

TULANE MARITIME LAW JOURNAL

VOLUME 33

WINTER 2008

NUMBER 1

Protections Afforded to Captured Pirates Under the Law of War and International Law

Michael H. Passman*

I.	INTRODUCTION	2
II.	THE THREAT OF PIRACY TO INTERNATIONAL SHIPPING	5
	A. <i>Modern Piracy</i>	5
	B. <i>The International Community's Response to Piracy</i>	8
III.	THE LAW OF INTERNATIONAL SEA PIRACY	10
	A. <i>The Definition of Piracy Under International Law</i>	11
	B. <i>The International Mandate To Fight Piracy</i>	13
	C. <i>U.S. Policy Applying an International Mandate To Fight Piracy</i>	14
	1. UNCLOS's Legal Status vis-à-vis the United States.....	14
	2. The U.S. Municipal Piracy Statute	15
IV.	APPLICATION OF THE GENEVA CONVENTIONS	16
	A. <i>Fundamental Problems with Applying the Geneva Conventions</i>	16
	1. Fundamental Issues of History That May Bar Application of the Geneva Conventions.....	16
	2. Fundamental Issues of the Geneva Convention Text That May Bar Application of the Geneva Conventions	18
	B. <i>The Application of the Third Geneva to Pirates</i>	20
	1. Prisoner of War Categories Applied to Pirates.....	21
	a. Members of Armed Forces.....	21
	b. Members of Militias Not Part of the Armed Forces.....	23
	c. Members of Armed Forces Professing Allegiance to a Government or Authority Not Recognized by the Detaining Power.....	27

d.	Inhabitants of a Nonoccupied Territory, Who on the Approach of the Enemy Spontaneously Take Up Arms To Resist the Invading Forces, Without Having Had Time To Form Themselves into Regular Armed Units.....	29
2.	Article 5 Hearings To Determine the Status of Pirates.....	30
C.	<i>Application of the Fourth Geneva to Pirates</i>	31
1.	Fourth Geneva Special Protections for Protected Persons	31
2.	Fourth Geneva General Protections for Whole Populations	33
V.	APPLICATION OF THE U.N. CONVENTION AGAINST TORTURE.....	34
A.	<i>Application of UNCAT's Torture Ban</i>	34
B.	<i>Application of UNCAT's Refouler Ban</i>	35
VI.	APPLICATION OF MORALITY AND BASIC HUMAN RIGHTS.....	37
VII.	CONCLUSION	39

I. INTRODUCTION

On January 16, 2006, ten Somali nationals hijacked the M/V SAFINA AL-BIRSARAT, an Indian-registered dhow.¹ These pirates used the dhow² to attack other ships in the area.³ One of the ships radioed the International Maritime Bureau,⁴ which operates a piracy reporting

* © 2008 Michael H. Passman. The author is an associate at Cassidy Schade LLP in Chicago. The author would like to thank Judge Evan J. Wallach of the United States Court of International Trade for his guidance and for reading a number of earlier drafts; CDR James McMahon, USCG of the Naval War College; LT Chris Williams, JAGC, USN of the Naval Academy; and Jean Davis, Linda Holmes, and Harold O'Grady of the Brooklyn Law School Library for their suggestions and research assistance; and Daniel Arking, Alex Haskell, and Benjamin P. O'Glasser for commenting on earlier drafts.

1. John C.K. Daly, *UPI Intelligence Watch*, UNITED PRESS INT'L, Mar. 18, 2006, http://www.upi.com/Security_Terrorism/Analysis/2006/03/17/upi_intelligence_watch/8288.

2. A dhow is a type of ship common to East Africa, India, and the Middle East. See 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 658 (Lesley Brown ed., 4th ed. 1993) (defining "dhow" as "[a] lateen-rigged sailing vessel of the Arabian Sea, with one or two masts"). A modern dhow does not necessarily have sails and masts, but follows the general design of its predecessors.

3. Paul Raffaele, *The Pirate Hunters*, SMITHSONIAN, Aug. 2007, at 38.

4. IMB: International Maritime Bureau, <http://www.icc-ccs.org/imb/overview.php> (last visited Sept. 16, 2008) ("The ICC International Maritime Bureau (IMB) is a specialised division of the International Chamber of Commerce . . . established in 1981 to act as a focal point in the fight against all types of maritime crime and malpractice.").

and rescue center.⁵ The International Maritime Bureau alerted the USS WINSTON S. CHURCHILL, a United States Navy destroyer in the area.⁶ The CHURCHILL located the SAFINA AL-BIRSARAT and captured the pirates.⁷ They were transported to Kenya and charged with and convicted of piracy under Kenyan law.⁸

Sea piracy is a major international problem⁹ and has been linked to terrorism.¹⁰ The SAFINA AL-BIRSARAT incident is an example of international cooperation in the fight against piracy.¹¹ The SAFINA AL-BIRSARAT incident raised substantial legal issues of how piracy is defined and whether a state has jurisdiction over alleged pirates—issues that have been addressed by other commentators.¹² International cooperation against piracy also raises legal issues as to the treatment of captured pirates, which will be addressed in this Article.

5. Raffaele, *supra* note 3, at 38.

6. *Id.*

7. Daly, *supra* note 1; Richard Halloran, *U.S. Navy Puts Maritime Pirates on Notice*, JAPAN TIMES, Feb. 2, 2006, <http://search.japantimes.co.jp/cgi-bin/eo20060202a1.html>.

8. Jane Nyambune, *Kenya Convicts Somali Pirates for 7 Years*, KENYA BROADCASTING CORPORATION, Nov. 1, 2006, <http://www.kbc.co.ke/story.asp?ID=39235>. For further discussion of the difference between the definition of piracy under international law and the crime of piracy under a state's municipal law, see discussion *infra* Part III and sources cited therein.

9. INT'L MAR. BUREAU, INT'L CHAMBER OF COMMERCE, 2007 PIRACY AND ARMED ROBBERY AGAINST SHIPS ANNUAL REPORT 24 (2008) [hereinafter 2007 ANNUAL REPORT ON PIRACY] (note that the ICC IMB uses its own nonlegal definition of piracy); JACK A. GOTTSCHALK ET AL., JOLLY ROGER WITH AN UZI 23 (2000); John Gershman, *Is Southeast Asia the Second Front?*, FOREIGN AFF., July/Aug. 2002, at 60, 68-69; Frank Kennedy, *Piracy Remained Serious in 2007 and May Get Worse*, GULFNEWS, Dec. 31, 2007, <http://archive.gulfnews.com/articles/07/12/31/10178403.html>.

10. Memorandum from George W. Bush, President of the United States, to the Vice President et al. (June 14, 2007), *available at* <http://www.whitehouse.gov/news/releases/2007/06/print/20070614-3.htm>; Rachel B. Bralliar, *Protecting U.S. Ports with Layered Security Measures for Container Ships*, 185 MIL. L. REV. 1, 10 (2005); Gal Luft & Anne Korin, *Terrorism Goes to Sea*, FOREIGN AFF., Nov./Dec. 2004, at 61, 61 (“[T]he scourges of piracy and terrorism are increasingly intertwined: piracy on the high seas is becoming a key tactic of terrorist groups.”); Halloran, *supra* note 7 (noting that leaders of Asian maritime nations worry that terrorists will ally with pirates). *But see* Charles N. Dragonette, *Lost at Sea*, FOREIGN AFF., Mar./Apr. 2005, at 174, 174-75 (arguing in a letter to the editor that a connection between piracy and terrorism is speculative).

11. 2007 ANNUAL REPORT ON PIRACY, *supra* note 9, at 36-37 (noting the actions by the United States and Kenya to capture pirates and quickly bring them to prosecution as an example of success in antipiracy efforts).

12. *See generally* Jon D. Peppetti, *Building the Global Maritime Security Network: A Multinational Legal Structure To Combat Transnational Threats*, 55 NAVAL L. REV. 73 (2008); Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1 (2007).

Because pirates are nonstate actors¹³ who act like combatants, it is unclear what protections they can claim under the law of war and international law.¹⁴ This Article argues that the law of war, international law, and basic human rights afford limited protections to captured pirates.¹⁵

Three significant humanitarian conventions afford protections to captured persons: (1) the Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva), (2) the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva), and (3) The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).

A very narrow group of captured pirates qualify as prisoners of war under the Third Geneva, which also requires that all captured pirates must be treated as prisoners of war until a competent tribunal determines otherwise if a doubt exists as to their status.¹⁶ The Fourth Geneva affords no protection to captured pirates.¹⁷ On the other hand, UNCAT affords captured pirates certain basic protections and limits those states to which the capturing power can turn captured pirates over for trial.¹⁸ Finally, captured pirates are also protected by basic humanitarian law and moral duty.¹⁹

Part II of this Article details the rise of modern piracy and the threat it presents to international shipping. Part III introduces the law of piracy and explains how it is applied by the United States. Part IV begins the analysis of protections afforded to captured pirates with an attempt to apply the Third and Fourth Geneva. Part V continues this analysis with a breakdown of the application of UNCAT. Part VI discusses the application of basic human rights to captured pirates. This Article concludes in Part VII and argues that captured pirates should be treated

13. Except in the case of mutiny, a warship cannot be a pirate ship and its crew cannot be pirates. See discussion *infra* Part III.A and sources cited there.

14. See Michael H. Hoffman, *Terrorists Are Unlawful Belligerents, Not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law*, 34 CASE. W. RES. J. INT'L L. 227 (2002) ("Though non-state combatants are inevitably part of the equation during internal armed conflict, they have almost no place legally in the structure of interstate conflict.").

15. One recent article on the law of piracy has addressed the application of the Fourth and Fifth Amendments of the United States Constitution to captured pirates in U.S. custody. See Bahar, *supra* note 12, at 44-56 (arguing for affording captured pirates Fourth and Fifth Amendment rights under certain circumstances). This Article will instead focus on protections afforded to pirates based on the law of war, international law, and basic human rights.

16. See *infra* Part IV.B.

17. See *infra* Part IV.C.

18. See *infra* Part V.

19. See *infra* Part VI.

lawfully. This Article begins by introducing the current threat piracy poses to international shipping.

II. THE THREAT OF PIRACY TO INTERNATIONAL SHIPPING

In order to understand the legal issues in the fight against piracy, one must understand the current state of piracy and the magnitude of the threat piracy poses to international shipping. As an initial matter, the terms “piracy” and “pirate” are used in this Part in their popular rather than legal sense²⁰ because pirates themselves are not always concerned with which law applies to them. “Piracy” will also be used here with reference to actions by states to fight piracy where that state’s municipal law may label acts of depredation at sea within their territorial waters as “piracy,” although such acts are not “piracy” under international law.²¹ Those who commit “piracy” under international law on the high seas or outside the jurisdiction of any state and those who commit “piracy” within territorial waters of a state are often the same people.²²

A. Modern Piracy

While many Americans think of piracy as something from history books or the movies,²³ sea piracy has never been eliminated.²⁴ Global piracy is responsible for about \$16 billion in damage to international shipping each year.²⁵ Hundreds of people are held hostage by pirates each year; some are assaulted, and a few are killed.²⁶ Today’s pirates are considerably more sophisticated than their counterparts of yesteryear: they often carry satellite phones, global positioning systems, automatic

20. This Part will make considerable use of statistics assembled by the International Maritime Bureau. For statistical purposes, the International Maritime Bureau defines “Piracy and Armed Robbery” as “[a]n act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act.” 2007 ANNUAL REPORT ON PIRACY, *supra* note 9, at 3.

21. See discussion of the definition of piracy under international law *infra* Part III.A.

22. See 2007 ANNUAL REPORT ON PIRACY, *supra* note 9, at 36 (reporting that pirates know that foreign ships are hesitant to enter territorial waters so they purposely anchor hijacked ships within territorial waters).

23. GOTTSCHALK ET AL., *supra* note 9, at 22 (arguing that one of the obstacles to stopping sea piracy is that many Americans and others do not recognize it as a modern threat).

24. Luft & Korin, *supra* note 10, at 61.

25. *Id.* at 62. *But see* Dragonette, *supra* note 10, at 174-75 (arguing that this figure is erroneous and inflated).

26. 2007 ANNUAL REPORT ON PIRACY, *supra* note 9, at 12 (stating that in 2007, 292 people were taken hostage by pirates, 29 were assaulted, five were killed, and three went missing); see also Raffaele, *supra* note 3, at 40 (“Ships and crews disappear on the high seas and coastal waters every year, never to be seen again.” (quoting Captain Noel Choong, head of the International Maritime Bureau’s Piracy Reporting Centre)).

weapons, antitank missiles, and grenades.²⁷ Many have mundane motivations: cash, cargo, and ransom.²⁸ Some are involved in organized crime.²⁹ Others are linked with Islamist terrorist and separatist groups.³⁰

Modern piracy peaked globally in 2003,³¹ but reported attacks rose by about ten percent between 2006 and 2007.³² The most reported pirate attacks in 2007 occurred in Indonesian waters,³³ even though many attacks there go unreported.³⁴ In the first quarter of 2008, the most reported piracy attacks occurred in Nigerian waters.³⁵ Because many piratical attacks occur at shipping chokepoints³⁶ and off the coast of oil-rich Nigeria,³⁷ piracy has begun to threaten global energy markets.³⁸

27. GOTTSCHALK ET AL., *supra* note 9, at 22; Luft & Korin, *supra* note 10, at 61-62.

28. Daniel Engber, *What Do Pirates Want from Us?*, SLATE, Mar. 21, 2005, <http://www.slate.com/id/2115126>.

29. Luft & Korin, *supra* note 10, at 62.

30. *Id.* at 61-63.

