Combating Maritime Perils in the Global Supply Chain: An Analysis of Force Majeure Clauses and the Doctrine of Commercial Impracticability in The Wake of "State-Sponsored Piracy"

Glenys P. Spence*

ABSTRACT

The laws of the oceans and seas have developed around the twin pillars of Maritime law and commercial law.[1] *These two legal spaces are inextricably linked because these laws were born in the same medieval space and developed apart from the common law.*[2] *Commercial law as we know it today has its genesis in the Lex Mercatoria or law merchant, which governed various commercial relationships.*[3] *Maritime law evolved from several medieval sea codes, chief among them being the Laws of Oleron, which governed freight and the relationships between the ship, seamen and merchants.*[4] *In medieval times, much like today, a significant portion of goods were shipped by sea. As a result, laws were needed to apply to the commercial disputes between merchants, most of which arose due to certain perils of the sea.*[5] *In particular, piracy was a*

* Glenys P. Spence, J.D. LL.M., Admiralty and Maritime Law, Assistant Professor of Law, University of Toledo College of Law.

1. *See generally* FREDERICK ROCKWELL SANBORN, ORIGINS OF THE EARLY ENGLISH MARITIME AND COMMERCIAL LAW 268-69 (Century Co. 1930) ("In the earlier part of the Middle Ages there were many of these towns, and they had jurisdiction both in maritime and in commercial causes. Such was the case at Ipswich, and the Red Book of Bristol says that the Lex Mercatoria applies to markets and instances ports as among the various sorts of places where markets are held. Pleas of merchants and sailors were tried in the Bristol Courts before 1241, and the maritime court of Yarmouth was in existence before the reign of Edward III. These local courts, then, were like the Continental courts and must have been the archetype for the later Admiralty Court since they had cognizance of both commercial and maritime cases.").

2. *See generally id.* at 268 n. 39 ("From very early times there had been in existence in some of the seaport towns 'port' or 'marine' courts which, sitting from tide to tide and administering the law maritime to merchants and mariners, had some of the characteristics of the Admiralty Court of later times.").

3. *Id.*

4. *See generally* THOMAS K. HEEBOL-HOLM, PORTS, PIRACY, AND MARITIME WAR: PIRACY IN THE ENGLISH CHANNEL AND THE ATLANTIC C.1280—C.1330, 127-29 (Brill 2013) (analyzing which laws regulated behavior at sea); *see also* SANBORN, *supra* note 1, at 269 n.54 ("There is no doubt that [the laws of Oleron] were the recognized code in matters within their scope in the courts of the boroughs long before those of the admirals came into being. . . . England based its maritime law also upon the laws of Oleron.").

5. *See* SANBORN, *supra* note 1, at 262 ("It was in the XVI Century that the results of the discoveries in the New World began to be felt in the redistribution of medieval trade along new routes. The overland routes began to decline, and transport on the sea received a new and a greater impetus. As never before, commerce took to the water, and voyages of commerce and of discovery were undertaken to the most distant parts of the globe. The old mercantile society underwent a metamorphosis, the Middle Ages came to an end, and the modern era began. The field of commerce was greatly extended; with improved

constant thorn in the maritime trade of the Middle Ages, and defining piracy and punishing pirates have challenged the maritime world ever since.[6]

This article examines the resurgence of maritime piracy as a threat to both international commercial transactions and the national security of the United States. I argue that this new wave of State-sponsored piracy will hamper the reasonable expectations of contracting parties because of the way piracy is traditionally defined in the general maritime law, U.S. statutes and international law.[7] *For contracting parties, this definition does not serve their interests because this State-sponsored form of piracy by the Houthi rebels is not perpetrated for private gain as contemplated in the definition of piracy. Rather, the attacks on ships in the Red Sea are solely for a political purpose.*

I. INTRODUCTION

The maritime industry is facing an old peril that threatens to disrupt global trade, and impact national and global security.[8] According to the U.S. Defense Intelligence Agency (DIA), global trade is currently facing a potential disruption from these activities.[9] (See Figures from the DIA at the end of this article). The

communications transactions were more rapid and larger sums of money were involved. Commerce now became thoroughly maritime and most truly international.").

6. *See id.* at 272 ("The records of this period are full of cases of piracy and of spoil at sea, and, as we have observed, they are to become the principal concern of the future Court of Admiralty.").

7. *See, e.g.*, Angelo Guisado, *Searching for Answers: Reprisals, Reckoning, and Recourse for Maritime Pirates*, 25 U.S.F. MAR. L.J. 121, 146-47 (2013) ("The argument is as follows: acts of violence committed on religious or ethnic grounds or for political reasons cannot be treated as piracy. Somali pirates could develop a political ideology or agenda that might provide mixed motivations for pirate attacks, causing a 'for private ends' issue.").

8. *See* DEF. INTEL. AGENCY, YEMEN: HOUTHI ATTACKS PLACING PRESSURE ON INTERNATIONAL TRADE (Apr. 5, 2024) ("Since November 2023, the Houthis have conducted dozens of attacks on commercial ships transiting the Red Sea, endangering civilian crews and threatening freedom of navigation through a critical global transportation route. The Houthis are non-state actors in Yemen who have used Iran's support to gradually expand their military capabilities since at least 2015. In early December 2023, the Houthis threatened to attack any ships that they believed were heading to Israeli ports, though many of their attacks both before and since have been against civilian ships with either tenuous or no known Israeli affiliations or port calls. Since mid-December 2023, the Houthis have also threatened to attack ships affiliated with the United States and its allies, including members of Operation PROSPERITY GUARDIAN, a multinational initiative to protect international freedom of navigation in the Red Sea. Despite seeking international legitimacy, Houthi actions have damaged regional security, impeded international humanitarian relief efforts, and put stress on global maritime trade."); *see also* The Lloyd's List Podcast, *Can Navies Protect Shipping?* LLOYD'S LIST (Aug. 9, 2024), https://perma.cc/U5M2-2GRH ("Since November we've seen nearly 90 incidents related to the Red Sea crisis and multiple piracy incidents, including hijackings in the Somali basin, and an uptick in events that could potentially become piracy attacks. Significant resources have been deployed in response to the Houthi attacks in the Red Sea, yet, transits through the Bab el Mandeb are consistently down 60% on normal volumes and ships are repeatedly coming under fire.").

9. *See* DEF. INTEL. AGENCY, *supra* note 8 ("As of mid-February, container shipping through the Red Sea had declined by approximately 90% since December 2023; shipping via the Red Sea typically accounts for approximately 10-15% of international maritime trade. Effects have been less severe in other shipping sectors carrying commodities on bulkers and tankers. Alternate shipping routes around

current piratical activity in the Red Sea signals the need for a reappraisal of the legal architecture surrounding this scourge.[10] The slow progress of international law because of its tether to past world events retards the growth of legal evolution for the twenty-first century. The COVID-19 pandemic exposed the fragility and vulnerability of maritime trade in the 21st century. So too is the resurgence of conflicts in the Middle East, the Russia-Ukraine war and the proxy war being waged by Iran with the unleashing of Houthi rebels in the Red Sea.

Currently, the shipping industry faces two old maritime perils: War and Piracy. The Israeli/Hamas war revived the threat of piracy to global shipping and daily reports highlight these attacks in the Red Sea, a major shipping corridor integral to global shipping.[11] Allegedly, the so-called pirates are backed by the Iranian government with the stated purpose of retaliation against Israel and the West for the conflict between Israel and Hamas, which began after the October terrorist attack on Israel by Hamas Militants. Since then, major shipping companies have reacted to these attacks by deviating shipments through the alternate route around the Horn of Africa, a longer and more costly route that would disrupt the business of shipping and pass costs onto consumers.[12]

Africa add about 11,000 nautical miles, 1-2 weeks of transit time, and approximately $1 million in fuel costs for each voyage. For many shipping companies, the combined costs of crew bonuses, war risk insurance (roughly 1000% more than pre-war costs), and Suez transit fees make the additional time and financial costs traveling around Africa less expensive by comparison. Threats to Red Sea transits are compounding ongoing stress to global maritime shipping caused by interruptions at the Panama Canal due to drought. As of mid-February, insurance premiums for Red Sea transits have risen to 0.7-1.0% of a ship's total value, compared to less than 0.1% prior to December 2023. As of February, humanitarian relief for Sudan and Yemen is being delayed by weeks and costing aid organizations more because of longer routes around Africa.").

10. Jordan Wilson, *The Rise, The Fall, and the Eventual Return of Modern Piracy: Addressing an Age Old Problem with Modern Solutions*, 47 J. MAR. L. & COM. 297 (2016) ("Political upheaval has paved the way for a quid-pro-quo relationship between these 'enemies of all mankind.' The rapid expansion of the Islamic State into Africa only magnifies this threat. It is therefore vital for global security interests to answer this growing threat with a robust strategy that calls upon both legal and military action.").

11. *See e.g.,* Connor Lahey, *Houthi interdictions in the Red Sea: Piracy or permissible?* AM. UNIV. COLL. OF L.: THE CRIM. L. PRAC. (Mar. 1, 2024), https://perma.cc/ENR2-KFKG ("On Nov. 19, 2023, a Bahamian flagged automobile-carrying cargo ship named Galaxy Leader sailed for India from Turkey, via the Red Sea, Southbound. As they made their way past the Yemeni port city of Al Hudaydah, a helicopter operated by members of the Houthi Rebel movement descended and disgorged a team of armed men, who proceeded to take the 25 merchant sailors aboard captive, seize control of the ship, and sail it to the port of Al Hudayah. This was the first action in a campaign of seizure and destruction of merchant shipping which has forced mass diversion of global shipping around the horn of Africa and jeopardized the personal security of many merchant sailors.").

12. *See* DEF. INTEL. AGENCY, *supra* note 8; *see also COSCO's Decision to Quit Israel Raises Strategic Concerns*, THE MAR. EXEC. (Jan. 28, 2024), https://perma.cc/X3XH-ZTY3; Michael H. Passman, *Interpreting Sea Piracy Clauses in Marine Insurance Contracts*, 40 J. MAR. L. L & COM. 59 (2009) ("Piracy at sea has plagued maritime commerce throughout the history of human civilization. There have been a substantial number of pirate attacks in the last several years. The rise of modern piracy has had important implications for both merchant shippers and insurance underwriters. For example, in the Gulf of Aden, insurance premiums have increased tenfold because of rampant piracy off the Somali coast.").

In the world of business transactions, contracting parties draft their agreements to accommodate foreseeable risks by way of *force majeure* clauses. The same is true in maritime commerce where all marine insurance policies contain a "perils clause" to accommodate the unique risks of shipping.[13] These perils are traditionally understood to be "Acts of God," the type of events that are absolutely beyond human control.[14] Under the general maritime law, the crime of piracy was generally regarded among the inherent risks typically covered under these marine insurance policies. Indeed, piracy is one of the "perils" listed in the original standard Lloyd's policy pursuant to the British Marine Insurance Act of 1906.[15] However, as maritime law has evolved, coverage for piratical attacks is not automatically covered and may be treated as an exclusion from coverage unless special coverage is obtained.[16] The burden is on the insured to show that any losses suffered is in fact a "peril of the seas".[17] In contract law, a *force majeure* clause, which contains a provision for piracy, will excuse parties from performance if that event occurs.

In this vein, contracting parties in the maritime industry will need to revisit their insurance coverage to procure separate coverage for these attacks.[18] The contract doctrines of excuse will not rescue these relationships because of the question of foreseeability. Even if parties include piracy in their *force majeure* clauses, the type of piracy contemplated in these clauses will not necessarily cover Red Sea piratical activities.[19] Even if it did, these attacks will be deemed

13. *See* Rosenthal v. Poland, 337 F. Supp. 1161, 1167 (S.D.N.Y. 1972) (Noting the common perils clause for maritime vessel insurance policies: "TOUCHING the Adventures and Perils which we the Assurers are contented to bear and do take upon us in this Voyage, they are, of the Seas, Men-of-War, Fire, Enemies, *Pirates*, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Taking at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People, of what Nation, Condition, or Quality soever, Barratry of the Master and Mariners, and all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Goods and Merchandise and Ship, &c., or any Part thereof . . . .") (emphasis added).

14. *See* Mamiye Bros. v. Barber S.S. Lines, 360 F.2d 774, 775 (2d. Cir. 1966).

15. *See* Marine Insurance Act 1906, 6 Edw. 7 c.41, § 3 (UK).

16. Mamiye Bros. v. Barber S. S. Lines, Inc., 241 F. Supp. 99, 108 (S.D.N.Y. 1965) ("The exception for 'perils of the sea' is very like in principle to that for an act of God. . . . 'Perils of the sea are understood to mean those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence.'").

17. Nw. Mut. Life Ins. Co. v. Linard, 498 F.2d 556, 561 (2d Cir. 1974) ("The burden of proof generally is on the insured to show that a loss arose from a covered peril.").

18. *See generally*, GRANT GILMORE & CHARLES L BLACK, JR., THE LAW OF ADMIRALTY 72 (Found. Press, Inc., 2d ed. 1975) ("The net effect is that there are two sorts of insurance in use today: ordinary marine and war risk. The perils clause in the ordinary marine policy does not mean what it says, but it covers only those risks which are not knocked out by the F. C. & S. [Free of Seizure and Capture] clause [T]here is some difficulty in distinguishing 'war risks' from 'marine risks' . . . .").

19. *See* Eric Danoff, *Marine Insurance for Loss or Damage Caused by Terrorism or Political Violence*, 16 U.S.F. MAR. L.J. 61, 70 (2004) ("A forcible taking at sea for profit is piracy, whereas a forcible taking in port or in local waters is one by assailing thieves. Like pirates, assailing thieves are out for personal gain, not political principle, and thus the term would not fit a politically motivated terrorist.").

foreseeable and the fact that costs may increase because of piracy will not excuse performance under the doctrine of commercial impracticability.

The pivotal question is whether these Red Sea piratical attacks constitute piracy or acts of war waged by a sovereign-by-proxy. These attacks have muddied the waters and the line of demarcation between piracy and war is hazy. For commercial parties and governmental actors, the answer to this question affects not only the business sector, but national security. Maritime piracy has always been an instrument of commercial obstruction because the activities are often linked to social, political, and economic issues.[20] Historically, the response to this scourge has been a multinational cooperation to capture and prosecute the perpetrators.

The threat from piracy has the potential to disrupt shipping and if it continues, performance of shipping parties would be rendered commercially impracticable.[21] As shipowners respond to ransom demands for the kidnapping of crew members, the costs of doing business will skyrocket. Moreover, the ability of shipowners to recruit crew is also impacted since the fear of being kidnapped or even killed will impact the employment of able-bodied seamen, a requirement for seaworthiness of ships under maritime law. In addition, the increased costs attributable to deviation of ships coupled with ransom demands could lead to scarcity of goods and spiral an increase in prices. Scarcity of goods coupled with increased prices can, in turn, lead to societal breakdown and civil unrest.[22]

II. THE CURRENT PROBLEM OF PIRACY IN THE RED SEA REGION

Before the current conflict, international shipping had begun to feel the impacts from the Russia/Ukraine war. The shipping industry was the first to feel the pains of the sanctions imposed by the United States and other governments on Russia. One of the first cases claiming excuse under a force majeure clause was a result

20. *See generally* JAMES KRASKA, CONTEMPORARY MARITIME PIRACY: INTERNATIONAL LAW, STRATEGY, AND DIPLOMACY AT SEA 6 (Praeger 2011) ("Piracy is important today because it threatens to disrupt communication links among nations, impeding the flow of world trade in oil, oats, and automobiles, and every other imaginable product and commodity. Because the liberal world order is dependent upon free and unfettered use of the oceans, maritime piracy is hostile to political stability and economic prosperity. Once again, prosperity and liberty are irreconcilably bound to freedom of the seas.").

21. *See generally* Daniel Pines, *Maritime Piracy: Changes in U.S. Law Needed to Combat This Critical National Security Concern*, 36 SEATTLE U. L. Rev. 69, 71 (2012) ("[T]he true threat posed by piracy, especially for the United States, is to our national security. George F. Kennan famously defined the term 'national security' in 1948 as 'the continued ability of this country to pursue its internal life without serious interference, or threat of interference, from foreign powers.' Under this definition, maritime piracy poses a clear national security threat to the United States.").

22. *See generally id.* ("Piracy threatens, and has taken, the lives of American crews and civilians. It poses an enormous economic threat, both in terms of ransom payments and impact on global commerce. It enhances political instability in significant regions of the world, such as the Horn of Africa and the Straits of Malacca. Most critically, though, maritime piracy offers an easy and tempting conduit for terrorism.").

of these sanctions.[23] But the resurgence of piracy in the Red Sea and Gulf of Aden (GOA) poses an even greater threat with the potential to plunge the world into a full-scale Middle East conflict.[24] The frequency of the attacks threatens to disrupt global trade beyond pandemic levels and poses a significant threat to U.S. national and global security.[25] According to a recent article by Lloyd, the end to these activities is nowhere in sight.[26] In fact, according to a recently unreleased UN Security Council report, the Houthis are building their pirate empire by exacting payments from the major shipowners in exchange for safe passage from the Red Sea blockade.[27]

This strategy of exacting payments from the major shipping companies to escape in exchange for cessation of piratical attacks is of global concern since these payments made by shipowners will increase the costs of shipping, which in turn affects the price of goods.[28] To date, more than 130 strikes have been launched on merchant ships traversing the region, the largest since World War II.[29] From all accounts so far, the Houthi threat in the Red Sea is not just a band of treasure seekers, but a powerful military organization with links to other militarized groups in the region.[30]

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23. *See* RTI Ltd v. MUR Shipping BV [2024] UKSC 18 (appeal taken from EWCA (Civ)) (holding that the reasonable endeavors exception to the force majeure clause did not justify the demand made by RTI that MUR accept payment in some other currency).

