of piracy,” and also to make further provisions for punishing the crime of piracy).

¹⁹ Act of January 15, 1897; 29 Stat. 487.

²⁰ P.L. 60-350; Act of March 4, 1909; 35 Stat. 1145 (An Act: To codify, revise, and amend the penal laws of the United States).

²¹ Convention on the High Seas, 13 U.S.T. 2312; T.I.A.S. 5200; 450 U.N.T.S. 82. Signed at Geneva, April 29, 1958. Entered into force September 30, 1962.

²² United Nations Convention on the Law of the Seas (UNCLOS), 21 I.L.M. 1261. Convention adopted December 10, (continued...)

Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention).²³ The United States is a signatory to the Convention on the High Seas and the SUA Convention, but not to UNCLOS. A “global diplomatic effort to regulate and write rules for all ocean areas, all uses of the seas and all of its resources” resulted in the convening of the Third United Nations Conference on the Sea in 1973 and the adoption of UNCLOS in 1982.²⁴ UNCLOS generally incorporates the rules of international law codified in the Convention on the High Seas, but also comprehensively addresses the use of other areas of the sea including, for example, the territorial seas, natural resources, and the seabed. Although the United States is not a signatory to UNCLOS, it is generally viewed as a codification of customary international law.²⁵

The Convention on the High Seas, to which the United States is a party, and UNCLOS both address piracy by stating that “[a]ll states shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.”²⁶ The term “piracy” is defined in UNCLOS (Article 101) as:

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

Article 110 of UNCLOS authorizes warships to visit and/or inspect ships on the high seas that are suspected of engaging in piracy. Although the United States is not party to UNCLOS, the Convention on the High Seas also authorizes the right of visitation/inspection of vessels suspected of being engaged in piracy.²⁸ States, under both the Convention on the High Seas and UNCLOS, are authorized to seize a pirate ship, or a ship taken by piracy and under the control of

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1982. Entered into force November 16, 1994 (the United States is not a party to the Agreement).

²³ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, T.I.A.S. Signed at Rome, March 10, 1988. Entered into force March 1, 1992 (for the United States March 6, 1995).

²⁴ The United Nations Convention on the Law of the Sea (A historical perspective), available at http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm.

²⁵ For a discussion on policy issues related to ratification of UNCLOS, see CRS Report RS21890, *The U.N. Law of the Sea Convention and the United States: Developments Since October 2003*, by Marjorie Ann Browne.

²⁶ Convention on the High Seas at Article 14; UNCLOS at Article 100.

²⁷ UNCLOS at Article 101. (The definition is, with a minor grammatical change, the same definition found in the Convention on the High Seas (Article 14).

²⁸ Convention on the High Seas at Article 22.

the pirates, and arrest the persons and seize the property on board.²⁹ The courts of the State whose forces carry out a seizure may decide the penalties to be imposed on the pirates.³⁰

The SUA Convention further expands on the judicial treatment of pirates. Its main purpose is “to ensure that appropriate action is taken against persons committing unlawful acts against ships.”³¹ Unlawful acts include, but are not limited to, the seizure of ships; acts of violence against persons on board ships; and the placing of devices on board a ship which are likely to destroy or damage it.³² The SUA Convention calls on parties to the agreement to make its enumerated offenses “punishable by appropriate penalties which take into account the grave nature of those offenses.”³³ The United States criminalizes acts of piracy,³⁴ and foreigners or U.S. citizens who commit acts of piracy are subject to imprisonment for life.³⁵

Contemporary Proceedings

The international community has responded to the threat of piracy in the waters off the Horn of Africa with multinational naval patrols, diplomatic coordination efforts, and enhanced private security efforts by members of the commercial shipping industry. However, questions regarding legal jurisdiction, due process for detained pirate suspects, and the role of foreign military forces in anti-piracy law enforcement activities may complicate current U.S. and international operations against pirates in the Horn of Africa region. The most immediate legal concern associated with anti-piracy operations are jurisdictional questions that arise based on the location of pirate attacks and/or international naval interventions, the nationalities of crew members, and the countries of registry and/or ownership of any seized vessels.³⁶ Multiple governments may be able to assert legal jurisdiction depending on the specifics of the incident. Political will may be present in some countries, but many governments lack sufficient laws and judicial capacity to effectively prosecute suspected pirates. The disposition of property and insurance claims for vessels involved in piracy also raises complex legal questions. A developing legal issue concerns the prosecution of juveniles participating in acts of piracy. Recent reports suggest that some of the Somali pirates are teenage minors,³⁷ and therefore could have a defense of infancy in certain jurisdictions that may assert jurisdiction over the offense.³⁸

²⁹ Convention on the High Seas at Article 19; UNCLOS at Article 105.

³⁰ *Id.*

³¹ International Maritime Organization statement on aims for the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, available at <http://www.imo.org/>.

³² *Id.*

³³ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation at Article 5.

³⁴ 18 U.S.C. § 1651 *et seq.*

³⁵ 18 U.S.C. §§ 1651 and 1652.

³⁶ For one review and discussion of these legal questions from a U.S. military point of view, see Cmdr. James Kraska and Capt. Brian Wilson, “Fighting Piracy,” *Armed Forces Journal*, February 1, 2009 (expressing view that international and regional cooperation, not armed force, is the long-term solution to piracy).