31. *Id.* at 61 (reporting in 2004 that piracy was at its “highest level in modern history”); 2007 ANNUAL REPORT ON PIRACY, *supra* note 9, at 5-6 (indicating that global piracy has fallen since 2003; note that the ICC IMB uses its own nonlegal definition of piracy).

32. 2007 ANNUAL REPORT ON PIRACY, *supra* note 9, at 24.

33. *Id.* at 5.

34. *Id.* at 22; *see* Raffaele, *supra* note 3, at 42 (reporting comments by a ship broker that many ship owners prefer to pay a ransom to pirates rather than submit to lengthy and costly criminal investigations by authorities); Luft & Korin, *supra* note 10, at 62 (stating that many shipping companies choose not to report piratical attacks to avoid raised insurance premiums and lengthy investigations).

35. INT’L MAR. BUREAU, INT’L CHAMBER OF COMMERCE, 2008 PIRACY AND ARMED ROBBERY AGAINST SHIPS 1ST QUARTER REPORT 6 (2008) [hereinafter 2008 1ST QUARTER REPORT ON PIRACY]. Although Nigeria was second in reported piracy attacks during the second quarter of 2008 because of a surge of Somali piracy in the Gulf of Aden, the number of attacks at the major Nigerian port of Lagos increased between the first six months of 2007 and the first six months of 2008 from eight to twelve. INT’L MAR. BUREAU, INT’L CHAMBER OF COMMERCE, 2008 PIRACY AND ARMED ROBBERY AGAINST SHIPS 2ND QUARTER REPORT 24 (2008) [hereinafter 2008 2ND QUARTER REPORT ON PIRACY].

36. *See* 2007 ANNUAL REPORT ON PIRACY, *supra* note 9, at 5-6 (reporting a relatively high number of attacks in the Gulf of Aden/Red Sea, Indonesia, the Strait of Malacca, Malaysia, and Somalia in 2007).

37. *See* 2008 1ST QUARTER REPORT ON PIRACY, *supra* note 35, at 23 (reporting that just over twenty percent of reported piracy attacks in the first quarter of 2008 occurred off the coast of Nigeria).

38. 2008 1ST QUARTER REPORT ON PIRACY, *supra* note 35, at 28 (reporting that piracy has contributed to a twenty percent cut in Nigerian oil production and that two shipping companies have shut down some of their operations in Nigeria because of out of control piracy); *see also* Luft & Korin, *supra* note 10, at 66-67; Daniel Yergin, *Ensuring Energy Security*, FOREIGN AFF., Mar./Apr. 2006, at 69, 70; Pablo Gorondi, *Attacks in Middle East, Nigeria Send Oil to Record \$117.40*, FOX NEWS, Apr. 21, 2008, <http://www.foxnews.com/wires/2008Apr21/0,4670,OilPrices,00.html> (reporting a rise in oil prices after a rocket attack from a small boat on a Japanese oil tanker in the Gulf of Aden); Edward Harris, *U.S. Military Takes on Latter-Day Pirates*, USA TODAY, Nov. 2, 2007, http://www.usatoday.com/news/topstories/2007-11-02-161307928_x.htm (reporting that oil producing areas of Nigeria are beset by piracy).

Somali piracy has remained a particularly nasty thorn in the side of the international shipping community.³⁹ In 2007, Somalia was third only to Nigeria and Indonesia in reported piracy.⁴⁰ The lack of any stable government in Somalia continues to hamper efforts to fight piracy there.⁴¹ Piracy is threatening food aid to Somalia's people,⁴² which is currently made possible only by foreign naval escort of United Nations World Food Program ships.⁴³ Somali piracy has also made a dent in its neighbors' economies. One source estimated that piracy was costing Kenya approximately \$139 million in lost revenue.⁴⁴ Neighboring nations that rely on Kenyan ports, which include Burundi, Democratic Republic of the Congo, Ethiopia, Rwanda, Sudan, and Uganda, may consider using alternate ports in the face of piracy.⁴⁵ Ships have been forced to increase their fees and have found their insurance premiums rising as a result of the unending threat from pirates.⁴⁶

39. As recently as April 2008, pirates seized a 288-foot yacht and its thirty crew members off Somalia. John Tagliabue, *Pirates Seize French Ship Off Somalia*, N.Y. TIMES, Apr. 5, 2008, at A9. The French Navy pursued the hijacked ship. *French Navy Pursues Hijacked Yacht*, CNN, Apr. 5, 2008, <http://www.cnn.com/2008/WORLD/africa/04/05/cruiseship.pirates/index.html>. Eventually the crew was released after the ship's owner paid a ransom. After the crew was free, French commandos raided a Somali village and captured the pirates. *France Raid Ship After Crew Freed*, BBC NEWS, Apr. 11, 2008, <http://news.bbc.co.uk/2/hi/africa/7342292.stm>.

40. 2007 ANNUAL REPORT ON PIRACY, *supra* note 9, at 5-6.

41. Harris, *supra* note 38; *Somali Islamists Take Control of Indian Ocean Base for Piracy*, TURKISH PRESS, Aug. 13, 2006, <http://www.turkishpress.com/news.asp?id=137326>; *U.S. Steps Up War Against Somali Pirates*, SOMALILAND TIMES, Feb. 11, 2006, <http://www.somalilandtimes.net/sl/2005/213/23.shtml> ("The lack of any stable or coherent government in Somalia is contributing to this lawlessness in its waters. Local warlords are interested in making money above all else, and hijacking commercial vessels has proven to be an expedient method of doing so." (quoting the head of the International Maritime Bureau)).

42. *Piracy Threat Curbing Food Aid to Somalia*, WASH. POST, May 22, 2007, at A10 (reporting that pirates attack U.N. World Food Program ships and at least one ship carrying food aid has refused to sail to Somalia due to out-of-control piracy). The United Nations estimates that 1.2 Somalis suffer from food shortages. 2007 ANNUAL REPORT ON PIRACY, *supra* note 9, at 37.

43. 2008 2ND QUARTER REPORT ON PIRACY, *supra* note 35, at 32 (reporting in mid-2008 that French, Danish, and Dutch frigates had been protecting food deliveries for more than seven months); see 2008 1ST QUARTER REPORT ON PIRACY, *supra* note 35, at 30 (reporting in early 2008 that the French Navy had passed responsibility for escorting U.N. World Food Program ships to the Danish Navy).

44. *Multi-National Force Deployed To Combat Piracy Off East African Coast*, SOMALILAND TIMES, Jan. 29, 2006, <http://www.somalilandtimes.net/sl/2005/211/24.shtml>.

45. *Id.*

46. *Id.*

B. The International Community's Response to Piracy

Several states have made efforts to combat modern piracy. A recent decline in Southeast Asian piracy⁴⁷ has been attributed in part to joint Greek-Malaysian efforts, with Greek donations supporting Malaysian antipiracy efforts,⁴⁸ and in part to increased individual action by Malaysia, Indonesia, Singapore, and Bangladesh.⁴⁹ In 2000, China executed thirteen pirates, twelve Chinese and an Indonesian, who had clubbed twenty-three blindfolded sailors to death following a hijacking in 1998.⁵⁰ The Philippines has also recently convicted people of piracy in its waters.⁵¹ Unfortunately, despite past antipiracy efforts⁵² the Nigerian Navy has found itself unable to contain piracy⁵³ in part due to a lack of political and law enforcement support.⁵⁴

Some states have addressed piracy in concert with one another. Indonesia, Malaysia, and Singapore have begun a very successful coordinated patrol system in the Strait of Malacca.⁵⁵ There were no reported pirate attacks in the Strait of Malacca in the first quarter of 2008.⁵⁶ The United States has donated high speed patrol boats and radar equipment to assist in this effort.⁵⁷ French and German forces cooperated

47. Reports of piracy in the Strait of Malacca, between Malaysia and Indonesia, and in the waters surrounding Indonesia generally, has declined considerably from peak levels in 2003 and 2004. 2007 ANNUAL REPORT ON PIRACY, *supra* note 9, at 5.

48. *Id.* at 38. Malaysia and Indonesia have not allowed patrols by international warships or private security firms in the Strait of Malacca but Malaysia accepts foreign monetary and technical aid. *Id.* at 38-39. On maritime border issues in East Asia, see generally Jonathan I. Charney, *Central East Asian Maritime Boundaries and the Law of the Sea*, 89 AM. J. INT'L L. 724 (1995).

49. 2007 ANNUAL REPORT ON PIRACY, *supra* note 9, at 24; *Somali Pirates Out of Control*, INT'L HERALD TRIB., June 13, 2007, <http://www.iht.com/articles/2007/06/13/business/pirates.php>.

50. Raffaele, *supra* note 3, at 41; *China Executes Pirates*, BBC NEWS, Jan. 28, 2000, <http://news.bbc.co.uk/2/hi/asia-pacific/622435.stm>.

51. *E.g.*, *People of the Phil. v. Victor Timon et al.*, G.R. No. 97841-42 (S.C. Nov. 12, 1997), *available at* <http://www.supremecourt.gov.ph/>; *People of the Phil. v. Titing Aranas et al.*, G.R. No. 123101 (S.C. Nov. 22, 2000), *available at* <http://www.supremecourt.gov.ph/>; *People of the Phil. v. Roger P. Tulin et al.*, G.R. No. 111709 (S.C. Aug. 30, 2001), *available at* <http://www.supremecourt.gov.ph/>.

52. 2007 ANNUAL REPORT ON PIRACY, *supra* note 9, at 38.

53. Harris, *supra* note 38.

54. 2008 1ST QUARTER REPORT ON PIRACY, *supra* note 35, at 28-29.

55. *Id.* at 31; *see* 2008 2ND QUARTER REPORT ON PIRACY, *supra* note 35, at 33 (quoting U.S. Navy Chief of Naval Operations Admiral Gary Roughead citing Indonesia, Malaysia, and Singapore's cooperation against piracy as an example other states could follow).

56. *Id.* at 6. This result is especially impressive considering that when piracy in the Strait of Malacca recently peaked in 2004, that area was one of the most pirate infested places on earth with thirty-eight reported attacks that year. 2007 ANNUAL REPORT ON PIRACY, *supra* note 9, at 5.

57. 2008 1ST QUARTER REPORT ON PIRACY, *supra* note 35, at 30-31.

in the Gulf of Aden to stop a pirate attack on a civilian yacht.⁵⁸ American, Australian, and Iraqi forces are cooperating to fight piracy off the coasts of Kuwait and Iraq.⁵⁹ Australia, Japan, and the United States have begun to jointly address piracy in strategy talks.⁶⁰

Several states have cooperated in efforts to stem Somali piracy in particular. In early 2006, American and French naval forces trained Kenyan forces to fight piracy.⁶¹ American, French, and other allied naval vessels have increasingly engaged Somali pirates.⁶² Finally, in June 2008, the United Nations Security Council adopted a resolution drafted by France, the United States, and Panama to allow foreign military forces to enter Somali territorial waters to repress piracy and armed robbery at sea in cooperation with the Somali Transitional Federal Government.⁶³

In its 2007 Annual Report on Piracy, the International Maritime Bureau wrote that the next step is “to establish a mechanism whereby pirates who are caught by the naval vessels can be handed quickly to shore based authorities for prosecution.”⁶⁴ The International Maritime Bureau praised Kenya’s exercise of jurisdiction in the SAFINA AL-BIRSARAT incident as a successful example of international cooperation to capture and prosecute Somali pirates.⁶⁵

58. Press Release, Commander, Joint Forces Maritime Component Commander/Commander, U.S. Naval Forces Central Command/Commander, U.S. 5th Fleet Public Affairs, Coalition Maritime Forces Deter Pirate Attack off Yemen (Dec. 15, 2004), *available at* http://www.navy.mil/search/display.asp?story_id=16309.

59. Raffaele, *supra* note 3, at 42-43; Press Release, Chief Journalist Walter T. Ham IV, USS Bonhomme Richard Public Affairs, USS Bonhomme Richard Chases Pirates Away From Fishermen (Feb. 22, 2005), *available at* http://www.navy.mil/search/display.asp?story_id=17186. The United States has also staffed military-contracted cargo ships in the Persian Gulf with security teams authorized to respond to enemy attacks, something like a modern day Q-Ship. One of these ships recently drove off harassing patrol boats believed to be Iranian but could also be used to surprise pirates who may think they are raiding a civilian vessel. See Jamie McIntyre, *U.S. Cargo Ship Fires Warning Shots in Persian Gulf, Navy Says*, CNN, Apr. 25, 2008, <http://www.cnn.com/2008/WORLD/meast/04/25/iran.shots/index.html>.

60. Victor D. Cha, *Winning Asia: Washington’s Untold Success Story*, FOREIGN AFF., Nov./Dec. 2007, at 98, 108.

61. *Multi-National Force Deployed To Combat Piracy Off African Coast*, *supra* note 44.