24. *See* Bridget Diakun, *Safety required for Red Sea normalization is nowhere in sight*, LLOYD'S LIST (Aug. 13, 2024), https://perma.cc/N2EL-YS6X (Quoting Cormac Mc Garry, director at Control Risks: "What is happening is not piracy. It is terrorism, and we have not had similar situations in the past few decades. We never have had to deal with drones and missiles. This is something which is absolutely new, absolutely horrific, and absolutely dangerous." The Houthis and the capabilities that they have demonstrated will be a long-term risk for the shipping industry beyond the war between Israel and Hamas.").

25. *See Red Sea Security Crisis Affects a Widening Swath of the Global Economy*, THE MAR. EXEC. (Jan. 25, 2024), https://perma.cc/DJQ5-RZ92.

26. *See* Diakun, *supra* note 24 ("There is no clearly defined path for shipping to return to Bab el Mandeb transits: 'This is something that is absolutely new, absolutely horrific and absolutely dangerous.'").

27. *See Report: Houthis On Track to Earn $2B a Year by Shaking Down Shipowners*, THE MAR. EXEC. (Nov. 4, 2024), https://perma.cc/7522-92PR ("A new report from the UN Panel of Experts on Yemen suggests that the Houthi group is extracting safe transit fees from owners—or else."); *see also* Richard Meade, *Houthi threat to shipping growing thanks to 'unprecedented' network of support*, LLOYD'S LIST (Nov. 4, 2024), https://perma.cc/8BTK-ZG4M ("UN Security Council intelligence has warned that the Houthis are extending their operational capabilities far beyond the territories under their control via a series of alliances that now include al-Qaida, al-Shabaab, Iran's Revolutionary Guard, Hezbollah and Hamas.").

28. *See* Ved P. Nanda, *Maritime Piracy: How Can International Law and Policy Address This Growing Global Menace?* 39 DENV. J. INT'L L. & POL'Y 177 (2011) ("Maritime piracy disrupts international navigation and trade and threatens the lives and property of people of many nations. Thus, because of both the human and commercial cost and the threat to regional security at sea, piracy has become a matter of grave concern for the international community and has consequently attracted global attention.").

29. *Report: Houthis On Track to Earn $2B a Year by Shaking Down Shipowners*, *supra* note 27.

30. *See* Meade, *supra* note 27 ("Overall, the UN Panel concludes that Yemen's Houthi rebels are transforming themselves into a 'powerful military organization' due to 'unprecedented' military support from outside sources.").

Piracy is not a novel issue.[31] In its infancy, the economy of the newly formed, United States was threatened by Barbary pirates after becoming independent from Great Britain and without a Navy to protect its commercial interests on the high seas.[32] In fact, from ancient maritime codes to the laws of the Admiralty in both British and American law, piracy is deemed as an inherent maritime peril. These asymmetrical methods of warfare have been waged throughout history as an instrument for control of the world's oceans. More importantly, control of these maritime spaces enables State hegemony on land because it is axiomatic that the control of the world's oceans is central to the locus of world power.[33]

Modern-day piracy as a State-sponsored issue began with the 1985 Achille Lauro incident.[34] In 1985, this Italian-flagged cruise ship was seized by the Palestine Liberation Organization (PLO), asserting revenge for Israel's imprisonment of fifty Palestinian prisoners. Just like the attacks today, the justification is linked to the age-old conflict between Israel and Palestine. At the time of the Achille Lauro incident, the attack was branded as a terrorist attack, instead of piracy. In the modern age, it is easier for the United States to respond to terrorist attacks than for piratical attacks, specifically when those attacks are State-sponsored. Although the Achille Lauro attack involved the taking of a vessel by force in the maritime space, it was seen as terrorism and not piracy. The definition of piracy under U.S. and international law hinders the prosecution of pirates because no nation has been willing to accept jurisdiction over the prosecution of pirates. Although the United States has successfully prosecuted pirates under our domestic statutes, jurisdiction over these actors is complex as demonstrated by the span of years between the prosecution of piracy cases in the United States.

Although President Biden acted in concert with the United Kingdom to respond militarily to the Houthi rebels in Yemen, the response is viewed in some circles as problematic since the former President did not seek Congressional approval to carry out these military strikes. The question arises as to whether the response to these attacks is appropriate since arguably, piracy is not a declaration of war by a sovereign. Moreover, is it proper under international and United

31. *See* Guisado, *supra* note 7, at 123 ("Termed 'peirates' as far back as 267 B.C. Greece, pirates have ensnared even the most revered historical figures, from Julius Caesar to Plato.").

32. *See* BRIAN KILMEADE & DON YAEGER, THOMAS JEFFERSON AND THE TRIPOLI PIRATES—THE FORGOTTEN WAR THAT CHANGED AMERICAN HISTORY 7-8 (Random House 2015).

33. *See generally* Admiral (R) Salim Dervişoğlu, *Who Dominates the Sea, Dominates the World*, TASAM (Mar. 25, 2023), https://perma.cc/U527-9K4X ("The great admiral of the Ottomans, Barbaros Hayreddin Pasha's very famous phrase 'Who controls the sea, rules the world' became widespread and was accepted, adopted and supported by the maritime nations, and even centuries later, the American Admiral Mahan spread his thoughts to the world in the same direction."); Sir Walter Raleigh, *A Discourse of the Invention of Ships, Anchors, Compass, etc*., in SIR WALTER RALEIGH'S JUDICIOUS AND SELECT ESSAYS AND OBSERVATIONS (1667) ("[F]or whoever commands the sea commands the trade; whoever commands the trade of the world commands the riches of the world, and consequently the world itself.").

34. Guisado, *supra* note 7, at 147 ("The ACHILLE LAURO, an Italian flag cruise ship sailing from Alexandria to Port Said, was seized by some members of the Palestine Liberation Front, which had noted political ideologies.").

States law to respond to piratical attacks through military strikes of facilities on land. These are questions that have not been clearly answered under United States law or international law. Moreover, the response to these attacks can trigger separation of powers issues under the War Powers, the Letter of Marque and Reprisals, and the Foreign Affairs Clauses.[35] What is needed is a clear definition of piracy because of the legal effects of state-sponsored and militarized attacks on maritime commerce, international business transactions and the national security of the United States. The current definition both defines and confines the interpretation of the term in commercial settings and the military response to the attacks on merchant shipping.[36]

III. DEFINITION OF PIRACY IN U.S. JURISPRUDENCE—THE SAME OLD SONG?

Historically, the crime of piracy is deemed as *"hostis humani generis,"*[37] a Latin phrase meaning enemies of all mankind. So defined, any country can employ their domestic laws to punish piratical actors regardless of where the act occurred.[38] Notwithstanding, there is still confusion in international debates over the definition of piracy and the propriety of punishment of pirates by States. Under the Alien Tort Statute (ATS), the Supreme Court has listed piracy as a possible violation of the law of nations.[39] The United Nations Convention on the Law of the Sea (UNCLOS), and the U.S. Piracy Statute also define piracy as a crime against the law of nations. The U.S. Constitution gives Congress the power to "define and punish piracy and felonies committed on the high seas and offenses against the law of nations."[40] The characterization of piracy as a crime against the law of nations happened in early international law. Pirates were

35. *See* JAY WEXLER, THE ODD CLAUSES—UNDERSTANDING THE CONSTITUTION THROUGH TEN OF ITS MOST CURIOUS PROVISIONS 132-34 (Beacon Press 2011) ("By including the Marque and Reprisal Clause in Article I, Section 8, the framers attempted to ensure that only Congress would have the power to commence armed hostilities against foreign nations. . . . By providing Congress the authority to issue such letters, the Framers gave Congress not only power over the initiation of warfare, but also over the conduct of naval warfare, in particular the power to determine who would be authorized to fight on behalf of the government, and the scope of and limitations of their authorization.").

36. *See, e.g.*, Lahey, *supra* note 11 ("There are two relevant questions here: Whether the Houthi fighters involved in these operations have committed piracy at international law, and whether the U.S. Navy has jurisdiction to enforce the relevant international law against these individuals involved in this series of operations.").

37. Paul R. Birch, Old Glory and the Jolly Roger: The Cultural Constraints and Strategic Imperatives of Modern Piracy (Jun. 2009) (Thesis, Sch. of Advanced Air and Space Stud., Air Univ., Maxwell A.F. Base), https://perma.cc/NR23-P9AC.

38. Yvonne M. Dutton, *Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court*, 11 CHI. J. INT'L L. 197, 203-04 (2010).

39. The Alien Tort Statute, 28 U.S.C. § 1350 (1948) (first adopted by the Judiciary Act of 1789) ("The district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004) (Alien Tort Statute provided the basis for district courts to exercise jurisdiction over a modest number of causes of action recognized under the law of nations, such as for offenses against ambassadors, violations of safe conduct, and *possibly for piracy*.) (emphasis added).

40. *See* U.S. CONST. art I, § 8, cl. 10 ("The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.").

deemed "*hostis humanis generis* by early international scholars who viewed piracy in a different light than as a lawful enemy as both Greece and Rome did.[41] Deemed as such, the killing of a pirate was permissible.[42] The perennial question is whether actors who perpetrate violence at sea based not on ***private ends***, but for political reasons, fall under the historical definition of piracy.

This question is of particular importance to global shipping concerns who are vulnerable to piratical attacks. The inherited legal definition of piracy in modern international law and in municipal laws such as the United States presents a dilemma for contracting parties and their insurers who are likely to claim that the current attacks are excluded from coverage for goods lost or damaged at sea or for increased costs of freight due to the Red Sea attacks.

Under the Law of the Sea Convention, piracy is defined as:

> 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 aircraft (or persons on property on board) either on the high seas or in a place outside the jurisdiction of any state.[43]

The Draft Piracy Convention defines piracy as:

> Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state:
>
> 1. An act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, ***for private ends*** (Emphasis added) without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. . . . .[44]

The Hollywood productions of pirate movies paint a romantic picture in the mind of moviegoers as swashbuckling actors fly across the screen adorned with

41. *See generally* Alfred P. Rubin, THE LAW OF PIRACY 19-23, University Press of the Pacific, HI 2006) (Alberto Gentilli (1552-1608) was the first writer to stamp an unlawful label on the practice of piracy).

42. See *generally* Tara Helfman, *The Dread Pirate Who? Challenges in Interpreting Treaties and Customary International Law in the United States*, 90 TUL. L. REV. 805, 822 (2016) (As the enemies of all mankind, pirates could be attacked in any place and by any person authorized by the sovereign to act in the interest of the public order of the high seas . . . . As the enemies of all mankind, pirates could be attacked in any place and by any person authorized by the sovereign to act in the interest of the public order of the high seas.).

43. *See* U.N. Convention on the Law of The Sea, Art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397.

44. *See* Joseph W. Bingham, *Research in International Law Part IV-Piracy: Draft Convention on Piracy*, 26 AM. J. INT'L L. SUPP. 739, 743 (1932).

eye patches and swords dangling from their hips.[45] From the early days, pirate movies starring venerable actors thwarting the murderous desires of Barbary pirates on the High Seas to tales of Captain Hook have whetted our appetites for this genre. In modern times, the handsome sweaty-clad, Jack Sparrow, adeptly portrayed by Johnny Depp and the Starz network "us-against-them" Black Sails series have all desensitized society to the scourge of piracy. But piracy is not romantic, and it is certainly not funny. In fact, piracy is akin to an act of war that threatens the global commons, maritime security, and thus the security of the United States.[46]

In addition to the Red Sea attacks, Somali pirates have also resumed their attacks in the Gulf of Aden and have become increasingly violent. As a result, more frequent, and aggressive pirate attacks could result in the loss of lives among crew members and passengers aboard hijacked ships since pirates are historically known to resort to violence, including murder, in pursuit of their objectives. Further, the potential loss of life is typically heightened in scenarios where pirates encounter resistance from crew members or encounter unforeseen complications during the hijackings. Moreover, it is estimated that the Gulf of Aden, a Somali pirate hot spot, is used by approximately 22,000 vessels annually, carrying around eight percent of the world's trade, including more than twelve percent of the total volume of oil transported by sea.[47] Therefore, it forms an essential oil transport route between Europe and the Far East. Disruptions to international trade routes could lead to the illegal dumping of pollutants and hazardous materials on the trade vessels, endangering marine ecosystems and biodiversity. A deliberate or accidental spillage of oil or other toxic substances into the marine environment could have devastating consequences for aquatic ecosystems, coastal communities, and livelihoods dependent on fishing and tourism.

The jurisdictional issue is one of the primary challenges in prosecuting piracy cases. Piracy typically occurs in international waters beyond the territorial jurisdiction of any single State, which raises questions about which State or States have the authority to prosecute these pirates. UNCLOS grants States the authority to prosecute pirates if the piracy occurs on the high seas or in exclusive economic zones.[48] However, coordinating jurisdiction among multiple States can be logistically and diplomatically challenging.

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45. *See* WEXLER, *supra* note 35, at 119 ("Americans adore pirates . . . But despite their curiously romantic appeal, pirates actually suck. They sucked back in the seventeenth and eighteenth centuries when they lawlessly plundered innocent ships with cannons and swords, and they continue to suck today, as they use their high-tech GPS equipment and automatic weapons to wreak havoc along the Horn of Africa and elsewhere.").

46. *See* Daniel Pines, *Maritime Piracy: Changes in U.S. Law Needed to Combat This Critical National Security Concern*, 36 SEATTLE U. L. REV. 69, 71 (2012) (Piracy threatens, and has taken, the lives of American crews and civilians. It poses an enormous economic threat, both in terms of ransom payments and impact on global commerce.).

47. Ved P. Nanda, *Maritime Piracy: How Can International Law and Policy Address This Growing Global Menace*, 39 DENV. J. INT'L L. & POL'Y 177, 178 (2011).

48. U.N. Convention on the Law of the Sea art. 100, 1833 U.N.T.S. 397 (Nov. 16, 1994).

Further, different States have different laws and procedures for suspected pirates, with some merely having a "catch and release" protocol. The legality problems of UNCLOS, however, center on the vagueness of UNCLOS itself, which has not yet been resolved by sufficient case law or clarification in legislation. Concerning the 1790 Act, while UNCLOS provides a definition of piracy, it does not similarly criminalize the offense, prohibit individual conduct, or provide for punishment. UNCLOS merely allows the States to do so and presumes to impose an obligation among the States to incorporate the provision into their domestic laws. Some argue that Article 101 should, therefore, be interpreted as a jurisdictional basis for the enforcement acts listed in the Convention but not a criminal norm and cannot serve as the basis for prosecutions.[49]

For the most part, States agree that "an act of violence other than war committed at sea constitutes piracy."[50] But this definition does not enjoy widespread acceptance. Some courts have not viewed politically motivated maritime attacks as piracy, reasoning that there is no intent to commit robbery for private gain. This reasoning has its genesis in 17th and 18th century jurisprudence which typically excluded politically motivated maritime attacks from the ambit of piracy.[51] In *The Ambrose Light*, the court held that "only those insurgents who had been recognized as belligerents by their own government or by another government would be exempt from acts of piracy."[52] In other words, these types of actors in the language of the time were privateers. It follows then, that under the principle of cases like *The Ambrose Light*, Red Sea attackers are not pirates since they are State-sponsored and are not committing these attacks for private ends.[53]

Today, there still needs to be universal agreement on what exactly constitutes the crime of piracy. This lack of clarity can lead to differing interpretations of what constitutes piracy and may complicate legal proceedings. Moreover, there are challenges related to the extradition and transfer of suspected pirates for prosecution. Due to the absence of functioning governments in places like Somalia and the limited capacity of regional States to prosecute piracy cases, international

49. Samuel Shnider, *Universal Jurisdiction over Operation of a Pirate Ship: The Legality of the Evolving Piracy Definition in Regional Prosecutions*, 38 N.C. J. INT'L L. 473, 481 (2013) ("UNCLOS itself is also ambiguous with its provisions relating to attempt and accessory crimes, which have not yet been fully interpreted in the context of criminal trials.").

50. *See* In re Piracy Jure Gentium, [1934] A.C. 586, 598 (U.K.), *reprinted in* 3 BRIT. INT'L L. CASES 836, 842 (1965).

51. *See e.g.*, The Ambrose Light, 25 F. 408, 412-13 (S.D.N.Y 1885).

52. *See generally* Konstantinos Mastorodimos, *Belligerency Recognition: Past, Present and Future*, 29 CONN. J. INT'L L. 301, 307 (2014) ("The customary law of war applies, including the relevant law for maritime war and insurgents "warlike activities, especially on the high seas, [will not] be . . . regarded as lawless acts of violence which, in the absence of recognition, might subject them to treatment as pirates.").

53. *See* The Ambrose Light, *supra* note 51, at 412 (noting that a key question in determining whether an act was piratical is whether the attackers "had or had not obtained any previous recognition of belligerent rights, either from their own government or from the political or executive department of any other nation; and that, in the absence of recognition by any government whatever, the tribunals or other nations must hold such expeditions . . . to be technically piratical.").

cooperation is often needed in apprehending, deporting, and transferring suspected pirates for trial, but it can be cumbersome and time-consuming. The international community has started to strengthen legal frameworks and enhance cooperation in prosecuting piracy cases in response to these challenges. This signifies a proactive response from the global community to combat piracy effectively, emphasizing the importance of collective action and mutual support in safeguarding maritime security and upholding international law.