³⁷ See <http://www.smh.com.au/world/fate-of-teen-pirate-uncertain-20090414-a5ih.html>.

³⁸ For example, under common law, children under the age of seven are conclusively presumed to be without criminal capacity; those who have reached the age of 14 are treated as fully responsible; while as to those between the ages of seven and 14, there is a rebuttable presumption of criminal incapacity. In addition, jurisdictions have adopted juvenile court legislation providing that some or all criminal conduct by those persons under a certain age (usually 18) must or may be adjudicated in the juvenile court rather than in a criminal proceeding. LaFave & Scott, *Criminal Law* § 4.11 (2d continued...)

The challenge of locating and sustaining jurisdictions willing and able to prosecute piracy suspects and detain pirate convicts persists. To date, some of these legal and law enforcement challenges have been addressed through the establishment of bilateral agreements by the United States, the United Kingdom, the European Union, and others with governments in the Horn of Africa region, particularly with Kenya. Some agreements concluded to date define procedures for the detention, transfer, and prosecution of captured pirate suspects. For example, suspected pirates captured by U.S. military forces now may be transferred to Kenyan custody for prosecution according to the terms of a bilateral memorandum of understanding signed in January 2009. However, rather than transfer suspected pirates to Kenya or the United States for trial, the U.S. military, has in some instances, confiscated their weapons and released them, allowing them to return to land.³⁹

The United States, in *United States v. Ali Said*, is currently attempting to prosecute individuals in federal district court for acts of piracy committed in the Horn of Africa region.⁴⁰ The case involves an attack on the USS *Ashland*, a U.S. warship, on April 10, 2010, in the Gulf of Aden. The government has alleged that the defendants approached the USS *Ashland* and shot a firearm at the ship. The USS *Ashland* responded by returning fire, destroying the skiff the defendants were traveling in, and killing one of the skiff's passengers. The crew of the USS *Ashland* observed the remains of an AK-47 style firearm, among other items, in the burning skiff and took the defendants into custody.

The defendants have been charged, among other offenses, with a violation of 18 U.S.C. § 1651, in that they “committed the crime of piracy as defined by the law of nations.”⁴¹ The defendants argued that the charge of piracy should be dismissed because they “did not board or take control of the USS *Ashland* and did not obtain anything of value from the vessel.”⁴² The government argued in response that piracy has “historically included different types of conduct and is not limited to the common law definition of robbery on land” and that “any unauthorized armed assault or directed violent act on the high seas is sufficient to constitute piracy.”⁴³

In resolving the defendant's motion to dismiss the charge of piracy, the United States District Court for the Eastern District of Virginia turned to the text of 18 U.S.C. § 1651. Noting that the statutory language of § 1651 “is devoid of any guidance on the scope of piracy under the law of nations,” the court turned to *Smith* to discern the definition of piracy.⁴⁴ The court found that according to the Supreme Court in *Smith*, as discussed above, the definition of piracy, under the law of nations, was “robbery or forcible depredations on the high seas, *i.e.*, sea robbery.”⁴⁵

The court then turned its attention to contemporary international law and international agreements to determine if the definition of piracy under the law of nations has evolved. After examining

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ed. 1986).

³⁹ Dana Hughes and Kirit Radia, “U.S. Navy Ship Grabs More Pirates, Lets Them Go,” April 2, 2010, <http://abcnews.go.com/WN/pirates-captured-released/story?id=10270726&page=1>.

⁴⁰ *United States v. Ali Said*, No. 2:10-cr-57 (E.D. Va., 2010).

⁴¹ Memorandum Opinion at 2, *United States v. Ali Said*, No. 2:10-cr-57 (E.D. Va. Aug. 17, 2010), ECF No. 94.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 6.

⁴⁵ *Id.* at 11.

various international sources, including the Convention on the High Seas and UNCLOS, discussed above, the court found “that despite the fact that the crime of piracy is generally recognized in the international community, *Smith* is the only clear, undisputed precedent that interprets the statute at issue.”⁴⁶ Ultimately, the court granted the defendant’s motion to dismiss the charge of piracy, but the other charged offenses including the use of firearm during a crime, assault with a dangerous weapon on federal officers and employees, and acts of violence against persons on a vessel remain valid.

Conclusion

While the definition of piracy has remained fairly consistent over the past 200-plus years, the definition may have limitations. In light of the recent development in federal court, the definition of piracy as robbery at sea may restrict the ability of the government to charge individuals as pirates under 18 U.S.C. § 1651. However, as illustrated by the *Ali Said* case, it appears that there are various other offenses in Title 18 that may be applicable to acts of violence on the high seas. For example, 18 U.S.C. § 1659, Attack to Plunder a Vessel, having a penalty of 20 years imprisonment; 18 U.S.C. § 2291(a)(6), Acts of Violence Against Persons on a Vessel, having a penalty of 20 years imprisonment; and 18 U.S.C. § 2291(a)(9), Conspiracy to Perform Acts of Violence Against Persons on a Vessel, having a penalty of 20 years imprisonment, would appear to be viable offenses rather than the offense of piracy.

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⁴⁶ *Id.* at 14.