62. 2007 ANNUAL REPORT ON PIRACY, *supra* note 9, at 36; *France Raid Ship After Crew Freed*, *supra* note 39. These efforts have had a positive effect. At the beginning of 2008, there were no hijacked ships detained in Somali territorial waters for the first time in over a year. 2007 ANNUAL REPORT ON PIRACY, *supra* note 9, at 36. There was only one reported pirate attack off Somalia in the first quarter of 2008. 2008 1ST QUARTER REPORT ON PIRACY, *supra* note 35, at 6. Unfortunately, by mid-2008 a surge of Somali piracy, particularly in the Gulf of Aden, had again made Somalia “the number one piracy hotspot with 24 incidents.” 2008 2ND QUARTER REPORT ON PIRACY, *supra* note 35, at 24.

63. 2008 2ND QUARTER REPORT ON PIRACY, *supra* note 35, at 31.

64. 2007 ANNUAL REPORT ON PIRACY, *supra* note 9, at 36-37.

65. *Id.*

III. THE LAW OF INTERNATIONAL SEA PIRACY

Piracy is uniquely situated in international law: pirates are captured on the high seas outside the territory of every state but are punished under the municipal laws of any state⁶⁶ instead of an international court.⁶⁷ Piracy is a crime under the municipal laws of many maritime states.⁶⁸ Pirates are punished under those statutes rather than international law.⁶⁹

Although pirates are *punished* under the municipal law of the state that holds them, their *capture* outside the jurisdiction of a state is made

66. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987); LORI FISLER DAMROSCH, LOUIS HENKIN, RICHARD CRAWFORD PUGH, OSCAR SCHACHTER & HANS SMIT, INTERNATIONAL LAW 405 (4th ed. 2001) (“Under the universal principal of jurisdiction. . . international law permits any state to apply its national law to punish piracy even when the accused is not a national of the state and the act of piracy was not committed in that state’s territorial waters or against one of its vessels.”).

67. Lawrence J. Khan, *Pirates, Rovers, and Thieves: New Problems with an Old Enemy*, 20 TUL. MAR. L.J. 293, 306 (1996).

68. See, e.g., Penal Code (1967) Cap. 63 § 69 (Kenya) (“Any person who, in territorial waters or upon the high seas, commits any act of piracy *jure gentium* is guilty of the offence of piracy.”); 18 U.S.C. § 1651 (2000) (“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.”); Piracy Act, 1837, 7 Will. 4 & 1 Vict., c. 88, § 2 (U.K.) (“[W]hosoever, with Intent to commit or at the Time of or immediately before or immediately after committing the Crime of Piracy in respect of any Ship or Vessel, shall assault, with Intent to murder, any Person being on board of or belonging to such Ship or Vessel, or shall stab, cut, or wound any such Person, or unlawfully do any Act by which the Life of such Person may be endangered, shall be guilty of Felony”); see also Merchant Shipping and Maritime Security Act, 1997, ch. 28, § 26 (U.K.) (“For the avoidance of doubt it is hereby declared that for the purposes of any proceedings before a court in the United Kingdom in respect of piracy, the provisions of the United Nations Convention on the Law of the Sea 1982 . . . shall be treated as constituting part of the law of nations.”). The Kenyan statute appears to presuppose that there is such a crime of piracy under international law. The American statute is unclear as to whether it presupposes that there is a crime of piracy under international law; the words “as defined by the law of nations” in the statute may apply to “crime of piracy” or “piracy.” The British statutes taken together suggest that the international law definition of piracy defines the crime of piracy under British municipal law but is silent on whether there is crime of piracy under international law. See generally Jacob W.F. Sundberg, *Piracy: Air and Sea*, 20 DEPAUL L. REV. 337, 341-46 (1971) (tracing the history of municipal piracy statutes in the United Kingdom, France, Italy, Spain, the Scandinavian states, and the United States).

69. United Nations Convention on the Law of the Sea, art. 105, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS] (“The courts of the State which carried out the seizure [of a pirate ship] may decide upon the penalties to be imposed”); GREEN HAYWOOD HACKWORTH, 2 DIGEST OF INTERNATIONAL LAW 681 (U.S. Govt. Print. Off. 1940-1944) (noting that pirates “may be punished by any nation that may apprehend or capture them”).

possible by international law. International law defines piracy⁷⁰ and calls on every state to suppress it.⁷¹

A. *The Definition of Piracy Under International Law*

The United Nations Convention on the Law of the Sea (UNCLOS) defines piracy under international law.⁷²

70. UNCLOS, *supra* note 69, art. 101 (defining piracy). *But see* ALFRED P. RUBIN, ETHICS AND AUTHORITY IN INTERNATIONAL LAW 92 (1997) (“[A]ll attempts to codify the supposed universal ‘law of nations’ defining ‘piracy’ on the level of treaty have failed to produce a comprehensible definition.”). *See generally* fuller discussion *infra* Part III.A.

71. UNCLOS, *supra* note 69, art. 100 (“All States shall co-operate 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.”); *see* fuller discussion *infra* Part III.B. Courts and commentators disagree as to whether or not piracy is a “crime” under international law. *Compare* United States v. Smith, 18 U.S. 153, 160-62 (1820) (Story, J.) (“The common law, too, recognizes and punishes piracy as an offense, not against its own municipal code, but as an offense against the law of nations . . . as an offence against the universal law of society, a pirate being deemed an enemy of the human race.”), *and* WILLIAM BLACKSTONE, 4 COMMENTARIES *68 (classifying piracy along with violation of safe-conducts and infringement of the rights of ambassadors as one of the principal violations against the law of nations), *and* Bahar, *supra* note 12, at 6 (suggesting piracy is an international crime), *and* Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hallow Foundation*, HARV. INT’L L.J. 183, 191 (2004) (suggesting piracy is an international crime), *and* Bruce D. Landrum, *The Globalization of Justice: The Rome Statute of the International Criminal Court*, ARMY LAW., Sept. 2002, at 2 (“As early as the sixteenth century, piracy was recognized as an international crime with universal jurisdiction.”); *and* Jon B. Jordan, *Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crime*, 9 MSU-DCL J. INT’L L. 1, 9 (2000) (suggesting that piracy is an international crime), *and* Michael A. Newton, *Continuum Crimes: Military Jurisdiction over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1, 5 n.12 (1996) (“The clearest instances of customary international crimes are piracy and war crimes.”), *and* Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT’L L. 269, 272 (1988) (suggesting that piracy is an international crime), *with* H.E. José Luis Jesus, *Protection of Foreign Ships Against Piracy and Terrorism at Sea: Legal Aspects*, 18 INT’L J. MARINE & COASTAL L. 363, 374 (2003), *and* Harvard Res. in Int’l Law, *Draft Conventions on Piracy*, 26 AM. J. INT’L L. 738, 760 (Spec. Supp. 1932) (“[P]iracy is not a crime by the law of nations. It is the basis of an extraordinary jurisdiction in every state to seize and prosecute and punish persons . . .”). For further discussion of this dispute, *see* ALFRED P. RUBIN, THE LAW OF PIRACY 313, 394-95 (Transnational Publishers, Inc. 1998) (1988) (discussing some of the debate and confusion surrounding whether or not piracy is a crime under international law); Thomas A. Clingan Jr., *The Law of Piracy*, in PIRACY AT SEA 168, 169 (Eric Ellen ed., 1989) (noting the debate over whether piracy is an international crime); BARRY HART DUBNER, THE LAW OF INTERNATIONAL SEA PIRACY 42-44 (1980) (discussing the Harvard Research scholars’ determination that piracy is not a crime against the law of nations and noting that the traditional view was that piracy is a crime or offense against the law of nations); JAMES LESLIE BRIERLY, THE LAW OF NATIONS 311-14 (Humphrey Waldock ed., 6th ed. 1963) (noting confusion between noncriminal piracy defined by international law and criminal piracy defined by municipal laws); Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 796 (1988) (noting the debate over whether piracy is an international crime).

72. Peppetti, *supra* note 12, at 91-93; Jesus, *supra* note 71, at 375 (arguing that UNCLOS is now customary international law and has ended the discretion of individual states to define piracy under international law); Jordan, *supra* note 71, at 11. *But see* RUBIN, *supra* note 71, at 393

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).⁷³

UNCLOS's main definition, in part (a), contains several elements. First, piracy must include illegal acts of violence, detention, or depredation.⁷⁴ The predicate illegal act is not limited to robbery.⁷⁵ Second, the illegal acts must be committed for private ends.⁷⁶ Attacks on ships and their crew for public or political motives, including terrorism, are not "piracy" under international law but are nevertheless unlawful under the United Nations Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.⁷⁷ Third, with an exception for piratical acts using a warship by a crew that has mutinied,⁷⁸ pirates must commit their illegal acts using a private ship; another state's warship cannot be a pirate ship.⁷⁹ Fourth, an illegal act committed by a

(suggesting that there may be no international law defining piracy and arguing that the UNCLOS definition does not reflect any widely accepted definition or consensus because the rules were not discussed during the drafting process and are incomprehensible); Samuel Pyeatt Menefee, *Yo Heave Ho!: Updating America's Piracy Laws*, 21 CAL. W. INT'L L.J. 151, 161-63 (1990-1991) (questioning whether UNCLOS is actually a full definition of piracy under international law).

73. UNCLOS, *supra* note 69, art. 101.

74. The questions of (1) who determines that an act is "illegal" and (2) which law is determinative are left unresolved. RUBIN, *supra* note 71, at 367.

75. Jesus, *supra* note 71, at 377 ("'Private ends' does not necessarily mean stealing.").

76. Peppetti, *supra* note 12, at 92; Jesus, *supra* note 71, at 376-79; Sundberg, *supra* note 68, at 384 (commenting on the definition of "piracy" in the 1958 Geneva Convention on the High Seas).

77. Jesus, *supra* note 71, at 378. *But see* Bahar, *supra* note 12, at 26-37 (arguing that terrorism on the high seas can be piracy).

78. UNCLOS, *supra* note 69, art. 102 ("The acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.").

79. Jesus, *supra* note 71, at 376; Sundberg, *supra* note 68, at 384 (commenting on the definition of "piracy" in the 1958 Geneva Convention on the High Seas).

crewmember aboard a ship and not against another ship is not piracy.⁸⁰ This is known as the “two ship requirement.”⁸¹ Fifth, sea piracy must be committed on the high seas or in a place outside the jurisdiction of any state.⁸² The high seas are defined as “all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.”⁸³

The definition of piracy in any given state’s municipal piracy statute is not always the same as the definition of piracy under international law.⁸⁴ For example, many nations criminalize “piracy” that takes place in their own territorial waters,⁸⁵ which is not “piracy” according to the UNCLOS definition.

B. *The International Mandate To Fight Piracy*

UNCLOS mandates that every state fight piracy:⁸⁶ “All States shall co-operate 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.”⁸⁷ UNCLOS gives every state universal jurisdiction over pirates.⁸⁸ Universal jurisdiction is the right of any state to capture and punish pirates under its own municipal laws even when the accused pirate is not a national of the state and the act of piracy was neither committed in its territorial waters nor against its nationals.⁸⁹ The expansive view of

80. BRIERLY, *supra* note 71, at 313; Sundberg, *supra* note 68, at 384 (commenting on the definition of “piracy” in the 1958 Geneva Convention on the High Seas). *But see* Bahar, *supra* note 12, at 38-40 (arguing against the two ship requirement).

81. Jesus, *supra* note 71, at 376-77.

82. *Id.* at 379-80; Sundberg, *supra* note 68 (commenting on the definition of “piracy” in the 1958 Geneva Convention on the High Seas).

83. UNCLOS, *supra* note 69, art. 86.

84. BRIERLY, *supra* note 71, at 312; Kontorovich, *supra* note 71, at 191; Randall, *supra* note 71, at 795.

85. *See, e.g.*, Pres. Dec. No. 532 (Phil.) (“Any attack upon or seizure of any vessel, or the taking away of the whole or part thereof . . . by means of violence against or intimidation . . . committed by any person, including a passenger or member of the complement of said vessel, in Philippine waters, shall be considered as piracy.” (emphasis added where different from UNCLOS definition)).

86. *But see* Jesus, *supra* note 71, at 374-75, 379 (arguing that UNCLOS does not require that states punish pirates so labeled under international law and leaves it up to each state to use, use part of, or not use its jurisdiction to punish piracy; the definition of piracy under a state’s municipal laws may not be the same as the international law definition).

87. UNCLOS, *supra* note 69, art. 100.

88. *See* UNCLOS, *supra* note 69, art. 105.

89. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987). The principal of universal jurisdiction allows states to assert power over pirates even when none of the other traditional bases (e.g., territoriality, nationality, etc.) for jurisdiction exist. For the other traditional bases of jurisdiction, see *id.* § 402.

universal jurisdiction expressed in UNCLOS has been accepted by many modern scholars.⁹⁰ Its origins are in earlier Anglo-American⁹¹ and German⁹² jurisprudence and perhaps further back.⁹³

Universal jurisdiction is not just a theory; the capture and trial of the SAFINA AL-BIRSARAT pirates was a real world exercise of universal jurisdiction by the United States and Kenya.⁹⁴

C. *U.S. Policy Applying an International Mandate To Fight Piracy*

1. UNCLOS's Legal Status vis-à-vis the United States

The United States has neither signed nor ratified UNCLOS.⁹⁵ On October 31, 2007, the Senate Foreign Relations Committee voted in favor of the treaty and to send it to the full Senate.⁹⁶ President George W. Bush; Senator Joseph Biden, Chairman of the Senate Foreign Relations Committee; and Rear Admiral Bruce MacDonald, Judge Advocate General of the Navy, support the treaty.⁹⁷

90. Peppetti, *supra* note 12, at 107; Bahar, *supra* note 12, at 13-14; Kontorovich, *supra* note 71, at 190; Jesus, *supra* note 71, at 379-80; Michael A. Newman, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 30 (2001) ("Prohibitions against piracy and slavery are two of the earliest substantive international crimes that over time became subject to the universal jurisdiction of all states."); Jordan, *supra* note 71, at 10; Randall, *supra* note 71, at 791-92. *But see* RUBIN, *supra* note 71, at 385:

To the argument that "international law" authorizes third party intervention, the answer is certain to be that it does not; that self-aggrandizing assertions of authority based on a supposed rule of "international law" are merely autointerpretations of the law, not determinations of the law, and are reminiscent of the now-failed rationales for imperialism.