Under Article 1, Section 8, Clause 10 of the U.S. Constitution, Congress has the power to define and punish acts of piracy committed on the High Seas and offenses against the law of nations. But how should we interpret this language? Generally, courts employ two canons when faced with modifying language in a statute.[54] The modifier under which courts attempt to lodge piracy is "against the law of nations." First, there is the last-reasonable-referent canon which states that subsequent modifying language usually only modifies the closest reasonable word.[55] Under this canon, the term, "piracy" would be modified by the term committed on the High Seas but would it be also modified by offenses against the law of nations.[56]?

The other canon, the last antecedent rule of construction, provides that a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows. The rule applies when the modifying clause appears at the end of a single integrated list. However, both constructions can be overcome through context because excluding piracy from the law of nations would result in absurdity because of the historical reception of the interpretation of piracy as a crime against all mankind and thus, an offense against the law of nations.

In the 1820 case, *Smith v. United States*, the Supreme Court, relying on the works of international publicists, concluded that the 1819 Piracy Statute incorporates the definition of piracy as a crime against the law of nations because it is a "robbery, or forcible depredations upon the sea."[57] The Court did not revisit this definition until a series of cases beginning in 2010. In the first case the district court relied on the definition in *Smith* and dismissed the charge of piracy because the defendant, Said, did not take anything of value.[58] A few years later, in 2012,

54. *See* BRYAN A. GARNER, MODERN AMERICAN USAGE 523-24 (2003).

55. *See* BRYAN A. GARNER, MODERN AMERICAN USAGE 523-24 (2003).

56. *See generally* Lockhart v. United States, 577 U.S. 347 (2016).

57. Smith v. United States, 18 U.S. 153, 182 (1820).

58. *See* United States v. Said, 757 F. Supp. 2d 554, 556-57 (E.D. Va. 2010), vacated, 680 F.3d 374 (4th Cir. 2012) ("Defendants were named in a live-count Indictment on April 21, 2010. On July 7, 2010, the Government filed an eight-count Superseding Indictment. The Government alleges that on or about April 10.2010 [*sic*], around 5:00 a.m., Defendants approached the USS Ashland in a small skiff in the Gulf of Aden. As Defendants' skiff became even with the USS Ashland on the USS Ashland's port side, at least one person on Defendants' skiff raised and shot a firearm at the USS Ashland. The USS Ashland responded by returning fire, destroying the skiff, and killing on of the passengers. At no time did Defendants board or attempt to board the USS Ashland. The USS Ashland crew members observed in the burning skiff, among other things, the remains of an AK-47 style firearm. Crew members of the USS Ashland then took Defendants into custody.").

in a series of consolidated cases arising from the capture of Somali pirates in the Gulf of Aden the courts were once again faced with the definition of piracy.[59] These cases were subject to a jurisdictional inquiry as to whether the action was a violation of U.S. law or general piracy under international law. These consolidated cases concerned a group of Somali pirates who had hijacked the vessels in return for ransom payments. Thus, the definition of piracy was satisfied in those cases compared to the *Said* case, where there was no robbery. Prosecuting piracy under a U.S. statute would be proper if the requisite territorial nexus is met. However, jurisdiction for general piracy must satisfy international consensus as to which acts constitute piracy. In the consolidated cases, the courts held that the prosecution of these defendants was proper under international law. In *United States v. Hasan* and *United States v. Ali*, the court held that piracy "must be defined according to contemporary customary international law" and that international law today is reflected in United Nations Convention on the Law of the Sea."[60]

One workable definition of piracy under international law arises from the British case, *In* re *Piracy Jure Gentium* (1934). In that case, no robbery occurred, and the defendants were ultimately acquitted. However, in a later discussion of this case, the Privy Council surmised that actual robbery was not an essential element of the crime of piracy and that a frustrated attempt to commit a piratical robbery was enough. Notwithstanding, the Privy Council acknowledged that in American law, a piratical act is one without the authority of a State. Viewed as such, even where there is no robbery, the crime of piracy exists as long as the act was not commissioned by a State. For purposes of universal jurisdiction under international law, the problem lies in the definition of piracy under international law.

Indeed, the revered publicists at the time defined piracy as "depredation on the seas, without the authority of a commission, or beyond its authority."[61] Under this definition, then, state sponsored attacks are not acts of piracy since these acts are authorized by a sovereign. Notably, this definition will not encompass the current piratical attacks against vessels in the Red Sea Corridor because these acts

59. *See, e.g.,* United States v. Hasan, 747 F. Supp. 2d 599, at 13 (E.D. Va. 2010).

60. United States v. Hasan, 747 F. Supp. 2d 599, 632–33 (E.D. Va. 2010), aff'd sub nom; United States v. Dire, 680 F.3d 446 (4th Cir. 2012) More specifically, the Court finds that the definition of general piracy under modern customary international law is, at the very least, reflected in Article 15 of the 1958 High Seas Convention and Article 101 of the 1982 UNCLOS. Because UNCLOS (1) contains a definition of general piracy that is, for all practical purposes, identical to that of the High Seas Convention, (2) has many more states parties than the High Seas Convention, and (3) has been much more widely accepted by the international community than the High Seas Convention, the Court finds that the definition of piracy in UNCLOS reflects the current state of customary international law for purposes of interpreting 18 U.S.C. § 1651. *See also* United States v. Ali, 885 F. Supp. 2d 17, 42 (D.D.C.), opinion vacated in part, 885 F. Supp. 2d 55 (D.D.C. 2012), rev'd in part, 718 F.3d 929 (D.C. Cir. 2013), and aff'd in part, 718 F.3d 929 (D.C. Cir. 2013) (Of the utmost significance, Resolution 2020 reaffirmed "that international law, as reflected in the [UNCLOS], sets out the legal framework applicable to combating piracy and armed robbery at sea.").

61. *See* United States v. Smith, 18 U.S. 153, 182 (1820).

are not *committed for private ends if the stated purpose is political retaliation against the State of Israel*.[62] Moreover, although the Houthis agreed with President Trump to halt their attacks on ships traversing the Red Sea in early May, subsequent reports provide that the group's attack on Israel will continue.[63] The United States, although not a party to UNCLOS, views piracy through similar lens in the U.S. Piracy Statute which states in pertinent part:

> "[w]hoever, 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." 18 U.S.C. § 1651.

The United States has adopted the definition of piracy under international law and has codified this definition in the Piracy Statute. By defining piracy in the same fashion as provided by international law, the U.S. has effectively hampered its power to prosecute maritime attacks on shipping when those attacks are tantamount to a declaration of war, and not piracy. The recent cases demonstrate the painful and torturous analysis in our piracy jurisprudence.

In the 2012 case, the 4th Circuit Court of Appeals relied heavily upon the definition in UNCLOS, which constitutes customary international law in the United States and Article 5 of the 1958 High Seas Convention, namely that the law of nations defines piracy to include acts of violence committed on the high seas for private ends without an actual taking.[64]

In *Dire*, the 4th Circuit Court of Appeals stated that jurisdiction over piracy can be exercised by any nation, but international consensus is required. Thus, where the U.S. captures pirates and prosecutes them in our courts, the jurisdictional nexus is met. But in *Dire*, the court cited frequently to *U.S. v. Said* for the proposition that piracy has not been adequately defined under U.S. Law. Critically, the *Said* court explained that the definition of piracy was "too unsettled to be authoritative and that relying on international law sources for the definition would violate due process."[65] In *Said*, the court refused to adopt the definition of piracy announced in *Smith* for this reason.[66]

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62. Christopher M. Blanchard, *Houthi Attacks in the Red Sea: Issues for Congress*, Foreign Affairs, U.S. Congress, (Sept. 6, 2024) (In October 2023, the Houthis threatened to intervene on behalf of the Palestinians against Israel, and in November the Houthis announced that they would attack Israeli ships in the Red Sea and downed a U.S. drone. In December, the Houthis expanded potential targets to include all ships sailing to Israeli ports if humanitarian aid delivery to Gaza was not expanded.).

63. *Houthis' Fight With Israel Could Mean Continued Risks for Shipping*, THE MAR. EXEC. (May 7, 2025), https://perma.cc/VVQ8-NKKN (Yemen's Houthi rebels have begun to clarify their version of the Red Sea truce agreement announced by the White House, and it appears that international shipping may still face risks on the waterway . . . . After Trump's statement, official Houthi media channels announced that the group would continue to attack Israel in retaliation for the ongoing military operations in Gaza. On Wednesday, Houthi spokesman Mohammed Abdulsalam emphasized that the new agreement with the White House did not affect the group's hostilities with Israel in "any way, shape or form.").

64. U.S. v. Dire, 630 F.3d 446, 459.

65. *See* Said, *supra* note 58, at 563-66.

66. *Id*.

In U.S. courts jurisprudence, the "law of nations" encompasses the crime of piracy because it is one of the enumerated "torts" in the 1789 Alien Tort Statute (ATS).[67] Under the law of nations, pirates are treated as *hostes humani generis*, and "are punishable in the tribunals of all nations."[68] The myriad definitions for piracy still beg the question of what is meant by "the law of nations." In *Smith*, Justice Story interpreted piracy as robbery upon the sea.[69] However, in a vigorous dissent, Justice Livingstone asserted that this definition did not comport with the Constitutional mandate that Congress has the power to define piracy and that our law should not be dependent upon such vague terms as the law of nations or other foreign definitions.[70]

In fact, the ancient laws of the admiralty that form the definition of piracy all seem to agree that sovereign-authorized attacks on vessels do not constitute piracy. Even under the Plunder of Vessels statute, the definition still excludes state-sponsored attacks.[71] Under this statute, the requirement is that the perpetrator must have an intent to plunder. But defining piracy either as actions without State authority or for private gain is problematic under modern international law and in the current environment because this would mean that the Red Sea attacks are not piratical if the intent is political or if the Houthis are State actors. The term "offenses against the law of nations" in U.S. jurisprudence has its genesis in the early interpretations of Roman law; namely the phrase, pirates are the enemies of all mankind.[72] It has been argued, however, that in this legal borrowing, the word piracy has been misinterpreted first by the common law and in public international law.[73] Pirates under Roman law did not fully evolve into *hostis humanis generis*,

67. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 132 (2013) (Breyer, J., concurring) ("In addition, § 404 of the Restatement [(Third) of Foreign Relations Law] explains that a 'state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade,' and analogous behavior.").

68. United States v. Smith, 18 U.S. 153, 156, 5 L. Ed. 57 (1820).

69. *Id.*

70. *See Id.*, 18 U.S. 153, 182, 5 L. Ed. 57 (1820) (Livingstone, J. dissenting) ([It] is the duty of Congress to incorporate into their own statutes a definition in terms, and not to refer the citizens of the United States for rules of conduct to the statutes or laws of any foreign country, with which it is not to be presumed that they are acquainted. Nor does it make any difference in this case, that the law of nations forms part of the law of every civilized country. This may be the case to a certain extent; but as to criminal cases, and as to the offence of piracy in particular, the law of nations could not be supposed of itself to form a rule of action; and, therefore, a reference to it in this instance, must be regarded in the same light, as a reference to any other foreign code.).

71. *See* 18 U.S.C.A § 1659 (West) (Whoever, upon the high seas or other waters within the admiralty and maritime jurisdiction of the United States, by surprise or open force, maliciously attacks or sets upon any vessel belonging to another, with an intent unlawfully to plunder the same, or to despoil any owner thereof of any moneys, goods, or merchandise laden on board thereof, shall be fined under this title or imprisoned not more than ten years, or both.).

72. *See generally* Alfred P. Rubin, THE LAW OF PIRACY 20-21 (discussing that the first writer to argue that what pirates do is forbidden by international law was Alberico Gentili who may have misquoted passages from Cicero).

73. *See generally id.*, at 102-103 (The misinterpretation of Roman law by English common law courts transformed piracy from a municipal crime into international law).

the enemy of all mankind, until about 534 A.D. in the Justinian Digests.[74] In earlier Greek and Roman history, piracy was frequently characterized as licensed warfare at sea.[75]

But we are still left with the gnawing feeling that the current piratical attacks in the Red Sea are not cognizable under any of these definitions of piracy. In *Smith*, Justice Story cited to one publicists' definition of a pirate as "one who roves the sea in an armed vessel without any commission or passport from any prince or sovereign state, solely on his own authority, and for the purpose of seizing by force, and appropriating to himself without discrimination, every vessel he may meet."[76]

Viewed in this light, the so-called Red Sea pirates is a misnomer since we are told that the attacks are sponsored by the government of Iran as a retaliation for Israel's attacks on Palestinians in Gaza. These attacks under the definitions in *Smith* are performed by commission from a "prince or sovereign state" and not for the individual pirates own private ends. Thus, the justification for the military strikes in Yemen would not be based on piracy, but as a reprisal for an attack by another sovereign. Indeed, during the First World War, the German U-Boat attack on the Lusitania merchant ship was a catalyst for the U.S. entry into that war.[77]

But the power here is specifically granted to Congress, not the President of the United States. Where the attacks are state sponsored, it is still the province of Congress to grant reprisals and make rules "concerning captures on land and water." Congressional approval is required for military attacks on Houthi/Iranian-controlled Yemen.[78]

Though the Supreme Court is wary of extending our statutes extraterritorially, the argument to protect commercial shipping may still win the day because the United States cannot sit idly by and countenance violence on the high seas.[79]

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74. *See generally id.* (positing that pirates began to be classified as brigands or robbers to differentiate between publicly declared enemies of Rome and those who were captured by robbers).

75. *See id*. at 1-18.

76. United States v. Smith, 18 U.S. 153, 163, 5 L. Ed. 57 (1820).

77. Library of Congress, https://perma.cc/NYM6-QCVG. The Lusitania Disaster (The sinking of the *Lusitania* was not the single largest factor contributing to the entrance of the United States into the war two years later, but it certainly solidified the public's opinions towards Germany. President Woodrow Wilson, who guided the U.S. through its isolationist foreign policy, held his position of neutrality for almost two more years. Many, though, consider the sinking a turning point—technologically, ideologically, and strategically—in the history of modern warfare, signaling the end of the "gentlemanly" war practices of the nineteenth century and the beginning of a more ominous and vicious era of total warfare.).

78. *See Four Senators Question Legal Basis for Strikes on Houthi Missile Sites*, THE MAR. EXEC. (Jan. 23, 2024), https://perma.cc/UZN6-9GD2.

79. *See generally* U.S. v. Hasan, 747 F. Supp. 2d 599, 632 (E.D. Va. 2010) ("[By] proscribing piracy in 18 U.S.C. 1651 pursuant to its definition under the law of nations, Congress created just such a statute, requiring the federal courts to look to customary international law."); *see also* Jordan Wilson, *The Rise, the Fall, and the Eventual Return of Modern Piracy: Addressing an Age Old Problem with Modern Solutions*, 47 J. MAR. L. & COM. 297, 298 (2016) ("This requires a comprehensive, yet unified, approach of partnering alongside regional allies. To successfully combat the growing link of terrorism and piracy, regional allies will need to focus on prosecuting captured pirates, stopping the money flow between pirate gangs and terrorist groups, and targeting terrorist networks using strategic military action. Universal jurisdiction provided within the scope of international treaties serves as the foundation for

There may be an implied duty to act within the ambit of universal jurisdiction where actions of one State threatens to destabilize global commerce. Thus, where the Iranian-backed Houthis are engaging in piracy as a way to wage war against other States, international law blesses the exercise of jurisdiction by the United States to repress piracy. [80] If the definition of piracy is broadened to mean "any act of hostility by any actor against merchant vessels," then such an unconstrained definition would serve the interests of shipowners and cargo interests in marine insurance policies. By removing the "robbery for private ends" definition, there can be no question that losses from the Red Sea attacks would be covered because under the Perils Clause, their actions would constitute piracy.[81]

IV. EARLY PIRACY IN AMERICAN HISTORY—THE SO-CALLED "GOLDEN AGE"

In the so-called, "Golden Age of Piracy," the colonial powers employed pirates to perpetrate violence against each other as they vied for control of newly created shipping lanes facilitated by early explorers such as Christopher Columbus, Vasco De Gama and Ferdinand Magellan.[82] In the 18th Century, the newly formed United States had to contend violent actors from the Barbary States, which led to the creation of the U.S. Navy under Secretary of State, and later President, Thomas Jefferson.[83] Thus piracy has been used as a militarized proxy tool

national courts in the region to re-establish the rule of law and transition from failed states to effective counter-piracy surrogates. The U.S. must stand ready to promote and enable the legal changes necessary while providing the assistance requited to effectively target and destroy the threat."); *See* U.S. v. Hasan, 747 F. Supp. 2d 599, 642 (E.D. Va. 2010); *see also* Jordan Wilson, *The Rise, the Fall, and the Eventual Return of Modern Piracy: Addressing an Age Old Problem with Modern Solutions*, 47 J. MAR. L. & COM. 297, 298 (2016) ("This requires a comprehensive, yet unified, approach of partnering alongside regional allies. To successfully combat the growing link of terrorism and piracy, regional allies will need to focus on prosecuting captured pirates, stopping the money flow between pirate gangs and terrorist groups, and targeting terrorist networks using strategic military action. Universal jurisdiction provided within the scope of international treaties serves as the foundation for national courts in the region to re-establish the rule of law and transition from failed states to effective counter-piracy surrogates. The U.S. must stand ready to promote and enable the legal changes necessary while providing the assistance requited to effectively target and destroy the threat.").

80. *See generally* Joel H. Samuels, *How Piracy Has Shaped the Relationship Between American Law and International Law*, 59 AM. U. L. REV. 1231, 1249 (2010) (discussing the case of Harmony v. United States, 43 U.S. 210 (1844), in which "[t]he Court interpreted 'piratical' in this context to be general, including any aggression belonging to a class of behavior commonly attributed to pirates, regardless of their motives . . . [T]he Court noted that 'a pirate is deemed, and properly deemed, *hostis humani generis*. But why is he so deemed? Because he commits hostilities upon the subjects and property of any or all nations, without any regard to right or duty, or any pretense of public authority.'").

81. *See generally* Arnould on Insurance, *Loss by Pirates, Rovers, and Thieves* Vol. 2, p. 821, sec. V (Amongst the perils which the underwriters avowedly make upon themselves in our common printed forms of policy, are those of "pirates, rovers, and thieves.").

82. *See generally* EUGENIO CUSUMANO & STEFANO RUZZA, PIRACY AND THE PRAVITISATION OF MARITIME SECURITY: VESSEL PROTECTION POLICIES COMPARED at 2.1 Piracy: From the 'Golden Age' to the Present 16-17 (2020).

83. *See generally* BRIAN KILMEADE & DON YAEGER, THOMAS JEFFERSON AND THE TRIPOLI PIRATES: THE FORGOTTEN WAR THAT CHANGED AMERICAN HISTORY 105-106 (2016).

throughout history and once again, this violence in the maritime space is being employed as a tool of war against maritime commerce.

For example, in the immediate aftermath of the Revolutionary War, piracy was used by the British against the young United States. Britain encouraged piratical attacks to crush the American economy and bring the country back into its colonial fold. In fact, at first, Britain and France both refused to use their power to quash the attacks by the Barbary Pirates on Mediterranean trade. It was against the backdrop that Thomas Jefferson decided to wage war on the Barbary States because the survival of the young Nation depended on it.[84] France also refused to use her power to quash piracy in the Mediterranean as to do so was to enable the strengthening of U.S. power which France wanted to contain to use in its ongoing fight against its old enemy—England.[85]

The Declaration of Paris in 1856 caused the decline of proxy wars through privateering.[86] All of the maritime powers with the exception of Spain and the United States signed this treaty.[87] In fact, in the treaty of 1778, France outrightly refused to supply protection against piracy to the United States even if it had so promised in the Franco-American Treaty of 1778.[88] Given these vacillations by these two great powers, the United States stood alone in the fight against the scourge of piracy and the Barbary States.

Today, a parallel can be drawn between these earlier conflicts and the Red Sea attacks on merchant shipping. Piratical attacks on merchant shipping were seen then as a weapon of war to destroy maritime commerce to weaken another country. The Houthis stated purposes in the Red Sea attacks stand in stark similarity.

A. America's Early Response to Piracy as an Attack on Trade

In 1789 when President George Washington began his new administration, the newly formed country was enjoying a robust trade with Europe.[89] Much like today, American maritime trade faced an enemy other than Britain—Barbary pirates from the nation of Tripoli and other Barbary States who plowed the Mediterranean Corridor preying on merchant vessels. For the young nation, this practice was tantamount to a full-scale war. As the first Secretary of State,

84. *See generally, id.* at 127-36.

85. *See* The Jefferson Papers (letter from De Choiseul,- "make no mistake about it. The true balance of power now rests in commerce and in America), translated from De Flassan, Histoire Generale et Rasionee de la Diplomatique francaise our de La Politique de la France (Paris 1811).

86. *See* The Declaration of Paris (Privateering is and remains abolished).

87. *Id.* (Smaller nations such as China refused to honor the treaty as well).

88. *See Treaty of Alliance with France: Primary Documents in American History*, LIBR. OF CONG., https://perma.cc/KEJ3-ASUD ("The Treaty of Alliance with France was signed on Feb. 6, 1778, creating a military alliance between the United States and France against Great Britain. Negotiated by the American diplomats Benjamin Franklin, Silas Deane, and Arthur Lee, the Treaty of Alliance required that neither France nor the United States agree to a separate peace with Great Britain, and that American independence be a condition of any future peace agreement. In addition to the Treaty of Alliance, the Treaty of Amity and Commerce with France was signed on Feb. 6, 1778, promoting trade and commercial ties between the two countries.").

89. KILMEADE & YAEGER, *supra* note 83, at 11.

Jefferson was handed the task to combat piracy in the Mediterranean and avert disaster to the American economy.[90]

To begin, Jefferson performed meticulous research with the aid of Captain Richard O'Brien, a sea captain who was captured by the Algerian Dey and used as a slave to carry out raids with the Algerian Navy. Using this "inside-man," Jefferson was able to collect the necessary intelligence on the state of the Algerian Navy in order to mount a counter-offensive against the Barbary States. He designed several naval strategies, which eventually brought an end to the Barbary scourge and in turn created the Worlds' best Navy.[91]

Prior to his appointment as Secretary of State, Jefferson along with John Adams, both ambassadors to France and England respectively, were aware of the problem of piracy in North Africa. For Jefferson, the crime of piracy was personal as an American who lived overseas. As Jefferson and his children were forced to travel across the high seas, North African pirates posed a clear and present danger to Jefferson's family and merchant shipping.[92]

The Barbary pirates, like the Houthis today, were sponsored by the State. America's Navy came into being as a response to the attacks from these Barbary pirates. As Secretary of State and as the third President of the United States, Jefferson was confronted with this very issue just as the Biden Administration and now the Trump Administration are today. Despite several setbacks and some humiliating defeats, the United States under Jefferson persevered against the Barbary States.

Currently, the new Trump administration is showing signs of following in the footsteps of Jefferson. Since taking office in January 2025, President Trump has taken aim at Yemen, the Houthi stronghold.[93] However, despite this showing of military action, the Houthis continue their attacks on merchant shipping in the Red Sea. In April, the USS Truman came under Houthi Attack and recently, the Houthis began to deny permission for vessels to depart the port of Ras Isa as retaliation for the U.S. strikes.[94] So far, President Trump appears determined to take

90. *Id.* (describing the dilemma faced by America's economy which depended on ongoing international commerce, specifically trade with southern Europe accessible only by sailing into the Mediterranean and within range of the Barbary pirates).

91. *See* Editorial Note: Reports on Mediterranean Trade and Algerine Captives, NAT'L ARCHIVES, https://perma.cc/SB23-DDGB.

92. *See* KILMEADE & YAEGER, *supra* note 83, at 6-9.

93. World, *U.S. strikes Yemen oil port in deadly escalation of trump's campaign against the Houthis*, PBS NEWS (Apr. 18, 2025), https://perma.cc/4D42-8N7B. (A U.S. airstrike on an important oil port held by Yemen's Houthi rebels killed more than 70 people and wounded many others, the Iranian-backed rebel group said Friday, marking a major escalation in the military campaign President Donald Trump launched against the faction last month. . . . The U.S. is targeting the Houthis because of the group's attacks on shipping in the Red Sea, a crucial global trade route, and on Israel. The Houthis are the last militant group in Iran's self-described "Axis of Resistance" that is capable of regularly attacking Israel.).

94. Report: USS Truman Lost Fighter While Maneuvering to Avoid Houthi Attack, THE MAR. EXEC. (Apr. 28, 2025), https://perma.cc/J4V4-Z2EU; Report: Houthis are Detaining and Threatening Vessels in Ras Isa Port, THE MAR. EXEC. (May 1, 2025), https://perma.cc/2PQS-3CY8.

the fight directly to Yemen, but the Houthi's resilience and dogged determination means that the group intends to keep up their activities.[95] Even after agreeing with the United States to halt the attacks, reports out of the region state that the group is bound and determined to continue attacks against Israel.[96]

B. Letters of Marque and Reprisals—The Overlooked Clause to Combat Piracy

The letters of Marque and Reprisals clause is among the most overlooked, maybe forgotten, clauses of the U.S. Constitution.[97] Under this clause, Congress has the power "to grant letters of marque and reprisals."[98] One main reason for the obscurity of this clause is that the enumerated power is fraught with its own perils, namely, that of the Separation of Powers concerning the War Powers granted to Congress and the Commander in Chief powers of the President. When it comes to acts of piracy, the foreign affairs power of the President is also triggered. Under Article II of the Constitution, the President is the "Commander in Chief of the Army and Navy."[99] On the other hand, the power to define and punish piracies and felonies lie with Congress. This brings us back to the current definition of piracy, which will support this enumerated power of Congress, but the current Red Sea attacks will not since these attacks do not fit into the definition.

Notwithstanding, the enumerated War Powers will also mean that retaliation against the attacks on a large scale will also be in the province of Congress. Looking back at Jefferson's fight with the Barbary States, one could argue that the Constitution contemplated a sharing of the War Powers and the Commander in Chief powers when it comes to maritime warfare.[100] Jefferson deployed this power by his response to Barbary piracy. Needless to say, the Red Sea crisis has constitutional separation of powers implications.

From a high value presidential powers standpoint, the current crisis could be seen as one in which the commander in chief power is paramount. The Colonial Government's use of privateers during the Revolutionary War, President

95. Emily Milliken, *Can Donald Trump "completely annihilate" the Houthis in Yemen?*, THE ATLANTIC COUNCIL, (Apr. 7, 2025), https://perma.cc/ED32-L32D (Despite a forceful military intervention from the Saudi-led international coalition against the group since their 2014 takeover of the capital in Sanaa, the Houthis have maintained, and expanded, their control in Yemen. The once small rebel group has evolved into a formidable military force, with emerging international support helping to enable their expanding maritime threats.).

96. THE MAR. EXEC., *supra* note 63.

97. *See* WEXLER, *supra* note 35, at 121 (stating that "[t]he United States hasn't issued a letter of marque or reprisal in almost two hundred years.").

98. *See* U.S. CONST. art. I, § 8.

99. *See* U.S. CONST. art. II. 2, Cl. 1: ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.").

100. *See* WEXLER, *supra* note 35, at 131 (comparing the relationship between the War Powers Clause and the Letters of Marque and Reprisal Clause to the symbiotic relationship between the Egyptian Plover and the Nile Crocodile).

Jefferson's actions during the Barbary attacks, and Lincoln's contemplation to use privateers to respond to the Confederate attacks on maritime trade during the American Civil War, though in the end declining to use privateers, demonstrate that when the nation faces these quasi-sovereign threats, presidential powers are at its highest.[101]

Here, the Commander in Chief clause can be construed not as declaring war, but thwarting threats against the national security and commerce of the United States. The powers exercised in the early days of the Republic bears out this premise. The threat to national security and the commerce of the young Nation allowed President Jefferson to marry the Commander in Chief clause with the Letters of Marque and Reprisals clause to thwart the desires of the Barbary states along with the duplicity of the maritime powers at the time towards the young United States: namely Great Britain and France.[102] The powers so deployed protected the national security of the United States and strengthened maritime commerce.

From the earliest maritime records to the 14th through the 18th centuries, sovereign nations have authorized letters of marque to protect the national security and commerce of their countries and dominions. Under the original understanding of international law, the sovereign prerogative in combating maritime attacks provided an alibi for any loss of life. In fact, the letter of marque was the line of demarcation between piracy and acts of the sovereign. Since 2009, in the aftermath of the Maersk Alabama (Captain Phillips) incident, some policy makers in the United States have asserted that the United States has the power to respond to violence on the high seas through the use of private vessels to solve the issue of piracy.[103] The issue here, of course, would be the constitutionality of such actions. Although there is a good argument to be made that since the United States is not a party to the Paris Declaration Respecting Maritime Law, the issuance of letters of marque to contain the current crisis will not run afoul of the Constitution.[104] The Declaration abolished privateering, which the United States never acceded to.[105]

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101. *Id.* at 132-33 (explaining the scholarly debates surrounding the War Powers and the Letters of Marque and Reprisal Clauses: On the one hand, scholars such as John Hart Ely argue that both clauses confer powers only on Congress and not the President; on the other hand, scholars such as John Yoo argue that letters of marque and reprisal were intended to be used by the President for so-called imperfect wars and for commercial purposes.).

102. *Id.*

103. *Id.* at 121 ("If we have 100 American wannabe Rambos patrolling the seas, it's probably a good way of getting the job done.").

104. Paris Declaration Respecting Maritime Law, Apr. 16, 1856, INT'L COMM. OF THE RED CROSS, https://perma.cc/R98W-UGFJ.

105. Jan Martin Lemnitzer, *How Instant and Universal International Law Is Born and How It Dies: The 1856 Declaration of Paris*, *in* 101 IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE, INTERNATIONAL LAW AND TIME: NARRATIVES AND TECHNIQUES 113, 115 (Klara Polackova Van der Ploeg, Luca Pasquet, & León Castellanos-Jankiewicz eds., 2022) ("The Declaration of Paris [] provides an opportunity to observe the lifespan and transformations of a treaty and its rules, as the Declaration succeeded in achieving universality against the determined opposition of the United States, which refused to join the treaty and fought a campaign to prevent the creation of a customary norm banning privateering." "[The Declaration's] instant success was thwarted by a model case for the early

Moreover, from an international law standpoint, the President has the power to conduct foreign affairs. To the extent that the President exercises this power to work with other foreign nations to respond to Red Sea attacks may also hold Constitutional water under the Foreign Affairs Clause. Regardless of who holds the power in the space, action must be taken. Without a governmental response, the task of combatting piracy in the Red Sea is left up to private parties who are unsure of the legality of hiring private maritime security contractors (PMSCs) to stave off these attacks.[106] But the scale of the current crisis and the legal hurdles that accompany military action by the United States and other governments, PMSCs may be a temporary answer to combat these attacks.[107]

C. Private Maritime Security Companies as Modern-Day Privateering

The employment by shipping companies of private maritime security companies is akin to the privateering employed by European Monarchs in earlier centuries and then the by United States at the Founding. The modern PMSC industry was created by oil companies as a response to piracy in the Gulf of Aden and other acts of piracy.[108] Some scholars view PMSCs as a proper response to maritime security threat. Others view them as illegal soldiers of fortune.[109] Just as the

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existence of a persistent objector rule since the United States fought tooth and nail against the Declaration and actively campaigned to prevent other states from joining. It favored the neutral rights included in the treaty but was steadfastly opposed to the way the Declaration linked them to a permanent abolition of privateering, then the United States' main strategic weapon in case of a war with Britain.").

106. *See* Grace Rodden & James Walsh III, *The Legal Issues of Private Armed Security on Commercial Ships*, 58 FED. LAW. 30, 32 (2011) ("The IMO [International Maritime Organization] discourages placing arms on commercial ships. In its latest report, the IMO Maritime Security Council reaffirmed its stance against shipowners' use of PSCs for Gulf of Aden transits, even though the IMO previously decided that the 'carriage of firearms was a matter for flag States to decide.' The IMO has several reasons for its current position: . . . [it] is concerned that armed guards on ships will cause violence to escalate, resulting in more deaths and injuries to ships' crews[;] [t]he use of force at sea by PSCs and by pirates may impose additional dangers to vessels, persons, and cargo (including flammable cargo and hazardous materials), and the IMO fears that some of the weapons used by PSCs and Somali pirates could cause a leak of hazardous material or even an explosion onboard[;] [t]he rules governing PSC personnel's use of force are unclear[;] [and] [i]t is uncertain whether individual employees of a PSC and the PSC itself may be held accountable both civilly and criminally for wrongdoing resulting from the use of force.").

107. *Id*. at 33 (citing Carolin Liss, *Privatizing the Fight Against Somali Pirates* (Murdoch Univ. Asia Rsch. Ctr., Working Paper No. 152, 2008) and Dana M. Parsons, *Protecting the Booty: Creating a Regulatory Framework to Govern Increased Use of Private Security Companies in the Fight Against Pirates*, 35 TUL. MAR. L. J. 153, 169, 176-77 (2010)) ("The use of PSCs increasingly has the approval of industry and the implicit approval of governments as a suitable alternative to a multinational naval coalition that is unable to protect every ship sailing in high-risk waters.").

108. *Id*. at 30 ("These seizures present the commercial industry with a difficult choice: pay the ransom, knowing that these payments encourage and fund future attacks, or refuse to do so and thereby risk the safety of the crew and fate of the ship. The international community's early failures to coordinate efforts to combat Somali piracy were attributable to an inadequate naval presence as well as an insufficient capacity and will to prosecute the perpetrators. This failure to combat the Somali piracy allowed the pirates to grow stronger, wealthier, and more daring.").

109. *Id*. at 33 ("Having the loosely regulated PSC industry enter into contracts with private shipowners raises some concerns among states, the international legal community, and private industry. The private contractual agreement arguably makes it easier for PSCs to evade compliance with

use of privateers were instrumental to Great Britain's dominance of the seas in earlier centuries, the use of PMSCs can be employed based on the same justifications.[110] Privateering was considered as a legitimate use of force under international law because, as stated earlier, the letters of marque carried by these privateers drew a clear line to separate them from pirates. "A Letter of Marque and Reprisal was an official warrant or commission from a government authorizing the designated agent to seize or destroy specified assets belonging to another party that had committed some offense under the "law of nations," the older term for "international law. A Letter of Marque usually was used by a government to authorize privateers to raid and capture merchant shipping of an enemy nation."[111]

The service of privateers was primarily used by governments as naval guerilla warfare units that both protected their countries ships on the seas, but also attacked the naval and economic cargo ships of interest of their enemies.[112] Historically, privateers were immune to piracy charges protected by their Letters of Marque.[113] Under British law, specifically the Offences at Sea Act of 1536, the raiding of a ship without a valid commission of Letters of Marque was seen as an act of piracy.[114]

Ultimately, privateers had wide discretion as to what they could or could not do so long as they remained loyal to their sovereign nation, in this case, Great Britain.[115] There may be no better example of early privateers and the purpose that they served than Sir Francis Drake.[116] Francis Drake was a commissioned privateer during Queen Elizabeth's reign.[117] Drake was instrumental in fighting the Spanish Armada on behalf of Great Britain.[118] However, despite his many successful and infamously unsuccessful battles against the Spanish Armada,

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international and domestic laws, and shipowners may ultimately be held responsible for actions taken by PSC personnel. PSCs operating under government contracts have been accused of human rights abuses, corruption, criminal violations, and disproportional use of force.").