91. BLACKSTONE, *supra* note 71, at *71 (stating that a pirate having "declar[ed] war against all mankind, all mankind must declare war against him"); WILLIAM WYNNE, *THE LIFE OF SIR LEOLINE JENKINS*, at xc (J. Downing et al. eds., 1724) ("So long an Arm hath GOD, by the Laws, given to his Vicegerent the King, and so odious are the Crimes of *Piracy* . . . and other Violences upon the Sea, that Justice observes and reaches the Malefactors, even in the remotest Corners of the World" (charge given to an Admiralty Session held at the Old Bailey)).

92. Sundberg, *supra* note 68, at 383-84.

93. BRIERLY, *supra* note 71, at 311 ("Under an ancient rule of maritime law, pirates are offenders against the law of nations, *hostes humani generis*, who may be arrested on the high seas by the warships of any state and brought into port for trial together with their ship."); see *United States v. Smith*, 18 U.S. 153, 162 (1820) (Story, J.) (citing earlier sources on the law of piracy).

94. Bahar, *supra* note 12, at 11.

95. Kevin Drawbaugh, *U.S. Senate Panel Backs Law of the Sea Treaty*, REUTERS, Oct. 31, 2007, <http://www.reuters.com/article/latestCrisis/idUSN31335584>; see U.N. Div. for Ocean Affairs & the Law of the Sea, Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as of July 2008, *available at* http://www.un.org/Depts/105/reference_files/chronologicalLists_of_ratifications.htm (last visited Sept. 22, 2008).

96. *Id.*

97. *Id.*

Although the United States has not ratified UNCLOS, President Bush cited it with approval when he defined “piracy” in a memorandum on “Maritime Security (Piracy) Policy.”⁹⁸ In that memorandum, President Bush stated that piracy “threatens U.S. national security interests and the freedom and safety of maritime navigation throughout the world, undermines economic security, and contributes to the destabilization of weak or failed state governance.”⁹⁹ President Bush also suggested a link between piracy and terrorism.¹⁰⁰ According to the memorandum, the policy of the United States is to increase international cooperation to stop acts of piracy and related acts and to “[e]nsure that those who commit acts of piracy are held accountable for their actions by facilitating the prosecution of suspected pirates.”¹⁰¹

2. The U.S. Municipal Piracy Statute

The United States’ municipal piracy statute states: “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.”¹⁰² The current statute, with few changes,¹⁰³ dates from 1819.¹⁰⁴ No one has been prosecuted under the current statute for over 100 years¹⁰⁵ and it has received negative treatment from recent commentators.¹⁰⁶ Because pirates will probably not be brought to the United States for trial in large numbers to enjoy the rights guaranteed by the United States Constitution,¹⁰⁷ the international law governing the treatment of captured pirates is all the more important.

98. Memorandum from George W. Bush, President of the United States, to the Vice President et al., *supra* note 10.

99. *Id.*

100. *Id.*

101. *Id.*

102. 18 U.S.C. § 1651 (2000); *see also id.* § 1652-1661 (listing other federal statutes addressing piracy); 33 U.S.C. § 381 (2000) (authorizing the President of the United States to use public armed vessels to fight piracy).

103. RUBIN, *supra* note 71, at 159; Menefee, *supra* note 72, at 161 (noting that the punishment for piracy was death under the original statute).

104. RUBIN, *supra* note 71, at 92.

105. *Id.*

106. *Id.* (citing 18 U.S.C. § 1651 historical and revision note (1982)); *see* Menefee, *supra* note 72, at 175-76 (critiquing and proposing changes to current U.S. piracy statutes).

107. For a discussion of the U.S. constitutional rights guaranteed to captured pirates, *see* Bahar, *supra* note 12, at 40-56 (arguing that the United States should ensure that pirates captured by U.S. warships are afforded Fourth and Fifth Amendment rights under the United States Constitution). While Lieutenant Bahar’s analysis is sound, if captured pirates are never brought to a U.S. court for trial, they will never have an opportunity to make a Constitutional challenge to the procedures used to capture and detain them. Therefore, the international community needs

IV. APPLICATION OF THE GENEVA CONVENTIONS

This Part will analyze the application of Third and Fourth Geneva Conventions to captured pirates. Despite serious historical and textual issues, the Third Geneva¹⁰⁸ may afford prisoner of war status to captured pirates in two very narrow circumstances: (1) they are actually members of the armed forces of a state but are pursuing piratical attacks for private ends or (2) the suspected pirates are actually not pirates but rather a legitimate naval *levée en masse* rising up to repel invasion mistaken for pirates. Additionally, the Third Geneva requires that if there is a doubt as to a captured person's status, he is entitled to be treated as a prisoner of war until a competent tribunal has determined his status.¹⁰⁹ On the other hand, the Fourth Geneva affords no protection to captured pirates.¹¹⁰

A. *Fundamental Problems with Applying the Geneva Conventions*

Before analyzing the specific provisions of the Third and Fourth Geneva Conventions, there are several serious historical and textual issues that may preclude application of these conventions, even if their specific provisions may facially encompass captured pirates.

1. Fundamental Issues of History That May Bar Application of the Geneva Conventions

Piracy has historically been outside the law of war.¹¹¹ Pirates were commonly called *hostes humani generis*, the enemies of all humankind.¹¹²

general standards, such as the ones presented in this Article, that all states can apply under international law to pirates captured by any nation.

108. Geneva Convention Relative to the Treatment of Prisoners of War, arts. 4-5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva].

109. *Id.* art. 5.

110. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva].

111. RUBIN, *supra* note 71, at 316:

“Piracy” is not a “war crime” historically or by any known definition applied in diplomatic practice or court case. Indeed, the term “piracy” was historically used to distinguish those who fought as privateers under the laws of war and those who had no valid commissions or sailed under the commissions of unrecognized powers and thus were subject not at all to the laws of war but to the normal criminal law of some state with the necessary legal interest to try them.

Id.; see also Ingrid Detter, *The Law of War and Illegal Combatants*, 75 GEO. WASH. L. REV. 1049, 1099 (2007).

112. BRIERLY, *supra* note 71, at 311 (“Under an ancient rule of maritime law, pirates are offenders against the law of nations, *hostes humani generis* . . .”); see also Detter, *supra* note 111, at 1097 (“Like pirates, genocidal terrorists place themselves outside the family of nations and make themselves enemies of mankind.”).

Captured pirates were not prisoners of war,¹¹³ and in some cases had fewer rights than domestic criminals.¹¹⁴ Pirates captured *in flagrante delicto*, while in the commission of a crime, were executed without a trial.¹¹⁵ Additionally, pirates were subject to unlimited interrogation and questioning.¹¹⁶

Under UNCLOS, modern international law has authoritatively required a trial for suspected pirates.¹¹⁷ But it is not clear that modern international law was meant to do the same to ameliorate the treatment of captured pirates. In Francis Lieber's *Instructions for the Government of Armies of the United States in the Field*, a foundational document of the modern law of war,¹¹⁸ pirates are specifically used as an example of combatants who deserve no protection.¹¹⁹ The drafters of the Geneva Conventions, writing immediately after World War II, may not have considered piracy a significant problem because piracy had been suppressed during the war.¹²⁰ Consequently, neither the Third nor the Fourth Geneva mentions piracy.¹²¹

In fact, the historical realities of piracy fly in the face of three fundamental assumptions that anchor the modern law of war: (1) the authority to wage war rests solely with states, (2) combatants and civilians are easily distinguishable, and (3) states operate on the basis of

113. Hoffman, *supra* note 14, at 229 (“When captured, however, pirates were not treated as prisoners of war but instead turned over to civil authorities for trial and punishment.”).

114. Deter, *supra* note 111, at 1098.

115. *Id.*

116. *Id.*

117. UNCLOS, *supra* note 69, art. 105 (“The courts of the State which carried out the seizure [of a pirate ship] may decide upon the penalties to be imposed . . .”).

118. Richard B. Jackson, *The Law of War and the Academy*, ARMY LAW., Sept. 2007, at 15, reprinted in Richard B. Jackson, *The Law of War and the Academy*, 14 NEW ENG. J. INT’L & COMP. L. 1, 3 (2007) (“The Lieber Code, also known by its official title, General Order 100, became the basis for the law of armed conflict, and much of it is preserved in the substance of the current law of war.”).

119. Gen. Order No. 100 (1863), available at <http://www.yale.edu/lawweb/avalon/lieber.htm> (popularly titled the “Lieber Code”).

Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but *shall be treated summarily as highway robbers or pirates.*

Id. § IV, pt. 82 (emphasis added).

120. See GOTTSCHALK ET AL., *supra* note 9, at 20.

121. Third Geneva, *supra* note 108; Fourth Geneva, *supra* note 110.

reciprocity.¹²² Piracy fails to satisfy all three assumptions. First, pirates are the archetype of a nonstate war maker.¹²³ Second, pirates are not always easily distinguishable from civilians until it is too late. For example, in the SAFINA AL-BIRSARAT incident, pirates used civilian speedboats¹²⁴ to approach their target—a civilian ship—and then used a captured civilian ship to attack other civilian ships.¹²⁵ Once captured, they denied that they were pirates.¹²⁶ Third, like other nonstate actors, pirates often do not reciprocate lawful treatment.¹²⁷ Reported pirate attacks resulted in 433 acts of violence on crew members in 2007.¹²⁸ In just one particularly gruesome example of a piratical torture-murder of unarmed civilians, in 2004, pirates pushed fourteen Bangladeshi fishermen into the refrigerated hold of their ship and left them literally to freeze to death.¹²⁹

2. Fundamental Issues of the Geneva Convention Text That May Bar Application of the Geneva Conventions

The text of the Third and Fourth Geneva Conventions themselves present fundamental difficulties that may preclude their application to captured pirates.

According to article 2, which is common to both the Third and Fourth Geneva Conventions, the Conventions apply to (1) “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them,” (2) “cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance,” and (3) conflicts where one of the “Powers” is not a party to the Conventions.¹³⁰

122. Daphné Richemond, *Transnational Terrorist Organizations and the Use of Force*, 56 CATH. U. L. REV. 1001, 1012 (2007). *But see* Luisa Vierucci, *Prisoners of War or Protected Persons Qua Unlawful Combatants? The Judicial Safeguards to Which Guantanamo Bay Detainees are Entitled*, 1 J. INT’L CRIM. JUST. 284, 305 (2003) (arguing that the Third Geneva “abandoned the reciprocity-based scheme in favour of the fullest protection for combatants”).

123. See GOTTSCHALK ET AL., *supra* note 9, at 1-27 (providing a historical overview and examples of piracy).

124. *Somali Pirates Face Death Penalty in Kenya*, SOMALILAND TIMES, Oct. 26, 2006, <http://www.somalilandtimes.net/sl/2005/249/050.shtml>.

125. Raffaele, *supra* note 3, at 38.

126. *Id.* at 43-44.

127. See Richemond, *supra* note 122, at 1026 (“[T]he concept of reciprocity tends to be absent in conflicts involving non-states.”).

128. 2007 ANNUAL REPORT ON PIRACY, *supra* note 9, at 12.

129. Roland Buerk, *‘Pirates’ Kill Bangladesh Crew*, BBC NEWS, Oct. 28, 2004, http://news.bbc.co.uk/1/hi/world/south_asia/3961883.stm.

130. Third Geneva, *supra* note 108, art. 2; Fourth Geneva, *supra* note 110, art. 2.

According to article 3, common to both the Third and Fourth Geneva Conventions, parties are bound to apply certain minimum protections to detainees in “the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”¹³¹

Read together, common articles 2 and 3 suggest that the Third and Fourth Geneva Conventions were meant to apply only to traditional wars between nation-states or noninternational civil wars.¹³² Pirate attacks are often neither. Most acts of piracy are clearly not a declared war or other armed conflict between two high contracting parties because only states can be parties to the Conventions.¹³³ Because acts of piracy under international law occur on the high seas or outside the jurisdiction of any state,¹³⁴ they do not arise during partial or total occupation of a high contracting party.¹³⁵ For the same reason, the minimum provisions guaranteed to detainees in article 3 cannot apply to pirates because piracy under international law does not occur in the territory of one of the high contracting parties.¹³⁶ Furthermore, “armed conflict” is not well defined in the common articles¹³⁷ and may not cover every incident that requires military means to address.¹³⁸

131. Third Geneva, *supra* note 108, art. 3; Fourth Geneva, *supra* note 110, art. 3.

132. Brett Shumate, *New Rules for a New War: The Applicability of the Geneva Conventions to Al-Qaeda and Taliban Detainees Captured in Afghanistan*, 18 N.Y. INT'L L. REV. 1, 31 (2005). Common article 2 covers international conflicts between two states while common article 3 covers internal conflicts between parties fighting for territory. International conflicts between a state and a nongovernmental organization, therefore, fall outside both common articles. *Id.* at 31-33.