110. *Id.* at 31 ("Maritime Security Directive 104-6 (series) provides guidance to U.S. vessels engaged in voyages through high-risk waters and encourages U.S. vessels to consider using private security contractors. The Coast Guard has also developed piracy-related Port Security Advisories to provide additional guidance and direction to U.S. vessels operating in high-risk waters.").

111. Arthur T. Downey, *Deviations from the International Rule of Law: An Historical Footnote*, 56 VILL. L. REV. 455, 456 (2011) (In the early days of this formalized practice, privateers were mostly thought of as an extension of the navy and government that they represented. As scholar Arthur Downey wrote, "Public navies were expensive and they had to be maintained in peacetime as well as in wartime, and so governments relied heavily on private initiative and enterprise to fight their wars. The system worked because it was backed by a substantial array of laws, including prize courts and bond requirements.").

112. *Id.*

113. Cale Gressman, *A Brief History of English Privateers Discover the History of English Privateering from its Origins to its End*. THE COLLECTOR (May. 9, 2023), https://perma.cc/5FJN-N38A.

114. Offences at Sea Act 1536, 28 Hen. 8 c. 15, § 1, 2, (Eng.).

115. Gressman, *supra* note 113.

116. *Id.*

117. *Id.*

118. *Id.*

Francis Drake was equally famous for capturing enormous amounts of wealth, usually in the form of gold, silver, and other precious metals for Queen Elizabeth.[119] Drake is the perfect example of how muddy and confusing these early privateers were. In many ways, privateers were contracted private military vessels conducting the business of the sovereign nation that commissioned them. Drake alone fought dozens of battles against the Spanish Armada during his time that was directly on behalf of the English crown.[120]

However, there is the other side of Drake's career that many to this day consider piracy itself. Specifically, Drake's raiding of Spanish Armada ships for gold, silver, and other natural resources, along with his involvement in the slave trade, has spurned many to conclude that Drake, and privateers in general, were not so different than pirates.[121]

However, privateers of this time, regardless of the negative stereotype and affiliation with acts of piracy, were primarily viewed and considered to be a naval warfare force contracted and commissioned by their respective governments.[122] Their job was simple: attack and cause as much damage to their government's enemies as possible. Under Letters of Marque, privateers protected their nations' commerce and, in turn, their national security. Although the acts of some privateers have been sharply criticized and denigrated in modern scholarship, it is important to understand the context in which they were deployed.[123]

During the Revolutionary War, when money was tight, the colonies could not sustain an organized naval force to respond to Confederate attacks. Thus, the only option was to rely on these privateers against the British. Under Letters of Marque, these privateers were de jure state actors engaged in acts of war, not acts of piracy. Without the use of privateers, the Revolutionary War may have been lost or success may have come much later. The same would be true for the War of 1812.[124]

PMSCs, though largely employed by private parties share parallels to their privateer counterparts. PMSCs offer a variety of services to their clients, including intelligence, infrastructure security, route mapping, and risk analysis. The functions performed by these contractors are not the answer to the current problem, but to help mitigate shipping costs, the loss of seamen's lives, and the general health of maritime commerce, it seems to be a temporary measure. It is not practicable to solve this problem by relying on the use of navies. Currently, the world is

119. Jamie LeAnne Hager, *The Pirate and the Privateer: A Comparative Study of Sir Francis Drake and Henry Morgan,* 1, at 4 (2008).

120. Sir Francis Drake, (June 6, 2023), https://perma.cc/D2X7-V3N6.

121. Gressman, *supra* note 113.

122. *Id.*

123. *Id.*

124. See WEXLER, *supra* note 35, at 128 ("Letters of marque and reprisal played an important role for the American colonies during the Revolution . . . They had to rely heavily on private vessels to . . . capture British ships. . . In the War of 1812, . . . ships sailing under letters of marque was even greater. Only twenty-two ships sailed for the American Navy, while several hundred private ships sailed with letters of marque.").

facing not only these piratical attacks, but the Russia/Ukraine war, the escalated war in Gaza exacerbated by threats from Iran and Hezbollah. The current crises demand the services of an already-stretched military.

Maritime Contracts—Old Threats—New Enemies

War and piracy are the oldest threats to maritime commerce. Hostilities against commercial transportation led by militant factions for political gain are not new. The impact on shipping from the Red Sea piracy was immediately apparent.

The shipping business usually involves several sophisticated parties. As a result, maritime contracts can be highly complex and apportioning costs for losses can be a herculean task.[125] Courts in the United States tend to interpret maritime contracts by borrowing from the common law of contracts or when applicable in reference to federal maritime statutory law. There have also been maritime cases where the court employed provisions from the UCC.[126] However, when a vessel is attacked by an act of war or a restraint of a government, special maritime defenses will be applied. The task that await the courts is whether to adopt some of these ancient maritime principles to the new realities faced by global trade. Arguably, the closure of the Suez Canal in the 1950s may have been foreseeable to shipping interests. Moreover, piracy with its long and storied history is also foreseeable. However, as stated earlier in this article, the law that was designed to deal with piracy then is ill-equipped to deal with piracy today.

The Suez Canal paradigm provides the bedrock principle for non-performance of maritime contracts. Contractual issues stemming from the current Red Sea crisis will be addressed by courts in both the United Kingdom and the United States along the same lines as the general contract cases. In these cases, the United States followed the U.K. precedents, which provided that a shipping party will not be excused from performance under any of the excuse doctrines.[127] In the event of closure of sea lanes to maritime transportation, the expectation set by these precedents is that ships must use any alternate routes to deliver cargo. In these situations, the Piracy Peril will not provide an excuse from performance. Absent an act of God, contracts must be performed notwithstanding changed circumstances.

A. Excuse from Performance Under U.S. Law—Force Majeure and the Doctrines of Excuse

Courts in the United States approach the doctrines along the line of the Paradine and the Suez Canal paradigms. With the exception of a few cases, our courts stress the foreseeability principle and tend to interpret force majeure

125. *See generally*, Detlev F. Vagts, *Rebus Revisited: Changed Circumstances in Treaty Law*, 43 COLUM. J. TRANSNAT'L L. 459, 462–63 (2005) (suggesting there are complications when contracts are sophisticated enough to address certain contingencies but not the particular one that happens).

126. *Compare* Princess Cruises v. General Electric Company, 143 F.3d 828 (4th Cir. 1998) (applying the U.C.C.), *with* Carnival Cruise Lines v. Shute, 499 U.S. 585 (1991) (applying common law).

127. *See e.g.* Glidden v. Hellenic Lines, 275 F.3d 253 (2d Cir. 1960).

clauses narrowly. In *Mineral Park Land v. Howard*, the court held that even if performance did not become impossible, the increased costs of performance to the breaching party made performance impracticable.[128] Later in *Westinghouse*, a case that was later settled out of court, the court leaned towards allowing the defense of impracticability due to increased costs.[129] Other than a few cases, none of the excuse doctrines enjoys success in U.S. courts. Even where there is a force majeure clause containing the usual events, if the clause does not specify the particular event, some courts will not excuse the non-performing party.[130]

The doctrine of force majeure does not enjoy equal treatment across all legal systems.[131] In cross-border transactions, the doctrine is fraught with peril as some legal systems limit the scope of the doctrine.[132] Even if a force majeure clause calls for excuse of performance due to piracy, a party may not be excused if that piracy is not of the type contemplated by the clause, which relied on the current definition of piracy at the time a contract was executed.[133]

The doctrines of excuse, impossibility, frustration of purpose, and commercial impracticability have dogged the modern landscape of commercial law. These

128. *See* Min. Park Land Co. v. Howard, 172 Cal. 289, 291, 156, 458, 459 (1916) (finding that the plaintiff's land contained earth and gravel far in excess of 101,000 cubic yards of earth and gravel, but that only 50,131 cubic yards, the amount actually taken by the defendants, was above the water level. No greater quantity could have been taken 'by ordinary means,' or except by the use, at great expense, of a stream dredger, and the earth and gravel so taken could not have been used without first having been dried at great expense and delay. On the issue raised by the plea of defendants that they took all the earth and gravel that was available the court qualified its findings in this way: It found that the defendants did take all of the available earth and gravel from plaintiff's premises, in this, that they took and removed 'all that could have been taken advantageously to defendants, or all that was practical to take and remove from a financial standpoint'; that any greater amount could have been taken only at a prohibitive cost, that is, at an expense of ten or twelve times as much as the usual cost per yard.).

129. *See* In re Westinghouse Elec. Corp. Uranium Conts. Litig., 76 F.R.D. 47 (W.D. Pa. 1977).

130. *See* Allegheny Energy Supply Co., LLC v. Wolf Run. Mining Co., 53 A.3d 53, 61 (2012) ("'*force majeure*' means any causes or circumstances beyond the reasonable control and without fault or negligence of the party affected thereby or of its subcontractors or carriers, such as, acts of God, governmental regulation, war, acts of terrorism, weather, floods, fires, accidents, strikes, major breakdowns of equipment, shortages of carrier's equipment, accidents of navigation, interruptions to transportation, embargoes, order of civil or military authority, or other causes."). *But see* Harold J. Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413 (1963) (stating that "[I]mpossibility caused by certain types of events (so-called *force majeure*) does constitute a cause of exoneration in most of the major legal systems of the world, although the limits of this doctrine are traditionally rather narrow.").

131. *See generally* Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413 (1963) (stating that "[I]mpossibility caused by certain types of events (so-called *force majeure*) does constitute a cause of exoneration in most of the major legal systems of the world, although the limits of this doctrine are traditionally rather narrow.").

132. *Id.*

133. Angelo Guisado, *Searching for Answers: Reprisals, Reckoning, and Recourse for Maritime Pirates*, 25 U.S.F. MAR. L.J. 121, 147 (2013) (citing the Republic of Bolivia v. Indemnity Mutual Marine Assurance Co. (1909) 1 Eng. Rep. 785 (KB). In 1909, Brazilian rebels seized a Bolivian ship, because of political disagreements with Bolivia, and "Bolivia argued that this type of attack was "piracy," and thus was an insured peril under the policy." Focusing on the political organization and motivations of the alleged pirates, and their lack of for-profit motivations, the court did not characterize the act as piracy, noting that, "'a pirate is a man who is plundering indiscriminately for his own ends, and not a man who is simply operating against the property of a particular State for a public end."').

doctrines have their genesis in Roman law and Canon law. Rarely do any of these defenses work to excuse parties from performance under a contract.[134] The seminal cases in this area hail from venerable backgrounds, making it difficult for common law jurisdictions to shake off this mantle of judicial hostility towards these doctrines.[135] The Suez Canal line of cases demonstrates that courts in the U.K. and the U.S. are not easily swayed by these doctrines.[136] The allocation of risks due to piratical attacks in the Red Sea may fall prey when examined under the traditional approach to the excuse doctrines under both the UCC and common law.

Particularly when performance becomes difficult or expensive, courts are reluctant to excuse parties from performance because market fluctuations are a foreseeable occurrence. In other words, they are contingencies that should have been in the contemplation of both parties at the time the contract was formed.[137] Excuses that are based only on economic feasibility, dimmed by higher costs, are generally denied. Also, where parties have either impliedly or expressly assumed the risk of a particular event, the excuse doctrines will not be viable. In short, where a party has not demonstrated absolute impossibility of its performance, these defenses will be dead on arrival.

In U.S. commercial jurisprudence, even acts of God excuses such as hurricanes have failed to sustain a defense based on any of the excuse doctrines.[138] Moreover, force majeure clauses are narrowly construed in U.S. courts.[139] The particular event must be stated in a force majeure clause to bolster this excuse. Under the UCC, the doctrine of frustration of purpose and impossibility fits within the statutory provision of commercial impracticability.[140] These doctrines are rooted in English cases such as *Paradine v. Jane*.[141]

Although later cases appeared to distance themselves from the anomalous result of *Paradine*, the pendulum swung back towards denial of excuses in the *Suez Canal* line of cases because of the closings of the Suez Canal.[142] These cases have put the doctrines to the sword. In *Paradine*, a defense akin to a "restraint of

134. Several cases that examine claims of excuse ultimately express their conclusions in terms of risk allocations, either by interpreting the express language of the contract or by finding that the contingency was foreseeable and that the risk resided with the party claiming the excuse. *See generally* Jennifer S. Martin, *Fighting Piracy with Private Security Measures: When Contract Law Should Tell Parties to Walk the Plank*, 59 AM. U. L. REV. 1363, 1381 (2010).

135. *See* e.g., Eastern Airlines, Inc. v. Gulf Oil Corp., 425 F.Supp. 429, 438 (S.D. Fla. 1975).

136. *Id.*; *See also* Transatlantic Financing Corp. v. U.S., 363 F.2d 312, 319 (D.C. Cir. 1966).

137. *Id.*

138. *See generally* Rochester Gas and Elec. Corp. v. Delta Star, No. 06 CV 6155, 2006 WL 1494893 (W.D.N.Y. Apr. 14, 2006).

139. *Id.*

140. U.C.C. § 2-615 (AM. L. INST. & UNIF. L. COMM'N 1977).

141. Paradine v. Jane, 82 Eng. Rep. 897 (K.B., 1647).

142. *See The Eugenia*, (1964), 2 QB 226, 239; Tsakiroglou and Co. Ltd. v. Noblee Thorl G.m.b.H., (1960) 2 QB 348; Carapanayoti & Co., Ltd. v. E.T. Green, Ltd., (1959) 1 QB 131, 148, followed in the U.S. by Transatlantic Financing Corp. v. United States, 363 F.2d 312, 319 (1966). Plaintiff argued that it was subjected to additional expense of $43,972.00 above the contract price of $305,842.92 because of the longer journey necessitated by the closing of the canal. *See also* Louisiana Power & Light Co. v. Allegheny Ludlum Indus., Inc., 517 F. Supp. 1319, 1325 (E.D. La. 1981) (holding that performance is

princes" defense was denied when a property was commandeered by Prince Rupert of German during the English Civil War.[143] The case stands for the proposition that contracts must be performed notwithstanding the impossibility of performance. The rationale underlying this holding is still not clear. Although the court concluded that the parties should have included a clause akin to a force majeure in their contracts, and the failure to do so resulted in a breach of contract, this reasoning set in motion the requirement that supervening events are only excused if they are not foreseeable by the parties.

According to Professor Williston, the case stands for the proposition that the impossibility of performance does not excuse one from their contractual obligations.[144] The *Paradine* decision still boggles the legal mind. According to Grant Gilmore, this decision was outside the realm of the contract law of all legal systems.[145] As a result, modern courts approached the excuse doctrine in a more reasonable, common-sense manner.[146] Where an event rendered performance impossible or frustrated the purpose of the contract, courts after *Paradine* seemed willing to let parties off the hook.[147]

But the courts seemed to reverse course to the *Paradine* principle in the *Suez Canal* line of cases. All of these cases, except one, held that the closure of the Canal was not enough to excuse performance of the shipping contracts.[148] Notwithstanding the exorbitant freight increases to traverse around the Cape of Good Hope as an alternate route, courts mainly denied the excuse for nonperformance. In the United States, this paradigm still lives in United States' commercial law. The cases reveal that even destruction of the subject matter may not

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still possible even if the horse is dead since the owner procured life insurance on the horse and it was foreseeable that the horse may die).

143. See Vagts, *supra* note 125, at 460-61 (explaining how the first case addressing impossibility and frustration in the Anglo-American system arose in 1647, during Great Britain's civil war, when a troop of Prince Rupert's royalist cavalry took possession of a manor that had been rented by its owner to another member of the gentry. When the lessor sued for unpaid rent, the tenant argued that the unexpected intervention of the troops relieved him of that obligation. The court held him to his bargain, stating that since he stood to reap any unexpected gains arising from the property during the term of the lease, he should also be held to the risks of loss. Only in the late Nineteenth Century did courts in Britain and the United States become more sympathetic to these claims.).

144. See *generally* James Gordley, *Impossibility and Changed Circumstances,* 52 AM. J. OF COMP. L. 513 (2004) (citing Williston, Contracts § 77.1 which states that the Paradine case was discussed once in 1802 in Walton v. Waterhouse, 85 Eng. Rep. 1233 (K.C. 1684) and that Blackstone did not discuss the Paradine case in his Commentaries on the Law of England nor did Powell in his 1790 Treatise on Contract Law).

145. *See generally* GRANT GILMORE, THE DEATH OF CONTRACT (Ohio St. U. Press, 1974).

146. Vagts, *supra* note 103, at 460-61 (stating that only in the late Nineteenth Century did courts in Britain and the United States become more sympathetic to these claims. Most recently, legislators have joined the movement).

147. *See Id.*; *See also* Gordley, *supra* note 144; *See e.g.,* Krell v. Henry, (1903) 2 KB 740; Taylor v. Caldwell, (1863) 122 Eng. Rep. 309 (KB); Mineral Park Land Co. v. Howard, 172 Cal. 289 (1916) (all allowing the doctrine of excuse).