133. *Id.* at 31 (“[N]ongovernmental organizations cannot sign international agreements governing the laws of war.”).

134. UNCLOS, *supra* note 69, art. 101(a)(i)-(ii).

135. Arguably, piracy committed by persons who set sail from an occupied territory and commit piracy on the high seas in an attempt to aid their occupied homeland might fall under a “case of partial or total occupation of the territory of a High Contracting Party” mentioned in common article 2. However, the International Red Cross Commentary to the Fourth Geneva on this paragraph speaks of this provision in its application to occupied *territory*, not to any possible scenario that could be related back to an occupation. ICRC Commentary to Geneva Convention Relative to the Protection of Civilian Persons in Time of War 21-22 (Sept. 10, 2008), available at <http://www.icrc.org/ihl.nsf/COM/380-600005?OpenDocument> (referring to this paragraph as “OCCUPIED TERRITORIES” and using the words “territory” or “territories” seven times).

136. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006) (“Common Article 3 . . . affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory ‘Power’ who are involved in a conflict ‘in the territory of a signatory.’” (emphasis added)).

137. Michael Petrusic, Comment, *Enemy Combatants in the War on Terror and the Implications for the U.S. Armed Forces*, 85 N.C. L. REV. 636, 649-50 (2007) (noting the disagreement among commentators and practitioners over the definition of “armed conflict” and presenting the U.S. Army Judge Advocate General School and International Committee of the Red Cross positions); David Scheffer, former U.S. Ambassador for War Crimes, Remarks at a

Some pirates, despite the fact that their piratical acts are for private ends, simultaneously identify themselves with a high contracting power or other power.¹³⁹ These pirates, as explained below, have an arguable claim to protection under the Third Geneva.

B. The Application of the Third Geneva to Pirates

Despite the historical and textual issues that may preclude application of the Third and Fourth Geneva Conventions to captured pirates, the Third Geneva may apply in limited circumstances to a small number of captured pirates. This section and the following section will analyze whether the Third and Fourth Geneva Conventions apply and, if so, whether they grant any protection to captured pirates.

The Third Geneva addresses protections for prisoners of war.¹⁴⁰ Analysis of the Third Geneva suggests that captured pirates are likely to be prisoners of war in only three very narrow circumstances: (1) they are actually members of the armed forces of a state but are pursuing piratical attacks for private ends, (2) they are fighting as part of an organized resistance movement (a four-part test set out below), or (3) the suspected pirates are actually not pirates but rather a legitimate naval *levée en masse*, rising up to repel invasion, mistaken for pirates.¹⁴¹ If captured, suspected pirates can claim prisoner of war status and if there is any doubt as to their status, they are entitled to be treated as prisoners of war until a competent tribunal determines otherwise. Of course, a pirate's status as a prisoner of war will only affect his treatment by the detaining

Brookings Institution Economic Studies and Governance Event: Counterterrorism and the Laws of War: A Critique of the U.S. Approach (Mar. 11, 2002) (arguing that different parts of the same enforcement action may or may not be an "armed conflict" depending on the jurisdiction and suggesting that the fight against al-Qaeda may be an armed conflict in Afghanistan but merely a law enforcement action in Brazil).

138. See Hoffman, *supra* note 14, at 229 (using pirates as the quintessential historical example for the proposition "[t]hat military means must be used to address some terrorist threats in the twenty-first century does not necessarily mean that the Geneva Conventions of 1949 and Protocols Additional of 1977 automatically apply in those circumstances").

139. See *infra* Part IV.B and sources cited there.

140. Third Geneva, *supra* note 108, pmb1.

141. *But see* Bahar, *supra* note 12, at 42 (asserting that pirates are not state actors and concluding that therefore captured pirates are not prisoners of war). Lieutenant Bahar's analysis is incomplete. As will be explained below, persons who commit piratical acts for private ends may nevertheless be corrupt or mutinous members of the armed forces of a state.

power¹⁴² but will not prevent the detaining power from trying him for the crime of piracy under municipal law.¹⁴³

1. Prisoner of War Categories Applied to Pirates

Article 4 of the Third Geneva enumerates categories of persons who, when captured, are prisoners of war.¹⁴⁴ The categories of most interest for the purposes of determining the protections afforded to captured pirates are: (1) members of the armed forces and militias forming part of the armed forces,¹⁴⁵ (2) members of militias not forming part of the armed forces,¹⁴⁶ (3) members of armed forces professing allegiance to a government or authority not recognized by the detaining power,¹⁴⁷ and (4) “inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units.”¹⁴⁸

a. Members of Armed Forces

Captured pirates who are members of the armed forces of a state are prisoners of war.

Some pirates in Somalia have supposedly claimed to be members of the Somali Coast Guard.¹⁴⁹ Additionally, a local Somali mayor in Puntland has recently reported that soldiers there have joined local pirates.¹⁵⁰ If members of a state’s army or coast guard committed piracy

142. Articles 12 through 125 of the Third Geneva lay out various protections that must be afforded to prisoners of war. Third Geneva, *supra* note 108, arts. 12-125.

143. Bahar, *supra* note 12, at 36 (“[C]aptured pirates would, and should, receive Geneva Conventions treatment, but they should also remain eligible for prosecution.”); *see* Vierucci, *supra* note 122, at 306 (“[I]t is well known that POW status can be no shield against personal liability for violations of the laws of war.”).

144. Third Geneva, *supra* note 108, art. 4.

145. *Id.* art. 4(A)(1).

146. *Id.* art. 4(A)(2).

147. *Id.* art. 4(A)(3).

148. *Id.* art. 4(A)(6).

149. Bahar, *supra* note 12, at 36-37 nn.166-167 (citing Bo-Mi Lim, *Militants Who Took Ship Deny Being Pirates*, ASSOCIATED PRESS, Apr. 5, 2006, http://www.benadir-watch.com/2006%20News/0405_Militants_deny_being_pirates.pdf). This assertion appears to be somewhat confused because the source cited therein quotes a militia spokesman claiming foreign nations are taking advantage of Somalia’s lack of “coastal guards,” not that the pirates are themselves members of a “Coast Guard.” Nevertheless, this analysis is not wasted because it is not unthinkable that corrupt or mutinous members of a nation’s coast guard or navy could commit piratical acts.

150. 2008 2ND QUARTER REPORT ON PIRACY, *supra* note 35, at 33. These soldiers turned pirates were reportedly “working with the regional administration of Puntland.” *Id.* Therefore, it is unclear what relationship these soldiers have to the national army of Somalia, which makes it

on a private ship for private ends, their capture by a warship of another state might implicate an armed conflict¹⁵¹ between high contracting powers or a high contracting power and another power.¹⁵² Therefore, the Third Geneva would apply¹⁵³ and captured Somali army or coast guard members turned pirates would be prisoners of war as members of armed forces.¹⁵⁴

Crew members on government vessels who mutiny and then commit piracy are pirates even though they do not meet the private ship element of the definition in article 102 of UNCLOS.¹⁵⁵ Therefore, the Third Geneva would also apply to a warship's crew that mutinied and then committed piracy using their warship. The mutinous crew, if

unclear whether a conflict between them and an international force would qualify as an armed conflict between a High Contracting Powers.

151. The Third Geneva applies "to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." Third Geneva, *supra* note 108, art. 2. Even if the coast guard members turned pirates are off on a private frolic unsanctioned by their government, their presence among pirates might cause the state whose ship is attacked to believe a war or armed conflict has begun. The fact that the coast guard members turned pirates' state may not believe any war armed conflict has begun is immaterial. Historically the line between lawful privateering and unlawful piracy was very thin and Protestant states often quasi-sponsored pirates (often former privateers) to attack Spanish shipping even though the pirates themselves were acting for private ends (and raided Protestant shipping too when available). GOTTSCALK ET AL., *supra* note 9, at 3-5.

152. Nearly any nation that might be capturing pirates has ratified the Geneva Conventions. Somalia has also ratified the Geneva Conventions. International Humanitarian Law—State Parties/Signatories, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (last visited Sept. 9, 2008).

153. Third Geneva, *supra* note 108, art. 2.

154. The four qualifying requirements for prisoner of war status under article 4(A)(2) of the Third Geneva apply only to militias, volunteer corps, and organized resistance groups which do not form part of the armed forces of the party to the conflict. All captured members of the armed forces of a state are prisoners of war regardless of their ability to meet these qualifications. Evan J. Wallach, *Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?*, ARMY LAW., Sept. 2007, at 18. *But see* Petrusic, *supra* note 137, at 655-57 (arguing that the four qualifying requirements apply in determining whether captured members of the armed forces of a state are prisoners of war).

155. UNCLOS, *supra* note 69, art. 102 ("The acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.").

captured, would be prisoners of war,¹⁵⁶ because mutineers are members of the armed forces of a state.¹⁵⁷

However, at least in the case of the Somali pirates claiming to be members of the coast guard, these self-serving declarations by pirates were not true: Somalia has not had a coast guard since 1991.¹⁵⁸ In practice, it is unlikely that any captured pirates will be legitimate members of the armed forces or constituent militia of any state.

b. Members of Militias Not Part of the Armed Forces

Captured pirates who belong to a militia or organized resistance movement not part of the armed forces of a state are generally not prisoners of war.

Pirates acting for private ends sometimes have links to some organization larger than themselves other than a state. For example, some pirates in Indonesia are members of separatist groups¹⁵⁹ and some pirates in Somalia are loyal to regional warlords.¹⁶⁰

Captured members of militias or organized resistance movements not part of the armed forces of a state are prisoners of war if they meet four qualifying requirements in article 4(A)(2) of the Third Geneva.¹⁶¹ To qualify as prisoners of war, captured pirates who claim to be members of militias or organized resistance movements not part of the armed forces must (1) be commanded by someone responsible for his subordinates,¹⁶² (2) have “a fixed distinctive sign recognizable at a distance,”¹⁶³ (3) carry arms openly,¹⁶⁴ and (4) conduct “their operations in accordance with the laws and customs of war.”¹⁶⁵

Some, but not all, pirates are presumably commanded by someone responsible for them. But responsibility in this context does not merely mean that some commander exists; rather it is a legal term of art

156. If mutinous members of a state’s armed forces are captured for piracy, they may be tried in any state including their own. However, they may not be returned to their own state for trial if there are substantial grounds for believing that they will be tortured in punishment for their mutiny or piracy. For a discussion of the U.N. Convention Against Torture’s refouler ban and its effect on efforts to punish pirates, see *infra* Part V.B.

157. In the United States, for example, the fact that a person who commits mutiny is still answerable to military justice suggests that such a person is still part of the armed forces of the United States. See 10 U.S.C. § 894 (2000).

158. Lim, *supra* note 149.

159. Luft & Korin, *supra* note 10, at 63.

160. *Somali Islamists Take Control of Indian Ocean Base for Piracy*, *supra* note 41.

161. Wallach, *supra* note 154, at 26-27.

162. Third Geneva, *supra* note 108, art. 4(A)(2)(a).

163. *Id.* art. 4(A)(2)(b).

164. *Id.* art. 4(A)(2)(c).

165. *Id.* art. 4(A)(2)(d).

meaning “command responsibility.”¹⁶⁶ “The principle of ‘command responsibility’ . . . holds a superior responsible for the actions of subordinates [and] appears to be well accepted in U.S. and international law in connection with acts committed in wartime. . . .”¹⁶⁷ Command responsibility is difficult to apply to pirates because it may be impossible to determine who their formal leader is even if they have one. Furthermore, because jurisdiction over piracy does not stretch to any pirate commanders who may be on shore,¹⁶⁸ it is practically impossible to punish such a pirate leader absent extradition.

Some modern pirates actually wear uniforms.¹⁶⁹ However, pirates who use civilian ships without affixing their own distinctive sign or flag will not qualify as having a distinctive sign recognizable at a distance even if they are wearing uniforms.¹⁷⁰ Some pirates carry arms openly (at least before warships arrive), such as those that attacked the SAFINA AL-BIRSARAT.¹⁷¹ However, no pirate conducts his piracy operations in accordance with the laws and customs of war because the act of piracy is itself outside the law of war.¹⁷² Therefore, pirates who belong to a militia or organized resistance movement not part of the armed forces of a state generally cannot fulfill all four of the requirements to qualify as a prisoner of war.

166. See Int’l Comm. of the Red Cross, ICRC Commentary to Geneva Convention Relative to the Treatment of Prisoners of War 59 (1960), available at <http://www.icrc.org/ihl.nsf/COM/375-590007?OpenDocument> (“He is responsible for action taken on his orders as well as for action which he was unable to prevent . . . [r]espect for this rule is moreover in itself a guarantee of the discipline which must prevail in volunteer corps . . .”).

167. *Hilao v. Estate of Marcos*, 103 F.3d 767, 777 (9th Cir. 1996).

168. A pirate commander on shore or in territorial waters would not be on the high seas or outside the jurisdiction of any state. Therefore, the power capturing pirates outside territorial waters has no jurisdiction to capture their leaders under UNCLOS. UNCLOS, *supra* note 69, art. 101(a)(i)-(ii).

169. GOTTSCHALK ET AL., *supra* note 9, at 63; *Somali Pirates Out of Control*, *supra* note 49.

170. Int’l Comm. of the Red Cross, *supra* note 166, at 60 (“If the partisans are on board a vehicle or . . . boat, the distinctive sign must of course be shown on the vehicle concerned. This is in line with the long-established regulations of international law regarding the flag in the case of war at sea.”).