148. *See* Societe Franco-Tunisienne D'Armement v. Sidermar S.P.A. [1960] 1 LLOYD'S REP. 594 (detailing frustration where the Cape route was highly circuitous and involved a cost increase of approximately fifty percent).

be enough to excuse performance.[149] Neither the increase in costs nor a decrease in profitability due to the intervening event will be excused.[150]

The *Paradine* principle and the *Suez* paradigm appear to subscribe to the Civilian tradition where the excuse of performance is contemplated *ab initio* but *not ex post*. In United States Contract jurisprudence, a distinction is often made between objective impossibility (the thing cannot be done) and subjective impossibility (I cannot do it, or as Professor Williston puts it, events that "merely made it impossible for the promisor.").[151] In private international law, there is an attempt at a gentler treatment towards excuses for non-performance. For example, the U.N. Convention for the International Sale of Goods (The CISG) excuses parties where performance is prevented due to an impediment beyond a party's control.[152] However, the interpretation of this provision has not overcome the "homeward bound" treatment of the doctrines of excuse.[153] Courts in both the Civilian and Common Law systems still resort to their own interpretation of what constitutes force majeure, impossibility, frustration, and impracticability.

In the current landscape, the *Paradin*e paradigm may once again derail any defenses related to the deviation of shipments from the Red Sea or the GOA regions. The strict interpretation in *Paradine* and its progeny, both in the United Kingdom and the United States, do not augur well for these "salty" transactions. Already, the global supply chain experienced commercial trauma during the COVID-19 pandemic. The current maritime impediments stemming from piratical attacks on merchant ships make the climate ripe for the excuse doctrine to proliferate in our courts. Piracy presents an exceptional challenge to both our maritime and commercial law jurisprudence because the law has not kept pace with twenty-first-century crime of piracy.

B. The Foreseeability Principle in the Current Situation

Under the doctrine of *Clausula Rebus Sic Stantibus* (commonly known as *Rebus Sic Stantibus),* agreements are made under an implied condition that the

149. *See e.g.,* Arabian Score v. Lasma Arabian Ltd., 814 F.2d 529 (8th Cir. 1987) (holding the commercial frustration doctrine inapplicable because death of the horse was foreseeable as evidenced by purchase of insurance and because the individual assumed the risk that the horse might die prematurely).

150. Louisiana Power & Light Co. v. Allegheny Ludlum Indus., Inc., 517 F. Supp. 1319 (E.D. La. 1981) (quoting Transatlantic Financing Corp. v. U.S., 363 F.2d 312, 319 (1966) that ". . . while it may be an overstatement to say that increased cost and difficulty of performance never constitute impracticability, to justify relief there must be more of a variation between expected cost and the cost of performing by an available alternative than is present in this case, where the promisor can legitimately be presumed to have accepted some degree of abnormal risk, and where impracticability is urged on the basis of added expense alone.").

151. *See* Gordley, *supra* note 144.

152. U.N. Convention on the International Sale of Goods, art. 79, Apr. 11, 1980, 1489 U.N.T.S. 3.

153. *See e.g.,* Vagts, *supra* note 103, at 476 (citing John O. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention, 484 (3d ed. 1999); *contra* Allen Farnsworth, *Review of Standard Forms or Terms Under the Vienna Convention*, 21 CORNELL INT'L L. J. 439, 447 (1988) ("Although the Convention's solution has the attraction of seeming to incorporate both common law and civil law doctrines, such a compromise can scarcely escape being illusory for jurists from both systems.").

agreement is binding absent a significant change in circumstances. However, that change must also be unforeseeable.[154] Legal writers and other eminent jurists such as Aristotle and Aquinas subscribed to the principle of *rebus sic stantibus*. Natural law scholars like Grotius followed suit. The doctrine is also enshrined in the Vienna Convention on the Law of Treaties.[155]

In the modern jurisprudence of Excuse, interpretation is premised on the principle of foreseeability. Borrowing from the old English case, *Hadley v. Baxendale*, an event is unforeseeable if it was not within the contemplation of the parties at the time of contracting.[156] For this paper, the issue is whether the Red Sea piratical attacks are foreseeable events. Arguably, war is a foreseeable event and most international contracts do include war in a force majeure clause. However, when it comes to piracy and specifically Red Sea piracy, the issue is shrouded in mist. Although the resurgence of piracy in the early 2000s makes piracy a foreseeable event, state-sponsored piracy blurs the distinction between an act of war and the general understanding of piracy as practiced in the early 2000s by bands of Somali pirates in the Gulf of Aden (GOA). For maritime contracts where losses are subject to highly complex marine insurance policies, how the crime of piracy is currently defined is critical to shipping concerns.

Disputes relating to insured risks of this type have plagued our courts since the aftermath of the creation of the State of Israel in 1948.[157] Different groups have articulated attacks on commercial shipping as a response to the pro-Israel stance by countries like the United States.[158] The justification has always been injustice, class struggle, and anti-imperialism. As a result, the impediments to shipping are always

154. *See* Lopez Morales v. Hospital Hermanos Melendez, Inc., 460 F. Supp. 2d 288, 291 (D.P.R. 2006) ("According to this doctrine [the Continental doctrine regarding the *rebus sic stantibus* clause], when there is a contract and the development or execution thereof takes place during a long time period, it is assumed that the parties have taken into consideration the circumstances prevalent at the time they reached their agreement, or those that they could normally foresee, and the continuing existence of such circumstances, particularly those of an economic nature, tacitly conditions the contract's continued force.") (Glenys Spence, trans.). Because it allows for an attenuation of that which is required of the parties under a contract, the *rebus sic stantibus* clause stands as a counter force to the rule embodied by the *pacta sunct servanda* axiom, set forth in Art. 1044 of the Civil Code, 31 P.R. Laws Ann. § 2994: "Obligations arising from contracts have legal force between the contracting parties, and must be fulfilled in accordance with their stipulations.").

155. *See* Vagts, *supra* note 103, at 460-61.

156. Hadley v. Baxendale, (1854) 9 Ex Ch 341, 156 Eng. Rep. 145.

157. Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co., 368 F. Supp. 1098, 1104-05 (S.D.N.Y. 1973), aff'd, 505 F.2d 989 (2d Cir. 1974) (discussing the background of the Palestine/Israeli relationship since 1948. "Among the conflicts in this litigation have been disputes about whether or how we should canvass the history of struggle centering upon what is now Israel, the present and former population of what was Palestine, and the surrounding Arab States. . . . The important and difficult questions are not about what happened, but about how to characterize the key events for insurance purposes.").

158. *See id*. at 1115 (The text, preserved by a crew member, said "PFLP is speaking. Why do we take the airoplane? We took the American airoplane because the government of America helps Israel daily. The government of America gives Israel fantom airoplanes which attack our camps and burn our village. We-the Group of AKA-which is following for p. f. l. p. know that by warning the people of America for the crimes and murders which is committed always in Palestine and Vietnam-makes him feel how his government helps Zionism.").

present and insurance litigation is frequent.[159] Even where the enumerated risks are not ambiguous, courts look to whether the disputed risk is one that is well known to the insurer when the policy was written. In short, courts construing actions of this type may look to the foreseeability of the actions in question.[160]

Notably, in *Pan Am*, the court disagreed with the defendant insurers who urged the court to treat the hijacking as part of the Arab-Israeli conflict and thus a political and military act. The court explained that such a construction would "sweep every skirmish into an act of war," and it declined to hold that terrorist actions for retaliation were an act of war.[161] Importantly, the *Pan Am* court stressed the importance of the non-involvement of Jordan and other Arab States in backing the Pan Am hijackers.[162] Moreover, the hijacking was not in the furtherance of a rebellion or insurrection.[163] Although the hijackers' stated purpose was to attack the U.S. government for assisting the State of Israel and further other political causes, the *Pan Am* court declined to couch this type of attack under the war exclusion in the "all-risk" policy because there was no connection to a Jordanian insurrection.[164]

The court noted that for insurance purposes, a military or usurped power must be (1) a de facto government, holding adversely and substantially controlling the territory it occupies, (2) an occupying power in possession by conquest, but not in either event by sufferance of the de jure sovereign. In this vein, the Houthi rebels, if backed by Iran outrightly or under its sovereign prerogative, would fall outside the contours of the Pan Am case, making the Red Sea attacks an act of war. The question plaguing the current situation is what deference should be given to cases like *Pan am* as to what constitutes a "war" for purposes of insurance coverage. Given the landscape today, where rogue states are the sponsors of terrorism and piracy, should these historic definitions rule the day, or should the realist view prevail basing the inquiry on the foreseeability principle?

159. Michael H. Passman, *Interpreting Sea Piracy Clauses in Marine Insurance Contracts*, 40 J. MAR. L. & COM. 59 (2009) (The rise of modern piracy has had important implications for both merchant shippers and insurance underwriters.).

160. *Id*. at 1120 (The London all risk insurers were circulating, debating, and actually writing before Nov. 1969 exclusion clauses descriptively labeled "War, Hijacking & Other Perils Exclusion." Such clauses were known to and considered by the American all risk insurers as well.).

161. Pan American World Airways, Inc., v. Aetna Surety and Casualty Co., 368 F. Supp. 1098, 1124 (S.D.N.Y. 1973).

162. *Id*. at 1124 (The court finds against the claimed exclusion because: (1) the proof does not establish that there was at material times an insurrection or rebellion in Jordan; and (2) even if there was, the loss by a hijacking from London to Beirut to Cairo was not one "due to or resulting from" any Jordanian insurrection or rebellion.).

163. *Id*. at 1124 ((1) The proof does not establish that there was at material times an insurrection or rebellion in Jordan; and (2) even if there was, the loss by a hijacking from London to Beirut to Cairo was not one "due to or resulting from" any Jordanian insurrection or rebellion.).

164. *Id*. at 1129.

C. The Perils of the Sea Clause Under the Carriage of Goods By Sea Act (COGSA)

In maritime law, the COGSA provides for certain exceptions when the hand of God is not at work. The Carriage of Goods By Sea Act (COGSA) recognizes that some human forces can subvert the hand of God.[165] These are the actions that result from "overwhelming human force such as an act of war, acts of public enemies, arrest or restraint of princes, rulers or peoples, or seizure under legal process, quarantine, restrictions and riots, and civil commotions." Under COGSA, a shipowner is not liable for negligence in the navigation and management of the ship.[166] However, a carrier has the burden of persuasion to show that damage to cargo was not the fault of the carrier or its agents. This burden is not confined to evidentiary facts. Rather the carrier has to persuade a court that it exercised all diligence that could not mitigate the damages caused by the event. Thus, the carrier always bears the burden to show that it was not negligent.[167]

The perils clause is the most frequently litigated in maritime law because not every incident of the sea is considered a "peril."[168] In situations where the threat is foreseeable or can be anticipated, coverage will be denied despite the peril.[169] Generally, courts considering the perils clause will employ an *ejusdem generis* construction. However, this construction is fraught with its own perils. When it comes to acts of piracy, the shipowner must show that the perpetrators are pirates in the legal sense.[170] Thus, unlike the GOA piracy of the early 2000s along the lines of those actions depicted in the movie, Captain Phillips, the current situation in the Red Sea is not piracy because the perpetrators of these actions are not pursuing private goals. Rather, the acts are political in nature. On top of that, these actions are a direct outgrowth of State action, albeit by proxy. Under marine insurance law, acts stemming from a sovereign are not automatically covered under the general marine policy. These are separately provided for by war risk insurance.[171]

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165. *See generally* Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW 567-68 (West Acad., 6th ed. 2019) citing Lord and Taylor LLC v. Zim Integrated Shipping Services, Ltd. 2015 AMC 1762 (S. D.N.Y. 2015) (Act of God . . . that occurs without human intervention, and which could not have been prevented by any foresight of the carrier. The emphasis is on the unforeseeable nature of the event. As with peril of the sea, human fault or negligence defeats a claim of act of God.).

166. Carriage of Goods by Sea Act, 46 U.S.C. § 30701 n. § 4(2)(a) (2006).

167. *See generally* Schoenbaum, *supra* note 165. *See also* Carriage of Goods by Sea Act, 46 U.S.C. § 30701 n. § 4(2)(q) (2006).

168. *See generally* Schoenbaum, *supra* note 165 at 566-67 (The excuse of "perils of the sea" has been defined as "those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power and which cannot be guarded against by the ordinary exertions of human skill and prudence.").

169. *Id.* § (4)(2)(a).

170. *See* Eric Danoff, *Marine Insurance for Loss or Damage Caused by Terrorism or Political Violence,* 16 U.S.F. MAR. L.J. 61, 69 (2004) (Those who seize a ship and hold hostages for political ends may be terrorists and criminals, but they are not pirates within the meaning of marine insurance policies.).

171. *See* Michael H. Passman, *Interpreting Sea Piracy Clauses in Marine Insurance Contracts*, 40 J. MAR. L. & COM. 59, 61 (2009) (stating that "While loss caused by pirates often remains a named peril,

V. MARINE INSURANCE LAW AND THE PERIL OF PIRACY—WHEN DOES PIRACY CONSTITUTE AN ACT OF WAR FOR INSURANCE PURPOSES?

Marine insurance law is of storied vintage and is considered *sui generis*.[172] In practice, however, marine insurance contracts are like private contracts in that sophisticated parties negotiate terms and come to an understanding of the coverage and exclusions under the policy. Wily insurers, however, frequently challenge coverage for events arising under most of the perils enumerated in the policy. These insurers aim to deny coverage at all costs.[173] Although the marine insurance policy appears to cover all losses that take place within the locus of the seas, that is not always the case.[174] Some modern insurers offer "specially to cover" clauses that allow for specific coverage that may overcome the traditional constructions of the events enumerated in the Perils Clause and separate policies to cover war risks and other modern occurrences.[175]

Axiomatically, the perils of the sea occupy the most important place in marine insurance policies. The Perils Clause is concerned with losses suffered outside the natural changes of seas.[176] These changes are akin to "Acts of God"—beyond the control or actions of human actors. The classic marine insurance policy covers the so-called "perils of the sea."[177] The Perils Clause provides:

> Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage: they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter mart, surprisals, takings at sea, arrests, restraints and detainments of all kings,

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some insurers now exclude piracy from coverage through various exclusions. Additionally, because of the ongoing worldwide rise in piracy, some insurers have recently removed piracy from the named perils in the hull clauses. Under these new clauses, coverage for piracy is included only by purchasing a separate war risk policy, paying an additional premium, and submitting to additional reporting requirements.").

172. *See generally*, GRANT GILMORE & CHARLES BLACK, The Law of Admiralty, 2d. ed. (Foundation Press 1975) sec. 2.2–2.3 (Marine insurance developed in antiquity right along with the corpus of maritime law, in the late Middle Ages and into the Renaissance . . . "Marine insurance is at first a field of bewilderingly strange to the shoreside lawyer.").

173. *See generally* Danoff, *supra* note 170 (The marine perils clause generally lists a number of specified risks, and then concludes with the words "and all other like perils, losses, and misfortunes." This is referred to as "ejusdem generis" (i.e., of the same kind, class, or nature). When the harm in issue is not one of those specified in the policy, the policy holder seeking cover invariably relies upon ejusdem generis. The ejusdem generis term does not however provide cover of risks beyond or different from those specified in the perils clause. Cover of pirates, rovers, assailing thieves, and "other like perils" would not include terrorists who, unlike the specified malefactors, are not out for personal financial gain, and thus are not "ejusdem generis" with them.).

174. *See* GILMORE & BLACK, *supra* note 172, at 71 ("The marine insurance policy, though it gives a wide shelter, does not protect against every sort of loss that may happen to vessel or cargo.").

175. *See Id.*

176. *See* GILMORE & BLACK, *supra* note 172, at 72-74 (The Found. Press inc., 2nd ed. 1975) ("Of the marine perils, by far the most important are those "of the seas." What is covered is not any loss that may happen on the sea, but fortuitous losses occurring through extraordinary action of the elements at sea or any accident or mishap in navigation.).

177. Marine Insurance Act, 1906, 6 Edw. 7, C. 41, Sch(1)(UK).

> princes and people, of what nation condition or quality soever, barratry of the master and mariners and of all other perils, losses, and misfortunes that come or should come to the hurt, detriment or damage of said goods and merchandises and ship &c, or any part thereof.[178]

The aphoristic terms are at once ancient and familiar in the maritime industry. These terms are usually diluted by exclusion clauses in marine insurance policies. In particular, events relating to warfare and other governmental actions and piratical activities are generally excluded from the general marine insurance policy.[179] Generally, courts do not interpret the language of a policy to extend to perils beyond those specifically enumerated. However, when it comes to the peril of piracy, ambiguity looms large.

In some cases, a court may construe an exclusion *contra proferantum* and in so doing employ an *ejusdem generis* interpretation to certain exclusions.[180] In the issue of piracy, this canon of interpretation has been historically employed by courts.[181] According to the court in the *Pan Am* insurance litigation, such hostilities do not fall under the type of risks contemplated by the exclusions, and thus actions of this type are covered risks.[182] Going on the canon of *contra proferantum*, these enumerated exclusions in an "all-risk" policy will generally be construed against an insurer and where ambiguities exist.[183]

In a line of cases dating back to the American Civil War, the issue of whether acts of Southern belligerents were acts of piracy or a restraint of princes and rulers was a frequent bone of contention for the courts.[184] For example, in *Babbit v.*

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178. *See* Am. Inst. of Marine Underwriters, *American Institute Hull Clauses* (2009).

179. *See generally* Gilmore & Black, THE LAW OF ADMIRALTY 71-76 (The Found. Press inc., 2nd ed. 1975).

180. *Id.* at 73-74.

181. *See e.g.*, Pan. Am. v. Aetna Casualty, 368 F. Supp. 1098, 1119-1120 (S.D.N.Y. 1973).

182. *See Id.*

183. *See* Michael H. Passman, *Interpreting Sea Piracy Clauses in Marine Insurance Contracts*, 40 J. Mar. L. & Com. 59, 62–63 (2009) (Marine insurance agreements are generally interpreted using the same rules of construction as other contracts. However, courts take the unequal bargaining power between the insurer and insured into consideration when interpreting insurance contracts. Interpreting the meaning of "pirates" or "piracy" in a marine insurance contract implicates three important contract doctrines: (1) reasonable expectations; (2) usage of trade; and (3) *contra proferentem*.).