171. *Somali Pirates Face Death Penalty in Kenya*, *supra* note 124.

172. Bahar, *supra* note 12, at 46 (“[P]irates are not technically within the Law of Armed Conflict.”). The International Committee of the Red Cross commentary notes that although the laws and customs of war are left undefined, individuals seeking prisoner of war status under article 4(A)(2) must be guided by morality and conscience: “in launching attacks, they must not cause violence and suffering disproportionate to the military result which they may reasonably hope to achieve. They may not attack civilians or disarmed persons and must, in all their operations, respect the principles of honour and loyalty as they expect their enemies to do.” Int’l Comm. of the Red Cross, *supra* note 166, at 61. Pirates, by definition, cause violence and suffering for private ends, not military necessity.

However, if captured by an enemy for acts other than piracy itself,¹⁷³ such pirates may be prisoners of war if they fulfill all four of the requirements to qualify as a prisoner of war presented above. There is historical precedent for organized pirate resistance movements not part of the armed forces of a state working in conjunction with belligerent powers during wartime.¹⁷⁴ These pirates may come closest to fulfilling the four requirements for prisoner of war status set out above.

During World War II, Chinese pirates cooperated with joint Nationalist Chinese/American naval forces under the Sino-American Cooperative Organization (SACO)¹⁷⁵ in training and operations on China's rivers and coasts.¹⁷⁶

Although the fog of war obscures the exact extent of the pirates' actions at sea before and during the war,¹⁷⁷ and therefore it is unclear if they would qualify as pirates under the modern UNCLOS definition,¹⁷⁸ they were certainly considered to be pirates by the Empire of Japan, Nationalist China, and the United States.¹⁷⁹ Even though their

173. If captured by an enemy for an act of piracy itself, such pirates cannot be prisoners of war because, as explained above, the act of piracy is itself outside the law of war. Therefore, the captured pirates would not be conducting their operations in accordance with the laws and customs of war and would thereby fail the four requirements for the members of an organized resistance movement not part of the armed forces of a state to be prisoners of war. See Third Geneva, *supra* note 108, art. 4(A)(2).

174. See generally MILTON E. MILES, A DIFFERENT KIND OF WAR (1967).

175. SACO was a joint Chinese/American operation under the joint command of Nationalist Chinese General Tai Li and U.S. Navy Captain (later Vice Admiral) Milton E. Miles that established weather stations and engaged Imperial Japanese forces in guerrilla warfare from 1942 until 1945 in preparation for eventual landing of regular U.S. forces in China. Arleigh Burke, *Foreword* to MILES, *supra* note 174, at ix-xi.

176. Chinese pirates were trained by American and Nationalist Chinese instructors. MILES, *supra* note 174, at 252, 428, 496. Their training was put to good use. Chinese pirates raided Japanese-held territory and acted in concert with American and Nationalist Chinese forces under SACO command in large scale operations against the Japanese. *Id.* at 431, 496, 509. They also successfully rescued downed American pilots before they could be captured by the Japanese. *Id.* at 251, 323. Chinese pirates furthermore acted as scouts and spies for American coast watchers by relaying information and going onboard Japanese warships disguised as fish sellers in order to collect information. *Id.* at 425. Finally, Chinese pirates were tasked with manning weather ships and laying mines. *Id.* at 250-51.

177. The pirates SACO trained and cooperated with operated on both the coasts and on the rivers as well as at sea. See *id.* at 248-49 (discussing various pirate forces). Some of the members of these "pirate navies" would not be considered pirates today under the UNCLOS definition if they raided only on the rivers and in close proximity to land, but others presumably raided on the high seas at some point in their career.

178. The issue is whether the Chinese pirates participated in acts of violence, detention, or depredation on the high seas or outside the jurisdiction of any state. See UNCLOS, *supra* note 69, art. 101.

179. All three of the regular military forces cooperated with and sought to co-opt the pirate forces that operated along the Chinese coast while recognizing their separate status as pirates. See discussion of a meeting between pirate representatives and joint Nationalist-

cooperation with Nationalist China and the United States was partially for public ends,¹⁸⁰ they nevertheless fulfilled the “private ends” prong of the UNCLOS piracy definition¹⁸¹ because some of their prior (and probably concurrent) acts of raiding were for private ends.¹⁸²

Their commanders may have been responsible for them and may have come substantially close to having a sense of “command responsibility”: each of the pirate resistance movements had a recognized leader¹⁸³ who was acknowledged with a semi-official or official capacity by the occupying power.¹⁸⁴ Furthermore, during some of their raids they were led by “command responsible” United States Navy and Marine Corps officers.¹⁸⁵ Although exactly what kind of sign these Chinese pirates used during their acts of piracy and espionage may have differed on the occasion, when led by American officers some distinctive sign was probably recognizable at a distance, at least on their officers’ uniforms or flags. These pirates also wore uniforms when training with American and Nationalist Chinese forces but preferred not to wear their uniforms during operations.¹⁸⁶ Therefore, depending on when they were captured and who was leading them at the time, they may or may not have had a fixed sign recognizable at a distance.¹⁸⁷ The Chinese pirates also carried arms openly during some operations.¹⁸⁸ Finally, whether or not these pirates conducted their American/Nationalist Chinese-led operations in accordance with the laws and customs of war probably depended on who was leading them and how much training they received.

Chinese/American naval commanders with accompanying discussion of Japanese attempts to co-opt pirate leaders in MILES, *supra* note 174, at 248-49.

180. Chinese pirates fought against Japan partly out of feelings of nationalism and sympathies for their own people. *Id.* at 60.

181. *See* UNCLOS, *supra* note 69, art. 101 (limiting the international definition of piracy to only acts “committed for private ends by the crew or the passengers of a private ship or a private aircraft”).

182. Prior to World War II a series of pirate forces operated on the coast of China. MILES, *supra* note 174, at 248. They maintained their freedom of action during the war. *Id.* at 60. Besides feelings of nationalism, Chinese pirates joined the fight against Japan partly for commercial reasons: “They were bad for business.” *Id.* at 248.

183. *Id.* at 248 (describing three pirate leaders and their organizations).

184. *Id.* at 248-49 (describing how pirate leader Chang Kwei-fong was made a member of a Japanese general’s staff and his rival pirate leader Chang Yee-chow was assigned a Japanese Navy captain and two Japanese Army officers as his “staff”).

185. *Id.* at 431.

186. *Id.* at 252.

187. *Id.*

188. *Compare id.* at 431 (describing American-led raids on Japanese soldiers where the pirates appear to carry arms openly and act as trained regular soldiers) *with id.* at 425 (describing pirates posing as fish sellers to collect information on Japanese warship movements).

The current Third Geneva was not adopted until after World War II,¹⁸⁹ so the analysis of who is a prisoner of war presented in this Article was not in force at that time.¹⁹⁰ Nevertheless, both China and the United States were high contracting parties¹⁹¹ and the pirates expressed allegiance to the military authorities of both.¹⁹² Although captured Chinese pirates cooperating with Nationalist Chinese and American forces were probably treated abysmally by their Imperial Japanese captors,¹⁹³ if a similar situation were to develop today they might be prisoners of war.

c. Members of Armed Forces Professing Allegiance to a Government or Authority Not Recognized by the Detaining Power

Captured pirates who are members of the “armed forces” of separatist movements are not prisoners of war.

Captured members of armed forces who profess allegiance to a government or an authority not recognized by the detaining power are prisoners of war.¹⁹⁴ A literal interpretation of this provision might lead to the conclusion that pirates who are members of separatist movements may be prisoners of war. However, the International Committee of the Red Cross commentary to this provision notes the concern that captured persons could abuse this provision to obtain more protections than they deserve.¹⁹⁵ The commentary makes clear that this provision is meant to be read “in the light of the actual case which motivated its drafting—that of the forces of General Charles de Gaulle which were under the authority of the French National Liberation Committee.”¹⁹⁶ Generally, this provision should only apply to “armed forces” fighting “in conjunction with a state recognized as a belligerent.”¹⁹⁷ More

189. Third Geneva, *supra* note 108, pmbl. (noting that the Third Geneva was adopted in 1949).

190. *See* Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929. This treaty is no longer in force as it has been superseded by the current 1949 Third Geneva.

191. International Humanitarian Law—State Parties/Signatories, <http://www.icr.org/ihl.nsf/WebSign?ReadForm&id=305&ps=P> (last visited Sept. 9, 2008).

192. MILES, *supra* note 174, at 250.

193. The Empire of Japan was not a signatory to the 1929 Geneva Convention Relative to the Treatment of Prisoners or War. International Humanitarian Law—State Parties/Signatories, <http://www.icr.org/ihl.nsf/WebSign?ReadForm&id=305&ps=P> (last visited Sept. 9, 2008). The Empire of Japan’s wartime atrocities against captured enemies is well documented. *See, e.g.*, LAURENCE REES, HORROR IN THE EAST (2002).

194. Third Geneva, *supra* note 108, art. 4(A)(3).

195. Int’l Comm. of the Red Cross, *supra* note 166, at 62.

196. *Id.*

197. *Id.*

specifically, an authority whose armed forces seek protection under this provision must either consider itself the representative of a high contracting party or at least declare that it accepts the obligations of the Geneva Conventions and will seek to apply them.¹⁹⁸

Pirates affiliated with separatist movements or regional warlords do not fight in conjunction with a state,¹⁹⁹ do not represent a high contracting party,²⁰⁰ and may not accept the obligations of the Geneva Conventions.

Furthermore, if persons really fighting in conjunction with a state recognized as a belligerent are raiding ships as part of their war policy, then they are not fighting for private ends and, by definition, are not pirates.²⁰¹ Such persons that have attacked unarmed civilian ships as part of their war effort may be war criminals²⁰² but are not pirates.

198. *Id.* at 63.

199. An interesting example is the Free Aceh Movement, a radical Islamist separatist group in Indonesia that has hijacked ships and taken hostages. Luft & Korin, *supra* note 10, at 63. Some elements of this movement seek independence for Aceh, an Indonesian province on the island of Sumatra that existed as a sovereign state for about 500 years before Dutch conquest in the late nineteenth century and early twentieth century. ANGEL RABASA & JOHN HASEMAN, *THE MILITARY AND DEMOCRACY IN INDONESIA: CHALLENGES, POLITICS, AND POWER* 99-100 (2002). Unlike de Gaulle's forces that fought in conjunction with the United Kingdom, the Free Aceh Movement does not fight alongside another state's military. *Cf. id.* at 100 (noting Libyan training of Acehnese fighter in the 1980s but no foreign aid thereafter).

200. While the Free Aceh Movement does not represent a high contracting power, some of its followers at least claim to represent a previously free and independent state. RABASA & HASEMAN, *supra* note 199, at 100. Nevertheless, for reasons perhaps unfair but patently obvious, Aceh (a state that has not existed for over 100 years) is not comparable with France (a state that existed in some form even during the time of de Gaulle's resistance).

201. *See* UNCLOS, *supra* note 69, art. 101(a) (stating that one of the elements of piracy under UNCLOS is that persons are only pirates if acting for private ends).

202. The United Nations has defined war crimes broadly:

War Crimes: Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

Int'l Law Comm'n, *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, princ. VI(b), delivered to the General Assembly, U.N. Doc. A/1316 (1950).

- d. Inhabitants of a Nonoccupied Territory, Who on the Approach of the Enemy Spontaneously Take Up Arms To Resist the Invading Forces, Without Having Had Time To Form Themselves into Regular Armed Units

Captured persons mistaken for pirates who are actually spontaneously taking up arms to resist an invasion may be prisoners of war, but this scenario is unlikely to occur.

Inhabitants of a nonoccupied territory who are captured while spontaneously taking up arms to resist invading forces, without having had time to form themselves into regular armed units, are prisoners of war provided they (1) carry arms openly and (2) respect the laws and customs of war.²⁰³

Some Somali pirates have claimed to be rising up against outside encroachment on Somali marine resources.²⁰⁴ This is not a real *levée en masse* as described in the Third Geneva because economic intrusion is not a real invasion.²⁰⁵ Furthermore, a real *levée en masse* uprising of this sort is not piracy under international law, because it is not for private ends.²⁰⁶ Captured *levée en masse* citizen-sailors, even if mistaken for pirates, are prisoners of war if they carry arms openly and respect the laws and customs of war.

Practically, however, there will be very few captured suspected pirates that will fit this category because piracy under international law must occur on the high seas or outside the jurisdiction of any state.²⁰⁷ Although not inconceivable, it is unlikely that pirates raiding outside a territorial sea could explain how their acts were caused by incursions into their territorial sea.²⁰⁸ Furthermore, a *levée en masse* can only exist for a

203. Third Geneva, *supra* note 108, art. 4(A)(6).

204. Lim, *supra* note 149 (“We are not pirates, but we are patriots who stood up to defend our sea resources from those taking advantage of their country’s lack of central government and coastal guards.” (quoting a Somali militia spokesman)).

205. Economic intrusion is characterized by a sustained intervention of a nonphysical nature. Therefore, sustained economic intrusion is too long to count as an instant invasion for the purposes of a *levée en masse*. Int’l Comm. of the Red Cross, *supra* note 166, at 68 (“[A] mass levy can only be considered to exist during a very short period, i.e., during the actual invasion period.”).