184. *See* The Brig Amy Warwick, (The Prize Cases), 67 U.S. (2 Black) 635, 643-44 (1862); *See also* Susan Poser & Elizabeth R. Varon, *United States v. Steinmetz: The Legal Legacy of the Civil War, Revisited*, 46 ALA. L. REV. 725, 762 (1995) (discussing the legal duality in the American Civil War). (Nowhere was the gulf between rhetoric and policy more evident than in the conduct of the war on the high seas. In one of his first official acts after the Confederate bombardment of Fort Sumter, President Lincoln announced the blockade of the Southern ports. To do so was, according to international law, virtually to recognize the belligerent status of the Confederacy. But Lincoln refused to concede that the blockade had such legal implications. In announcing the blockade, he also declared:

> (I)f any person, under the pretended authority of the said (Confederate) States, or under any other pretense, shall molest a vessel of the United States, or the persons or cargo on board of her, such person will be held amenable to the laws of the United States for the prevention and punishment of piracy. The punishment for piracy, as for treason, was death. Thus, with Lincoln's establishment of the blockade, the dual theory of the Civil War was born.).

Sun Mut. Ins. Co., at the time when Arkansas seceded from the United States and joined the Confederacy, a group of rebels from Arkansas stormed a boat carrying sugar from Cincinnati to New Orleans, and seized the cargo.[185] The insurance company denied coverage, and the court ruled in favor of the plaintiffs over the insurer's arguments that the actions by the rebels constituted a restraint of government, which was excluded from the policy.[186] In Babbitt, the court employed *ejusdem generis* to find that the policy included acts of the kind committed because the rebels did not claim to represent any recognized constituted government. The court explained that the robbery by these rebels did not fall under the "restraint of princes and rulers' exclusion because the robbers did not represent any authority.[187] Thus, the robbery was included *ejusdem generis* in the perils clause.[188]

Indeed, a long line of Civil War cases involving maritime losses perpetrated by Southern rebels wrestled with the question of whether the belligerents acted at the behest of a governmental authority or whether they were simply pirates or assailing thieves. In these cases, courts were called upon to determine whether activities by those representing the Confederate States were covered under the War Clause of the insurance policies.[189] The Civil War and the ensuing "Prize Cases" bear an eerie similarity to the current Red Sea hostilities. Both events trigger questions of Statehood, Sovereignty, National Security, and issues relating to the private laws of contract and marine insurance.

These issues have been revived in the current Red Sea attacks because the question is once again front and center—are the attacks in the Red Sea *jure belli* or are they piracy?[190] If the former, then coverage may be available under a separate War Risk policy, but if the latter, the answer is more complex. When it comes

185. Babbitt v. Sun Mut. Ins. Co., 23 LA. ANN. 314, 316 (1871).

186. *Id.* (The perils are as follows: "Of the rivers, fires, rovers, assailing thieves, and all other perils and losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandise or any part thereof by reason of the dangers of the river.").

187. *Id.* (explaining that "arrests, restraints and detainments of kings, princes, and people;" that "people" meant "the ruling power of the country," which this mob was not) (They may not be the acts of "rovers and assailing thieves," for these imply the *animus furandi*, but the taking was *ejusdem generis;* it was without any pretense of sanction by even a pretended authority, and the evidence shows it was accompanied with acts of robbery, the bar of the boat being not unnaturally a special object of plunder. We conclude, therefore, that this taking was a peril included in the general words at the close of the peril clause.).

188. *Id.* (The persons in Helena by whom the sugar was seized, "some of it sold and some carried to Little Rock," are proved to have been citizens of the place, acting under no pretext of authority, but simply as a mob. It may be supposed, from the record, that they made the seizure because the vessel and cargo were believed by them to belong to persons in Cincinnati, but the reason of the outrage does not necessarily determine its character. The motive is one thing; the authority set up another. They neither represented nor claimed to represent any State or government, real or imaginary, actual, or pretended.).

189. *See e.g.,* Fifield v. Ins. Co. of Pennsylvania, 47 Pa. 166, 169 (1864).

190. See *Id.* (A pirate is usually defined as *hostis humani generis,* but a more accurate description of the offence of piracy is that it is robbery or forcible depredation upon the sea, *animo furandi*. It is usually contrasted with captures *jure belli,* . . . . The distinction between privateering and piracy is the distinction between captures *jure belli* under color of governmental authority and for the benefit of a political power organized as a government *de jure* or *de facto,* and mere robbery on the high seas committed from

to maritime attacks on merchant shipping where the attackers claim that their purpose is to effectuate some type of political change, can the *ejusdem generis* canon of interpretation be useful to enforce coverage for losses under the policy of marine insurance.?[191] For example in *Fiffield v. Ins. Co. of Pennsylvania*, the court seemed to conclude that even where the actors hail from a government *de facto*, their actions should be covered under the "restraints of princes and rulers" exception, the same as a government *de jure*.[192]

Flowing from this line of cases is the proposition that *de facto* actors, like the Houthi rebels, could be viewed as legitimate and thus their actions in the Red Sea can be excluded under certain marine policies. Viewed under these lenses, shipping concerns and marine insurers must clarify these terms to avoid costly litigation.

The working definition in the case law does not address the current issues. For marine insurance purposes, the definition is unworkable. As discussed in the *Pan Am* case, whether war is declared for insurance purposes heavily depends on whether the hostile activities are closely connected to the furtherance of an insurrection at the behest of *de jure* sovereign or a *de facto* military faction. Under international law, war is divided into two camps: (1) the legality of the use of force between two nations is referred to as *jus ad bellum* or just war and (2) the behavior of combatants during war is called *jus in bello* or justice in wartime.[193] For insurance purposes, *jus ad bellum* is the kind contemplated under a war-risk

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motives of personal gain, like theft or robbery on land. In the one instance the acts committed inure to the benefit of the commissioning power, and in the other to the benefit of the perpetrators merely.).

191. Michael H. Passman, *Interpreting Sea Piracy Clauses in Marine Insurance Contracts*, 40 J. MAR. L. & COM. 59, 66 (2009) (The existence of multiple definitions of piracy invites confusion when interpreting insurance contracts.).

192. *Id.* (distinguishing piracy from privateering and framing the case as falling under one or the other. If the Jeff Davis was not a privateer, she was a pirate, and if she was a privateer she was made so by the commission she bore. The legal effect of that commission, therefore, must depend upon the *status* of the Southern Confederacy. That it is a government *de jure,* no man who is faithful to the Constitution of the United States will for a moment contend. But is it not a government *de facto*? Any government, however violent and wrongful its origin, which is in the actual exercise of sovereignty over a territory and people large enough for a nation, must be considered as a government de facto. Vattel tells us that any nation which governs itself under what form soever without any dependence on foreign power, is a sovereign state. And our American ideas will accept from foreign nations no other authentication of the right to rule, than the fact of ruling. General Jackson, in his message of December 1836, in setting forth the uniform policy and practice of this government to recognize the prevailing party, in all foreign disputes, told Congress that "all questions relative to the government of foreign nations, whether of the old or new world, have been treated by the United States as questions of fact only." And this sentiment has been repeated numberless times in our state papers. There is no doubt, therefore, that the Federal Government is accustomed to concede, not only belligerent rights, but civil authority also, to governments de facto.).

193. *Jus in bello*, is the law that governs the way in which warfare is conducted. *Jus ad bellum* is the justification or reasons for war or its prevention. Jeff McMahan, *Morality, Law, and the Relation Between Jus Ad Bellum and Jus in Bello*, 100 AM. SOC'Y INT'L L. PROC. 112, 113 (2006) (According to the traditional theory of the just war, responsibility for matters of *jus ad bellum* lies with the sovereign, not his soldiers. What it is morally permissible to do in war (a matter of *jus in bello*) depends crucially on whether one has a just cause (a matter of *jus ad bellum*).

policy or an exclusion under an all-risk policy. This begs the question as to whether state-sponsored piratical attacks constitute *jus ad bellum.*

A. The "War Risks" Policy

A typical "all risks" policy will contain exclusions for actions taken by a government, war, whether declared or not, strikes, riots, and civil commotions.[194] These exclusions can then be covered by procuring a separate "war risk policy," which may cover acts of piracy. A typical war risk policy will be enumerated as follows:

> war, invasion, acts of foreign enemies, hostilities (whether declared or not, civil war, rebellion, revolution or insurrection, military or usurped power or confiscation and/or nationalization or requisition or destruction by any government or public or local authority or by any independent unit or individual engaged in irregular warfare.[195]

B. The Free of Capture and Seizure Clause (FC&S)

The FC&S clause in a marine insurance policy may provide coverage to encompass the current attacks since this clause applies to the vessel.[196] The general FC&S clause in a marine insurance policy reads as follows:

> This insurance is only against the risks of capture, seizures, destruction or damage by men-of-war piracy, takings at sea, arrests, restraints, detainments and other warlike operations and acts of kings, princes and peoples or prosecutions of hostilities or in the application of sanctions under international agreements whether by a belligerent or otherwise including factions engaged in civil war, revolution, rebellions or insurrection, or civil strife therefrom, and including the risks of aerial bombardment floating or stationary mines and stray or derelict torpedoes and weapons of war employing atomic fission or radioactive force, but excluding claims for delay, deteriorated and/or loss of market, and warranted not to abandon on any ground other than physical damage to ship or cargo until after condemnation of the property insured.[197]

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194. Robert T. Lemon II, *Allocation of Marine Risks: An Overview of the Marine Insurance Package*, 81 TUL. L. REV. 1467, 1495 (2007) (Due to the obvious substantial increase of risk, the marine insurance market purposely seeks to separate "war risks" from the traditional "marine perils" the shipowner or ship operator is likely to face in the ordinary course of its marine operations. These exclusionary clauses require the shipowner and ship operator to obtain separate war risk insurance in order to maintain full hull and P&I coverage when the vessel is subject to warlike conditions, or when the vessel is subject to seizure or detainment by government authority, or when the vessel transits a geographic area where the risk to the vessel is greater on account of political instability or hostile conditions in that area.); *See generally* GILMORE & BLACK, *supra* note 172, at 71-90.

195. *See* Lemon, *supra* note 194, citing to American Institute 87B-108 Hull War Risks and Strikes Clauses (Including Automatic Termination and Cancellation Provisions) For Attachment to American Institute Hull Clauses Dec. 1, 1977), https://perma.cc/N6EF-FKEA.

196. *See Id.* at 1496, citing to Am. Inst. of Marine Underwriters, American Institute Hull Clauses Form (1977) [hereinafter AIMU, Hull Clauses Form].

197. *Id.*

Despite this lengthy enumeration of losses, the FC&S clause can be misleading to maritime parties since the clause is more often than not interpreted as a "war risks" exclusion clause, which, as the name suggests, provides coverage only for wartime activities.[198] After the Spanish Civil War, insurers began to exclude piracy under the FC&S clause.[199] In the current climate, the problem of coverage is subject to the generally accepted definition of piracy. Because the current attacks are state-sponsored, the question of coverage looms large. These provisions in marine insurance policies will be heavily litigated because of the inherent ambiguity surrounding the current activities in the Red Sea. When the Iranian State is the sponsor of piratical attacks on merchant shipping, is this an act of war for purposes of marine insurance law? Moreover, is this war under international law since the stated reasons for the attacks are a response to another state's actions, namely, Israel's response to the Hamas attack? Furthermore, does the joint response by the United States and the United Kingdom to bomb military targets in Yemen further prove that this is a war?

When hostilities emanate from a public authority, then it is a war, even if only a partial war.[200] Even if the hostilities are not under the banner of a sovereign nation, if the hostile party holds or controls a portion of territory in a hostile manner, this is akin to war.[201] The Supreme Court has consistently opined that "piracy is a depredation without authority from any prince or state . . . and unlawful depredation is the essence of piracy."[202]

C. The Restraint of Princes Defense

A frustration defense may prevail under maritime law if a party such as a Charterer's failure to perform is due to a governmental restraint. However, such restraints cannot be temporary.[203] Under both "shore" law and maritime law, this defense is believed to be a relic of a bygone era gone to rest in an enchanted cave of sirens that once lured mariners to their death.[204] The current events resulting from the Russia/Ukraine war and the Israeli/Hamas conflict belie that belief. These two wars and state-sponsored piracy have awakened the "restraint of

198. Eric Danoff, *Marine Insurance for Loss or Damage Caused by Terrorism or Political Violence*, 16 U.S.F. MAR. L.J. 61, 63-65 (2004) (This label is a misnomer because the clause excludes far more than losses from capture or seizure. Such clauses often exclude liability for all sorts of acts of force or violence, including loss by acts of enemies, arrests, and restraints of princes (i.e., governments), weapons of war, hostilities (whether or not officially declared), revolution, rebellion, and similar warlike operations. Indeed the clause is sometimes (and more accurately) referred to as the "war risk exclusion" clause.).

199. *See* Peter Rogan, *Insuring the Risk of Terrorist Damage and Other Hostile Deliberate Damage*, 77 TUL. L. REV. 1295, 1317 (2003).

200. *See e.g.*, Bas v. Tingey, 4 U.S. 37, 43 (1800).

201. *See The Brig Amy Warwick*, (The Prize Cases), 67 U.S. (2 Black) 635, 643-44 (1862).

202. *See* United States v. Smith, 18 U.S. 153, 163, 5 L. Ed. 57 (1820).

203. *See generally* Gilmore & Black, *supra* note 172, at 71.

204. *See generally* Detley F. Vagts, Rebus Revisited: Changed Circumstances in Treaty Law, COLUM. J. TRANSNAT'L L. 459, 463 (2005) ("Restraint of princes" clauses have been found in maritime insurance contracts for many centuries excepting government interference with the ships insured.).

princes defense" from its long slumber.[205] In the current climate, the defense has emerged from mere philosophical curiosity into a business reality.

Red Sea Piracy as a Proxy War—The Response to the Current Attacks

The U.S. response to the Red Sea crisis needs to mimic the Jeffersonian strategy to the Barbary States. The current events playing out in the Red Sea region threaten maritime commerce in the same way as the Barbary pirates. In that situation, Secretary of State and then President Thomas Jefferson approached the situation as a response to war by a sovereign—*jus ad bellum*—a just war. The current situation should put to rest the prevailing view that the crime of piracy is either a relic of the past or the crime perpetrated by poor individuals from failed states. As is evident by the current reports coming almost daily from the maritime community, maritime commerce is under siege. Just as the newly-birthed United States was threatened by the Barbay pirates, the same is true today.

To combat the scourge of piracy, the United States went to war after diplomacy failed.[206] The newborn Marine Corps and the slighter older U.S. Navy took the fight to the Barbary States. In fact, Algeria had declared war on the United States, and piratical activities blossomed into all-out war.[207] There was no question that these hostilities were committed at the behest of the Algerian State. The only response from the United States was to retaliate and bring these activities to an end. By so doing, the United States regained control of the seas, and the nation's commerce was saved from ruin.[208]

One of the first decisions was to cease the practice of paying bribes to the Barbary States and paying ransom demands for captives. Along with Jefferson, John Jay and Alexander Hamilton agreed that the Navy was the answer to combat Barbary piracy. In 1786, John Jay declared, "I should prefer war to tribute and carry on our Mediterranean trade in vessels armed and manned at the public expense."[209]

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205. The Harvard Law Review Association, Restraint of Princes, 32 HARV. L. REV. 839, 839–40 (1919) (The "restraint-of-princes" clause, of ancient origin, has since the beginning of the war been the subject of construction by American and British courts in the three species of contracts in which it is still commonly employed, namely, charter-parties, contracts of affreightment,[3] and contracts of marine insurance); *see also* The Harvard Law Review Association, Insurance - Clause Excepting Loss or Frustration of Venture by Government Restraint Held Inapplicable to Constructive Loss of Goods, 55 HARV. L. REV. 686 (1942) (This construction of a standard clause subjects underwriters to shipping losses accompanying the outbreak of war which they may not have anticipated in computing premiums. The frustration clause, couched in the archaic phraseology of marine insurance, was adopted following a decision in the last war, establishing, first, that a policy on cargo covers a loss of the venture although the goods are safe and, second, that a legal prohibition evoked by a declaration of war constitutes a "restraint of princes" even without presence of force.).

206. *See* KILMEADE & YAEGER, *supra* note 83 (quoting Thomas Jefferson, "It rests with Congress to decide between war, tribute and ransom, as the means of re-establishing our Mediterranean commerce.").

207. *Id.*

208. *Id.*

209. *See* The Papers of Thomas Jefferson, vol. 10, 22 June–31 December 1786 596-599 (Julian P. Boyd eds., 1954), Princeton University Press 1954.

Observers in the maritime security field argue that the current response to piracy is woefully inadequate to counter the proxy war carried on through the use of aerial drones, missiles, water born IEDS (WBIED), sea mines, limpet mines, and other aerial devices.[210] The counter-piracy provisions in place since the mid-2000s are inadequate to combat the level of sophistication employed by Houthi rebels. Moreover, the nature of these attacks necessitates stronger responses along military lines. The older Private Maritime Security (PMSC) model of deterrence has lost its deterrent effects because the Houthi actors are not robbers. The old method of anti-boarding through the use of armed security developed during the early emergence of Somali piracy in the GOA is inadequate.[211]

While this model proved effective in countering the traditional armed robbery, these attacks are not for robbery. They are not for personal gain. They are being committed at the behest of a sovereign. The UNCLOS is the primary legal framework under which piracy is addressed, managed, and adjudicated.[212] Indeed during the resurgence of Somali piracy in the GOA, the stated objective enshrined in various Security Council Resolutions are "to use all necessary means to effectuate the full eradication of piracy and armed robbery at sea off the Coast of Somalia."[213]

Other law enforcement operations such as the European Union Naval Forces, Atalanta, NATO's Operation Ocean Shield and combined task force have been effective in combating Somali piracy in the GOA. Notwithstanding this show of force to combat Somali piracy, the same has not materialized to combat Red Sea piracy. One sticking point here is whether the U.S. has jurisdiction over activities in the Red Sea. Put another way, does universal jurisdiction over piracy also require that the act occur on the high seas?[214]

CONCLUSION

During the American Civil War, piracy, euphemistically called privateering, was used as a tool of war. Both sides used these activities to prosecute the Civil War, and as arguably two nations engaged in warfare, albeit one *de jure* and the

210. *See* Simon O. Williams, *Lightly Armed Guards Are No Solution For Houthi Attacks*, The Maritime Executive (Jul. 8, 2024), https://perma.cc/3EHH-CPDL.

211. Daniel Pines, *Maritime Piracy: Changes in U.S. Law Needed to Combat This Critical National Security Concern*, 36 SEATTLE U. L. REV. 69, 118 (2012) (Though its naval ships patrol the oceans around Somalia, the U.S., as well as other nations patrolling such waters, uses a strategy of mostly passive deterrence. Pirates may be attacked if they first attack a vessel in the region, but more likely, once the pirates' plans are thwarted, the pirates are allowed to escape without any major ramifications.).

212. *See* S.C. Res. Res. 1851 (Sept. 16, 2008).

213. *See Id.*; *see also*, Daniel Pines, Maritime Piracy: *Changes in U.S. Law Needed to Combat This Critical National Security Concern*, 36 SEATTLE U. L. REV. 69, 92 (2012) (Finally, and perhaps most critically, UNCLOS III does not provide any guidance or requirements for the punishment of pirates. UNCLOS III not only leaves it up to each state to decide how to punish pirates, but indeed does not even require that nations actually punish captured pirates. This leads to inconsistencies amongst nations as to the degree to which pirates are punished, and also undoubtedly encourages pirates to operate in territories in which the host nation is uninterested or unable to mount piracy prosecutions.).

214. *See* U.N. Convention on the Law of the Sea art. 86, Dec. 10, 1982, 1833 U.N.T.S. 397.

other *de facto*. During the Eighteenth and early Nineteenth centuries, privateering was an accepted practice under the law of nations existing at that time.[215] British dominion over the seas was heavily dependent on merchant shipping. Actions against merchant vessels have always been a strategy utilized during times of war. During the War of 1812, the British, having secured victory over Napoleon, redoubled their efforts against the United States by targeting American commerce. The U.S. responded in kind.[216]

Piracy today, as defined in its strictest sense, does not capture the current Red Sea Attacks. A common thread running through the definition of piracy in myriad precedents is the qualification of ***"for private ends."*** (emphasis added). Thus, when a violent maritime actor is not working toward this end, then the actions are not piracy. The current attacks on merchant shipping are distinct from those of the Somali attacks in the GOA region and Southeast Asia. As such, new rules of the maritime road are needed.

Under the general maritime law, piracy was one of the named perils of the sea, and losses as a result were automatically covered.[217] In modern marine insurance practice, coverage for losses caused by piracy is not automatic. Rather, the peril must be procured through special policies. And even then, because of the narrow definition, these special policies may be interpreted to exclude Red Sea attacks because these attacks are not committed ***to serve private ends***.

Legal precedents on these issues have largely ignored the commercial impracticability doctrine as an impediment to the performance of maritime contracts. These precedents signal that there are no remedies for nonperformance arising from maritime threats. The failure to grant remedies will disincentivize shipowners from diverting their ships around the Horn of Africa to avoid piratical attacks. The increased transaction costs associated with this deviation, coupled with ransom demands, could lead to maritime bankruptcies.[218] The kidnapping of crewmembers is tantamount to the impressment of civilians and seamen by the British in the early years of the American Republic.[219]

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215. Daniel Pines, *Maritime Piracy: Changes in U.S. Law Needed to Combat This Critical National Security Concern*, 36 SEATTLE U. L. REV. 69, 76 (2012) (Some nations supported certain types of pirates (known as "privateers") to augment the nation's coffers because pirates in cahoots with a given government would split the proceeds of their booty with the crown.).

216. *See* Donald PETRIE, THE PRIZE GAME: LAWFUL LOOTING ON THE HIGH SEAS IN THE DAYS OF FIGHTING SAIL 34 (Naval Institute Press, 1999).

217. *See generally* Michael H. Passman, *Interpreting Sea Piracy Clauses in Marine Insurance Contracts*, 40 J. Mar. L. L & Com. 59 (2009).

218. Daniel Pines, *Maritime Piracy: Changes in U.S. Law Needed to Combat This Critical National Security Concern*, 36 SEATTLE U. L. REV. 69, 71 (2012) (Piracy threatens, and has taken, the lives of American crews and civilians. It poses an enormous economic threat, both in terms of ransom payments and impact on global commerce.).

219. *See generally* PETRIE, *supra* note 216, 13-30 (Discussing the Royal Navy Pressgangs and stating that "many Americans were captured at sea and either held for ransom or impressed into British service.").

The link between commercial shipping and the national security of the United States cannot be overstated.[220] These sea lanes are part of the Suez Canal shipping route on which vessels carry more than one-third of the world's trade, which includes more than twelve percent of the world's oil.[221] When these vessels are attacked for political purposes, shipowners and cargo interests must undertake a longer voyage to avoid being attacked. Some shipowners have turned to employing maritime security as a counter to piratical attacks. However, under international law, it is not clear whether this strategy of mitigation could run afoul of international human rights law.

The attacks are political in nature and sponsored by a State. The potential for protracted litigation in this arena demands new rules under both international and domestic law. Scholars of international law agree that the current definition of piracy in U.S. and international law, specifically under the United Nations Convention on the Law of the Sea (UNCLOS), is unworkable given the current climate.[222] As argued throughout this paper, the problem for maritime commercial parties lies in the definition of piracy. The restriction of "for private ends" enshrined in UNCLOS, U.S. law, and other international legal definitions of piracy does not help the interests of commercial parties because the current Red Sea attacks are not committed for private ends. Thus, the first step in alleviating this problem is to delete this limitation from the definition of piracy. In addition, the geographical restriction of the "high seas" is also an impediment since most of the attacks take place outside of that maritime space.[223] These definitional problems lead to ambiguity in commercial law, breed uncertainty which in turn leads to increased transaction costs in maritime shipping.

Towards the end of 2024, news reports signaled that Israel and Hamas were poised to agree to a cease-fire. The Houthis promised that a cessation of hostilities will stop the attacks. However, the Region is politically unstable, and the Houthis appear to have the substantial financial and military backing of a State. Moreover, as promised, the Houthis resumed attacks when it was clear that Israel

220. *See* Pines, *supra* note 177 (Piracy constitutes the greatest criminal threat to this maritime commerce. The estimated cost of pirate attacks ranges from $12 billion to $25 billion per year. And these figures are likely drastically understated, as large numbers of pirate attacks are never reported for a variety of reasons. Further, these numbers do not include indirect costs, such as increased insurance premiums to shipping companies, or increased fees that such shipping companies pass to customers to cover the heightened cost and risk.).

221. *See generally* ANNA PETRIG & ROBIN Geifs, PIRACY AND ARMED ROBBERY AT SEA, THE Legal FRAMEWORK FOR COUNTER PIRACY OPERATIONS IN SOMALIA AND THE GULF OF Aden 52 (Ulrich Sieber ed, 2013) ("There will be plenty of opportunities given that in the course of globalization the international shipping industry has grown exponentially, becoming itself a motor of globalization.).

222. *Id*. at 221 ("The treaty rules on piracy are "incomprehensible and therefore codify nothing."); *see* ALFRED P. RUBIN, THE LAW OF PIRACY, 373-93 (Naval War College Press, 1988); *See also* Petrig and Geifs *supra* note 221, at 59 (discussing the definition of piracy under Article 101 of UNCLOS, while generally accepted, is intrinsically convoluted. Its ambiguity has been the subject of much criticism. This may be partly because piracy was largely regarded as an archaic 18th century phenomenon, which was not worthy of prolonged diplomatic deliberation when the definition was incorporated into UNCLOS.).

223. *See* U.N. Convention on the Law of the Sea art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397.

did not cease the attacks on Gaza. As the United States ushered in the second Trump presidency, Israel regained its confidence in United States support of its efforts in Gaza and the Houthis subsequently resumed their attacks. The most recent attack was a missile strike at Israel's Ben Gurion airport. At the writing of this article, the United States was once again gearing up to retaliate against the Houthis.[224]

The sheer amount of damage to international shipping since October 2023 will embolden this group and others to use these tactics to articulate their political agendas in the Region. Since the coffers of these actors are filled by land-based resources, then it is time for the United States and its allies to strike at the heart of this scourge to prevent further destabilization in the maritime space. But given the resilience exhibited by the group and the growing belief that the Houthis are backed by Iran, the Trump administration will need to develop new strategies, such as a more robust intelligence-gathering on the ground in Yemen in order to quell these attacks. Until then, global shipping remains in peril.

224. See NBC News, Israel launches airstrikes on Yemen after Houthi rebels struck airport Six strikes targeted Yemen's Hodeidah port, Houthi-affiliated TV reported.

APPENDIX

Tables From Defense Intelligence Report[225]

At least 29 major energy and shipping companies have altered their routes to avoid Houthi attacks:					
» British Petroleum (BP)[97]	» C.H. Robinson[98]	» CMA CGM[99]	» COSCO[100]	» Equinor[101]	» Euronav[102 103]
» Evergreen[104]	» Frontline[105 106]	» Gram Car Carriers[107]	» Hafnia[108 109]	» Hapag-Lloyd[110]	» HMM[111]
» Hoegh Autoliners[112]	» Klaveness Combination Carriers[113]	» Kuehne + Nagel[114]	» Maersk[115]	» MSC[116 117]	» Nippon Yusen[118]
» Ocean Network Express[119]	» OOCL[120]	» Qatar Energy[121]	» Star Bulk[122]	» Shell[123]	» Stena Bulk[124]
» Tailwind Shipping Lanes[125]	» Torm[126 127]	» Total Energies[128]	» Wallenius Wilhelmsen[129]	» Yang Ming Marine Transport[130]	

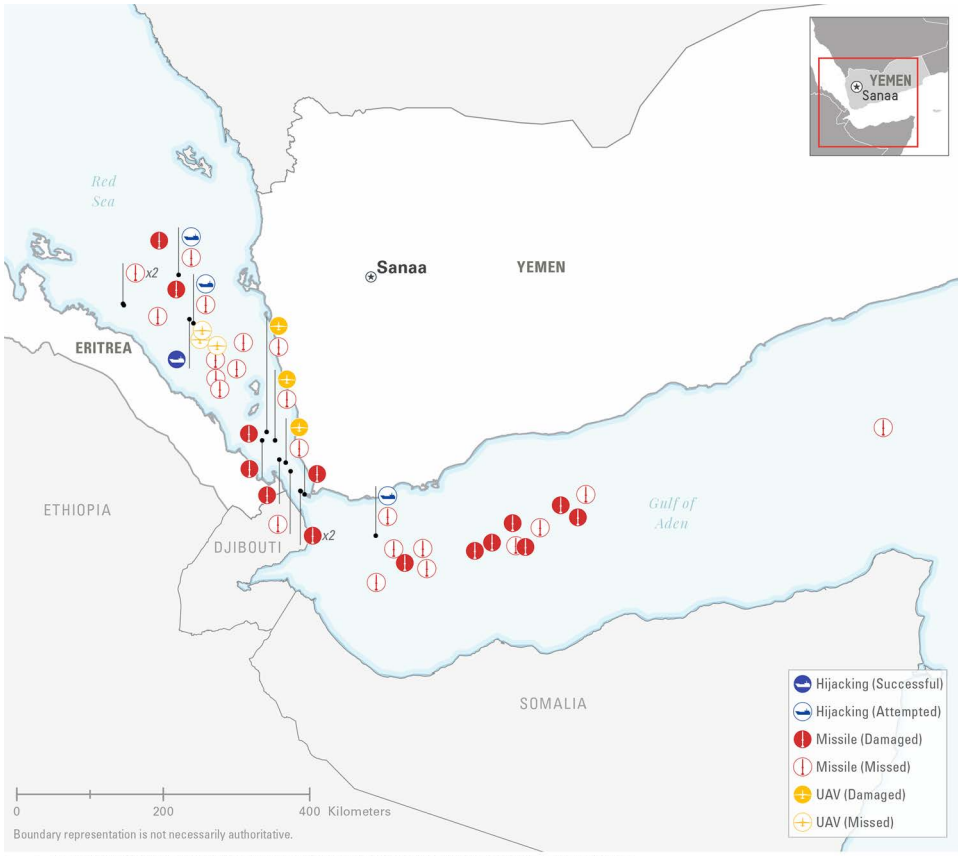
At least 65 countries' interests have been affected:						
» Argentina[26]	» Bahamas[27]	» Barbados[28]	» Belarus[29]	» Belgium[30]	» Belize[31]	» Bosnia and Herzegovina[32]
» Brazil[33]	» Bulgaria[34 35]	» Burma[36]	» Canada[37]	» China[38 39]	» Cyprus[40]	» Denmark[41]
» Djibouti[42]	» Egypt[43 44]	» France[45]	» Gabon[46]	» Georgia[47]	» Germany[48]	» Greece[49]
» India[50 51]	» Iran[52]	» Ireland[53]	» Israel[54]	» Italy[55]	» Japan[56]	» Kuwait[57]
» Lebanon[58]	» Liberia[59]	» Malaysia[60]	» Malta[61]	» Marshall Islands[62]	» Mexico[63]	» Montenegro[64]
» Morocco[65]	» Nepal[66]	» Nigeria[67]	» Norway[68]	» Oman[69]	» Pakistan[70]	» Palau[71]
» Panama[72]	» Philippines[73]	» Qatar[74]	» Romania[75]	» Russia[76 77]	» Saudi Arabia[78 79]	» Seychelles[80]
» Singapore[81]	» Sri Lanka[82]	» South Korea[83]	» Sudan[84]	» Sweden[85]	» Switzerland[86]	» Syria[87]
» Thailand[88]	» Türkiye[89]	» Ukraine[90]	» United Arab Emirates (UAE)[91]	» United Kingdom (UK)[92]	» United States[93]	» Venezuela[94]
» Vietnam[95]	» Yemen[96]					

225. Defense Intelligence Agency, Houthi Attacks Pressuring International Trade (May 2024).

Houthi Commercial Shipping Attacks and Affected Nations, November 2023 – March 2024 (cont.)

	Icon	Date	Name	Flag	Owner	Operator	Crew	Departing Port	Destination
Feb 2024 (cont.)	☐	6 Feb	**Morning Tide**	Barbados	UK	UK	Unknown	Türkiye	Singapore[230 231 232]
	■	12 Feb	**Star Iris**	Marshall Islands	Greece	Greece	Unknown	Brazil	Iran[233]
	☐	15 Feb	**Lycavitos**	Barbados	Greece	Greece	Unknown	Singapore	Egypt[234 235 236]
	☐	16 Feb	**Pollux**	Panama	UK	Greece	Unknown	Russia	India[237 238 239]
	■	18 Feb	**Rubymar**	Belize	Lebanon	Lebanon	Egypt, India, Philippines, Syria	UAE	Bulgaria[240]
	■	19 Feb	**Sea Champion**	Greece	United States	Greece	Unknown	Argentina	Yemen[241 242 243]
	■	19 Feb	**Navis Fortuna**	Marshall Islands	United States	Marshall Islands	Belarus, Burma, Russia, Ukraine	India	Italy[244 245 246 247]
		20 Feb	**The European Union launches its mission, called ASPIDES, to protect maritime traffic in the Red Sea, which includes forces from Belgium, France, Germany, Greece, and Italy[248]**						
	■	22 Feb	**Islander**	Palau	Liberia	Liberia	Unknown	Thailand	Egypt[249 250 251 252]
	☐	24 Feb	**Torm Thor**	United States	United States	United States	Unknown	Malaysia	Djibouti[253 254]
Mar 2024	■	4 Mar	**MSC Sky II**	Liberia	Switzer-land	Cyprus	Unknown	Singapore	Djibouti[255 256]
	■	6 Mar	**True Confi-dence**	Barbados	Liberia	Greece	India, Nepal, Philippines, Sri Lanka, Vietnam	China	Saudi Arabia[257]
	☐	8 Mar	**Propel Fortune**	Singapore	Singapore	Singapore	Unknown	India	Unknown[258 259]
	☐	11 Mar	**Pinocchio**	Liberia	Singapore	Singapore	India, Roma-nia, Ukraine, Vietnam	Saudi Arabia	Türkiye[260 261 262 263]
	☐	14 Mar	**Pacific 01**	Panama	Vietnam	Vietnam	Unknown	Singapore	Unknown[264 265 266]
	☐	15 Mar	**Mado**	Marshall Islands	Greece	Greece	Unknown	Saudi Arabia	Singapore[267 268]
	☐	17 Mar	**Mado**	Marshall Islands	Greece	Greece	Unknown	Saudi Arabia	Singapore[269 270]
	■	23 Mar	**Huang Pu**	Panama	China	China	China	Russia	India[271 272]

● *Hijacking (Successful)* ○ *Hijacking (Attempted)* ■ *Missile (Damaged)* ☐ *Missile (Missed)*
▲ *UAV (Damaged)* △ *UAV (Missed)*



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