206. UNCLOS, *supra* note 69, art. 101(a).

207. *Id.* art. 101(a)(i)-(ii).

208. For example, the CHURCHILL tracked down the SAFINA AL-BIRSARAT about fifty-four miles off the coast of Somalia. *U.S. Steps Up War Against Somali Pirates*, *supra* note 41 (reporting the distance as eighty-seven kilometers). The territorial sea of any state is limited to twelve nautical miles. UNCLOS, *supra* note 69, art. 3. Given that set of facts, it would have been manifestly unreasonable for the pirates captured in that incident to claim they were repelling an invasion into Somalia’s territorial sea.

very short period of time immediately after an invasion.²⁰⁹ Pirates who continuously raid shipping once it is clear no invasion is occurring or has occurred are not a legitimate *levée en masse*.

It is also unlikely that a real naval militia responding to a real invasion would be mistaken for pirates since pirates generally do not respect the laws and customs of war.

2. Article 5 Hearings To Determine the Status of Pirates

Captured pirates generally must receive a hearing to determine whether they are entitled to prisoner of war status. Despite the fact that the above discussion has considerably narrowed the possibility that captured pirates qualify as prisoners of war, article 5 of the Third Geneva requires the detaining power to take an additional step to determine the status of persons they capture:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.²¹⁰

Commentators disagree over whether the detaining power must assume all captured persons are prisoners of war until a tribunal²¹¹ determines otherwise,²¹² or if an officer in the field can deny prisoner of war status where it is obvious that a captured person is not a prisoner of war.²¹³

209. Int'l Comm. of the Red Cross, *supra* note 166, at 68 ("It should, however, be emphasized that a mass levy can only be considered to exist during a very short period, i.e. during the actual invasion period. . . . [Eventually] the authority commanding the inhabitants . . . must either replace them by sending regular units, or must incorporate them in its regular forces.").

210. Third Geneva, *supra* note 108, art. 5.

211. The composition of such a tribunal and the rules it must follow to determine a captive's status are unclear but must meet certain minimum standards. *See generally* Wallach, *supra* note 154, at 40-41; Vierucci, *supra* note 122, at 301-06.

212. Evan Wallach, *supra* note 154, at 27-29.

213. Vierucci, *supra* note 122, at 300-01 (arguing that "[i]f the circumstances 'make it obvious that the claim to [POW] status is obviously untrue', the field officer may deny POW status" (second alteration in original) (citing *Public Prosecutor v. Oie Hce Koi*, [1968] 1 All E.R. 419, a British case in which an accused had the burden of proof as to prisoner of war status)). While there may be times that captured persons are so obviously not prisoners of war that no review is necessary, there are serious consequences for error. If persons entitled to an article 5 tribunal review do not receive one, any protections they might be afforded continue in force. A military commander who fails to properly determine status using article 5 tribunals will incur substantial liability if he or she does not provide the correct level of treatment guaranteed to captured persons under the law of war and international law. *See also* Evan J. Wallach, *The Logical Nexus Between the Decision to Deny Application of the Third Geneva Convention to the Taliban and Al Qaeda and the Mistreatment of Prisoners in Abu Ghraib*, 36 CASE W. RES. J. INT'L L. 541, 563-74 (2004) (discussing the United States' treatment of detainees in the War on Terror).

Because of the manifest illegality and unacceptability of piratical behavior,²¹⁴ there will probably be times where no prisoner of war status hearing is necessary. For example, the pirates in the SAFINA AL-BIRSARAT incident never argued that they were members of the armed forces of Somalia,²¹⁵ and their location and acts on the high seas suggested they were not.²¹⁶

However, some pirates may claim to be members of their nation's armed forces. Or they may claim to be a *levée en masse* repelling a perceived invasion. As long as these claims are reasonable, article 5 creates a rebuttable presumption that any person captured in an international conflict is a prisoner of war and entitled to a status hearing.²¹⁷

C. Application of the Fourth Geneva to Pirates

Captured pirates receive no protection under the Fourth Geneva because the terms used in the Fourth Geneva simply do not apply or apply only incomprehensively to pirates.

The Fourth Geneva protects civilians in times of war²¹⁸ and guarantees two kinds of protections: (1) special protections guaranteed to "protected persons" and (2) more general protections guaranteed to the whole populations of countries in conflict.²¹⁹

1. Fourth Geneva Special Protections for Protected Persons

Captured pirates are not protected persons under the Fourth Geneva.²²⁰ Under the Fourth Geneva, "protected persons" enjoy

214. See GOTTSCHALK ET AL., *supra* note 9, at 22 ("Modern pirates . . . are bloodthirsty slime creatures . . .").

215. Bahar, *supra* note 12, at 37.

216. See *U.S. Steps Up War Against Somali Pirates*, *supra* note 41 (stating that the pirates were eighty-seven kilometers, equal to about fifty-four miles, from the shore of Somalia when tracked down by the CHURCHILL). The territorial sea of any state is limited to twelve nautical miles. UNCLOS, *supra* note 69, art. 3.

217. Wallach, *supra* note 154, at 28 ("Article 5 . . . creat[es] a rebuttable presumption that any person captured in an international conflict is entitled to POW rights.").

218. Fourth Geneva, *supra* note 110, pmb.; see also Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 27 ("The Fourth Geneva Convention has to be read with the understanding that it focuses on the protection of civilians.").

219. Compare Fourth Geneva, *supra* note 110, art. 4, with *id.* art. 13.

220. If captured persons are thought to be pirates but actually are not, then they may be "protected persons" under the Fourth Geneva depending on their circumstances. However, as explained *supra* Part III, pirates do not have to be convicted of "piracy" in a municipal court to be pirates under international law. Naval and coast guard commanders should take care that captured persons they have labeled as pirates are actually pirates under international law before

particular rights.²²¹ Protected persons are “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals”²²² and who are not otherwise protected by other Geneva Conventions.²²³ Additionally, under the nationality requirement,

[n]ationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.²²⁴

Taken together, this language is even broader than the criteria of applying the Fourth Geneva as set forth in common article 2.²²⁵ In practice, however, its application is limited.²²⁶

There are three difficulties with the application of this definition of protected persons to pirates. First, capturing pirates has nothing to do with occupation, suggesting that this language was not written with pirates in mind. Second, it is unclear what “conflict” means. If conflict means the same thing as it does in common article 2, piratical attacks may not rise to the level of a covered “conflict.”²²⁷

Third, the nationality requirement is particularly unclear when applied to pirates. Under one theory, pirates have no nationality because they are enemies of all humankind.²²⁸ This rule is not simply rhetorical; it is sometimes difficult or impossible to determine the nationality of captured pirates.²²⁹ If pirates have no nationality, then they arguably

denying them Fourth Geneva “protected persons” status. However, there is no need to seek court approval or a criminal conviction before doing so.

221. Fourth Geneva, *supra* note 110, arts. 5-12, 35-141.

222. *Id.* art. 4.

223. *Id.*

224. *Id.*

225. *See id.* art. 2.

226. *See* Kenneth B. Brown, *Counter-Guerilla Operations: Does the Law of War Proscribe Success*, 44 NAVAL L. REV. 123, 153 (1997) (“While this definition seemingly encompasses a broad spectrum of individuals, it is, by necessity, much narrower. In practice the terms have been limited . . .”).

227. *See* discussion *supra* Part IV.A.2.

228. *In re Piracy Jure Gentium*, [1934] A.C. 586 (P.C.) (per Viscount Sankey L.C.) (appeal taken from H.K.) (“[A pirate] is no longer a national, but *hostis humani generis*, and as such he is justiciable by any State anywhere.”).

229. *See* WILLIAM LANGEWIESCHE, *THE OUTLAW SEA: A WORLD OF FREEDOM, CHAOS, AND CRIME* 71 (2004) (stating that the pirates who hijacked the ALONDRA RAINBOW were of uncertain nationality).

always meet the nationality requirement of the Fourth Geneva. But it is incongruous that a rule historically formulated to place pirates outside the law should be used under the Fourth Geneva to give captured pirates more protection.

2. Fourth Geneva General Protections for Whole Populations

Captured pirates receive no protection under the general protections of the Fourth Geneva. The Fourth Geneva guarantees certain very basic protections, such as protection and respect of the wounded, sick, infirm, and expectant mothers,²³⁰ to “the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.”²³¹ Read literally, and superficially, this language might guarantee Fourth Geneva general protections to captured pirates.

This language again appears to be broader than the criteria in common article 2 regarding whether the Fourth Geneva even applies.²³² Perhaps more significantly, this language is also incomprehensible when applied to captured pirates. First, there are usually no countries in conflict during a piratical attack because piratical acts under international law are, by definition, for private ends.²³³ Second, while the Fourth Geneva affirms equality of nationality, pirates *are* distinguished by their nationality (or lack thereof): Pirates are subject to universal jurisdiction precisely because they are enemies of humankind²³⁴ and lack the protection of any state.²³⁵ Third, these protections are expressly “intended to alleviate the sufferings caused by war.”²³⁶ As repeatedly noted above, piracy is an act outside the law of war and piratical attacks are not “war” in the colloquial sense of the word.²³⁷ Even if there is some international

230. Fourth Geneva, *supra* note 110, art. 16. Other basic protections are set forth in *id.* arts. 14-26.

231. *Id.* art. 13.

232. *Id.* art. 2.

233. UNCLOS, *supra* note 69, art. 101(a).

234. Peppetti, *supra* note 12, at 106 (stating that pirates’ status as *hostis humani generis* is one of two reasons they are subject to universal jurisdiction, the other reason being that no state possesses territorial jurisdiction on the high seas).

235. Deter, *supra* note 111, at 1098 (“The pirate, like the terrorist and the plainclothes spy, has placed himself outside the protection of any state . . .”).

236. Fourth Geneva, *supra* note 110, art. 13.

237. THE NEW SHORTER OXFORD ENGLISH DICTIONARY, *supra* note 2, at 3621 (“The state of . . . armed conflict between nations or states; armed hostilities between nations or States, or between parties in the same nation or State; the employment of armed forces against a foreign power, or against an opposing party in the State.”).

law concept that nonstates can make war,²³⁸ the use of the word “countries” in the Fourth Geneva makes such a concept inapplicable here.

V. APPLICATION OF THE U.N. CONVENTION AGAINST TORTURE

The United Nations Convention Against Torture grants two distinct protections to captured pirates. First, pirates cannot be tortured²³⁹ or ill-treated.²⁴⁰ Second, when cooperating with other states to punish pirates, as the United States and Kenya did in the SAFINA AL-BIRSARAT incident, the capturing state cannot turn the pirates over to another state for trial if there are substantial grounds to believe the pirates would be tortured.

A. *Application of UNCAT's Torture Ban*

UNCAT bans torture and ill-treatment of people by a state.²⁴¹ Specially, article 2 of UNCAT states:

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

238. Deter, *supra* note 111, at 1073 (“It has long been established in international practice that there might well be a war between a state and a non-state enemy . . .”).

239. Under the U.N. Convention Against Torture,

the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1(1), Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 [hereinafter UNCAT].

240. UNCAT does not define ill-treatment except as cruel, inhuman or degrading treatment or punishment other than torture. Rebecca B. Schechter, Comment, *Intentional Starvation as Torture: Exploring the Gray Area Between Ill-Treatment and Torture*, 18 AM. U. INT'L L. REV. 1233, 1244 (2003).

241. Eric Neumayer, *Qualified Ratification: Explaining Reservations to International Human Rights Treaties*, 36 J. LEGAL STUD. 397, 409 (2007); Yael Aridor Bar-Ilan, *Justice: When Do We Decide?*, 39 CONN. L. REV. 923, 925 n.1 (2007); Schechter, *supra* note 240, at 1240-41.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.²⁴²

Although a literal reading of article 2(1) might lead a reader to believe that torture is banned only in the territory of a party, article 5 makes clear that the ban is meant to cover actions on board ships.²⁴³

A party that captures pirates may not torture or ill-treat them.²⁴⁴ Persons who torture captured pirates should be punished under municipal law.²⁴⁵

B. Application of UNCAT's Refouler Ban

More interesting for the purpose of an analysis of the proper treatment of captured pirates is UNCAT's requirement that "[n]o State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."²⁴⁶

242. UNCAT, *supra* note 239, art. 2. UNCAT also requires:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Id. art. 16.

243. *Id.* art. 5. Article 5 provides:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
 - (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State. . . .

Id. If this were not the case, bizarre results could occur. For example, a state could put criminals onto ships, take them outside of their territorial waters, and then torture them with impunity. Clearly this is not what UNCAT has in mind. See John Ip, *Comparative Perspectives on the Detention of Terrorist Suspects*, 16 *TRANSNAT'L L. & CONTEMP. PROBS.* 773, 781 (2007) (arguing that states have a duty to apply human rights law beyond their territorial borders, the relevant question being whether the state has control and authority over a person physically outside the state).

244. Nearly every nation is a party to UNCAT, including the powers most likely to capture pirates such as Australia, China, France, Germany, Indonesia, Nigeria, the Philippines, the United Kingdom, and the United States (though some have signed on only with reservations). Notably for the purposes of international cooperation against piracy, Malaysia and Singapore are not signatories, and India has not ratified UNCAT. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 Dec. 1984, *available at* <http://www2.ohchr.org/english/bodies/ratification/9.htm#N11> (listing parties to UNCAT).

245. UNCAT, *supra* note 239, art. 4 ("1. Each State Party shall ensure that all acts of torture are offences under its criminal law. . . . 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.").

246. *Id.* art. 3(1). In its reservations upon ratification, the United States declared that it "understands the phrase, 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in article 3 of the Convention, to mean 'if it is more

This rule may have a significant impact on captured pirates because it severely limits the states to which a captured pirate can be taken for trial. There are no exceptions to this rule.²⁴⁷ UNCAT provides that “[f]or the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”²⁴⁸

These criteria conceivably disqualify many states that have the potential to be places for trials of captured pirates,²⁴⁹ including Bangladesh,²⁵⁰ Kenya,²⁵¹ and Nigeria.²⁵² UNCAT’s refouler ban clearly bars a capturing state from returning captured Somali pirates to Somalia.²⁵³ UNCAT could significantly complicate international cooperation between capturing naval powers and regional powers with blemished human rights records.²⁵⁴

likely than not that he would be tortured.” OHCHR—Committee Against Torture, Declarations and Reservations, <http://www.unhchr.ch/html/menu2/6/cat/treaties/convention-reserv.htm> (last visited Sept. 9, 2008).

247. Schechter, *supra* note 240, at 1243 n.57; see UNCAT, *supra* note 239, art. 2(2) (“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”).

248. UNCAT, *supra* note 239, art. 3(2).

249. See Bahar, *supra* note 12, at 81-84 (arguing for regional piracy courts to avoid the ad hoc nature of current piracy prosecutions). While a regional piracy court under the auspices of several states would make piracy prosecutions more regular and perhaps even help foster the rule of law in participating states, UNCAT’s refouler ban would limit the participation of some states and the proper placement of such a court.

250. 2007 U.S. STATE DEPARTMENT COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: BANGLADESH, <http://www.state.gov/g/drl/rls/hrrpt/2007/100612.htm> (last visited Sept. 9, 2008) (reporting lack of elections and torture by security forces acting with impunity).

251. 2007 U.S. STATE DEPARTMENT COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: KENYA, <http://www.state.gov/g/drl/rls/hrrpt/2007/100487.htm> (last visited Sept. 9, 2008) (reporting election irregularity along with widespread and open torture by police). The election problems that put the credibility of Kenya’s presidential election into doubt occurred in December 2007, well after the United States transferred the SAFINA AL-BIRSARAT pirates to Kenya. Therefore, the United States and Kenya’s cooperation at that time was presumably lawful.

252. 2007 U.S. STATE DEPARTMENT COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: NIGERIA, <http://www.state.gov/g/drl/rls/hrrpt/2007/100498.htm> (last visited Sept. 9, 2008) (reporting regular police beatings of protestors, criminal suspects, detainees, and convicted prisoners).

253. 2007 U.S. STATE DEPARTMENT COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: SOMALIA, <http://www.state.gov/g/drl/rls/hrrpt/2007/100504.htm> (last visited Sept. 9, 2008) (reporting a total absence of rule of law and that militias torture and abuse detainees and use rape as a weapon to intimidate and punish enemies).

254. Unfortunately, the United States has been accused of torturing persons captured during the War on Terror. Tom Lasseter, *U.S. Abuse of Detainees Was Routine at Afghanistan Bases*, MCCLATCHY NEWSPAPERS, June 16, 2008, <http://www.mcclatchydc.com/detainees/story/38775.html>; see Randall Mikkelsen, *CIA Says Used Waterboarding on Three Suspects*, REUTERS,

VI. APPLICATION OF MORALITY AND BASIC HUMAN RIGHTS

*A true system of politics cannot therefore take a single step without first paying tribute to morality. . . . The rights of man must be held sacred, however great a sacrifice the ruling power may have to make.*²⁵⁵

In addition to the protections provided by the Geneva Conventions and Convention Against Torture, captured pirates are protected by basic human rights law.

The protections that should be afforded to captured pirates cannot be found only in documents laying out specific provisions of the law of war and international law.²⁵⁶ These fields of study, in large measure, were founded on natural law²⁵⁷ rather than scraps of paper agreed to by individuals or states.²⁵⁸ Enlightenment philosophers—in both Europe²⁵⁹

Feb. 5, 2008, <http://www.reuters.com/article/topNews/idUSN0517815120080205?feedType=RSS&feedName=topNews> (noting that some consider waterboarding illegal torture). For an analysis of the legality of waterboarding, see generally Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT'L L. 468, 504 (2007) (concluding that waterboarding is torture and illegal). Although disturbing, handing pirates over to the United States may nevertheless not violate UNCAT's refouler ban because there is not the same type of confusion over the application of criminal justice to suspected pirates as there is to suspected terrorists: Pirates are to be brought to justice in a civilian court under existing U.S. law. The American civilian criminal justice system, despite its flaws, is generally regarded as free of torture. As long as the United States brought pirates to justice as the municipal piracy statute requires, it would not be unlawful to refouler pirates to the United States for trial.

255. IMMANUEL KANT, *Perpetual Peace: A Philosophical Sketch*, in KANT: POLITICAL WRITINGS 125 (H.S. Reiss ed., 2d ed. 1991) (1795). *But see* RUBIN, *supra* note 71, at 186, 206 (acknowledging that "he who takes force for the bottom line finds life in international society to be solitary, expensive, and probably nasty and brutish although perhaps not short" but concluding: "Do rules that bind the conscience bind the state? Rules that bind the conscience bind the conscience; rules that bind the state bind the state").

256. Detter, *supra* note 111, at 1054 ("We need to return to the clear concepts of natural law and of ethics to supplement rules made by states in treaties, agreements, and 'approved' customary rules."); *see* ICRC, Official Statement, The Relevance of IHL in the Context of Terrorism (2005), *available at* <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/terrorism-ihl-210705> ("Persons not covered by either the Third or the Fourth Geneva Convention in international armed conflict are entitled to the fundamental guarantees provided for by customary international law . . . as well as by applicable domestic and human rights law.").

257. "Natural rights are those which appertain to man in right of his existence." THOMAS PAINE, *Rights of Man*, in RIGHTS OF MAN, COMMON SENSE AND OTHER POLITICAL WRITINGS 119 (Mark Philp ed., Oxford University Press 1985) (1791).

258. *See generally* HUGO GROTIUS, THE LAW OF WAR AND PEACE (Francis W. Kelsey trans., The Liberal Arts Press 1925) (1625). *But cf.* RUBIN, ETHICS, *supra* note 71, at 19 ("[P]ositivism, obsessed with authority and contemptuous of moral balancing, dominates the thinking of statesmen and has so dominated since the seventeenth century regardless of the naturalist models adopted by the publicists whose writings seem to have survived with greatest reputation.").

259. *E.g.*, JOHN LOCKE, TWO TREATISES OF GOVERNMENT 289 (Peter Laslett ed., Cambridge University Press 2d ed. 1988) (1689) ("Reason . . . teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions."); IMMANUEL KANT, *The Metaphysics of Morals*, in PRACTICAL PHILOSOPHY 557 (Mary J. Gregor ed., Cambridge University Press 1996) (1797) ("But a human being regarded as

and America²⁶⁰—proclaimed a basic respect for the dignity of fellow humans.²⁶¹ The nations of the world affirmed the principal of human dignity in the United Nations Charter²⁶² and reaffirmed it in the Universal Declaration of Human Rights.²⁶³ Even if captured pirates were previously subject to whatever cruel whim their captors could design,²⁶⁴ civilized states do not act that way anymore.²⁶⁵

While all of the foregoing analysis could apply to any state that captures pirates, the United States military has a special responsibility to act humanely because of its history at the forefront of the law of war and human rights.²⁶⁶

a *person*, that is, as the subject of a morally practical reason, is exalted above any price; for as a person (*homo noumenon*) he is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in itself, that is, he possesses a *dignity* (an absolute inner worth) by which he exacts *respect* for himself from all other rational beings in the world. He can measure himself with every other being of this kind and value himself on a footing of equality with them.”).

260. *E.g.*, THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.”); 1 ALEXANDER HAMILTON, *The Farmer Refuted*, in THE WORKS OF ALEXANDER HAMILTON 87 (Henry Cabot Lodge ed., G.P. Putnam’s Sons 1904) (1775) (“[N]atural liberty is a gift of the beneficent Creator to the whole human race . . .”); see James Madison, *Essay*, NATIONAL GAZETTE, Mar. 27, 1792, reprinted in JAMES MADISON, JAMES MADISON’S “ADVICE TO MY COUNTRY” 83 (David B. Mattern ed., 1997) (“In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.”).

261. See Yehoshua Arieli, *On the Necessary and Sufficient Conditions for the Emergence of the Doctrine*, in THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 5 (Eckart Klein & David Kretzmer eds., 2002) (referring to the notions expounded in the Universal Declaration of Human Rights as “the direct offspring of the great ideas of the 18th century Enlightenment, of the American and French revolutions, of the movement towards democracy and of liberalism which shaped modern history”).

262. U.N. Charter pmb. (“WE THE PEOPLES OF THE UNITED NATIONS DETERMINED . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . .”).

263. Universal Declaration of Human Rights, G.A. Res. 217A, art. 1, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) (“All human beings are born free and equal in dignity and rights. They are endowed by nature with reason and conscience, and should act towards one another in a spirit of brotherhood . . .”).

264. GOTTSCHALK ET AL., *supra* note 9, at 28 (“[I]t is true that many offending pirates have had their necks stretched (or worse) after capture.”).

265. See Bahar, *supra* note 12, at 41 (reporting, from personal experience as the Staff Judge Advocate of the U.S. Navy NASSAU Strike Group between April 2005 and June 2006, that the pirates captured in the SAFINA AL-BIRSARAT incident were afforded basic human rights and never mistreated).

266. Walter R. Schumm, Bobby B. Polk, John Bryan, Frank Fornataro & Captain Jennifer Curry, *Treat Prisoners Humanely*, MIL. REV., Jan./Feb. 1998, at 83, 83:

For over 220 years, our nation’s founding principles have extolled the value of human life, and they form the basis for humane treatment of enemy prisoners of war. National ideals demand it, international law requires it. . . . Because the US Army’s honor and

VII. CONCLUSION

In order to fight against the scourge of global piracy, states will have to cooperate.²⁶⁷ But states must fight piracy in a legal way that respects the humanity of captured pirates. As explained above, some captured pirates may be prisoners of war, those that claim to be prisoners of war are generally guaranteed a hearing to determine their status, and no captured pirates may be tortured. Additionally, pirates must be afforded basic human rights.

Distaste for piracy unites both dominant naval powers and regional powers. The common cause all states have against pirates can create powerful synergies and result in cooperative solutions like the United States and Kenya employed in the SAFINA AL-BIRSARAT incident. Successful cooperation may lead more countries to assist in antipiracy efforts.²⁶⁸

However, ill-treatment, unfair trials, and torture of captured pirates will call into question the motives and values of states that participate in antipiracy efforts, especially in Southeast Asia where both piracy and opposition to U.S. foreign policy are high.²⁶⁹ Because every state has an investment in international shipping,²⁷⁰ it is in every state's best interest

reputation depend on firm but humane [enemy prisoner of war] treatment, we must uphold the highest standards of conduct.

See *Johnson v. Eisentrager*, 339 U.S. 763, 798 (1950) (Black, J., dissenting) ("Our nation proclaims a belief in the dignity of human beings as such, no matter what their nationality or where they happen to live.").

267. Peppetti, *supra* note 12, at 73; Bahar, *supra* note 12, at 7; Niclas Dahlvang, *Thieves, Robbers, & Terrorists: Piracy in the 21st Century*, 4 REGENT J. INT'L L. 17, 44 (2006).

268. See 2008 2ND QUARTER REPORT ON PIRACY, *supra* note 35, at 29 (acknowledging recent international cooperation against piracy); 2008 1ST QUARTER REPORT ON PIRACY, *supra* note 35, at 30-31 (reporting that Denmark is taking over a cooperative escort of Somali-bound food ships originally arranged between France and the U.N. World Food Program and that the United States has been donating radars to both Indonesia and Malaysia to assist in their joint patrols of the Strait of Malacca with Singapore).

269. THE PEW GLOBAL ATTITUDES PROJECT, THE PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, VIEWS OF A CHANGING WORLD 19 (2003) (reporting in June 2003 that just fifteen percent of Indonesian respondents expressed a favorable view of the United States, down from 61% in Summer 2002 and seventy-five percent in 1999/2000); THE PEW GLOBAL ATTITUDES PROJECT, THE PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, WHAT THE WORLD THINKS IN 2002 55 (2002) (reporting in December 2002 that thirty-six percent of Indonesian respondents expressed an unfavorable view of the United States); see also *Amid Loud Protests, Bush Praises Indonesia*, MSNBC, Nov. 20, 2006, <http://www.msnbc.msn.com/id/10362963> (describing a massive 13,000 person protest and other smaller protests against U.S. foreign policy and U.S. President George W. Bush in response to Bush's visit to Indonesia).

270. Bahar, *supra* note 12, at 75, and sources cited therein ("The situation is ripe for multilateral efforts with U.S. leadership. Economic incentives, for example, are well aligned."); see Yergin, *supra* note 38, at 78-79 (discussing the importance of international shipping of oil to the global economy); Luft & Korin, *supra* note 10, at 62 ("WATER COVERS almost three-quarters

that the fight against piracy remains legally and morally beyond reproach.

of the globe and is home to roughly 50,000 large ships, which carry 80 percent of the world's traded cargo.”).