

**Response of the United States of America to the International Law Commission on
Prevention and Repression of Piracy and Armed Robbery at Sea
August 2023**

The United States thanks the International Law Commission (ILC) for the opportunity to submit information and views concerning the ILC’s topic “Prevention and repression of piracy and armed robbery at sea” including with regard to:

- (a) the legislation, case law and practice of States relevant to the topic, including in relation to articles 100 to 107 of the United Nations Convention on the Law of the Sea;
- (b) the agreements entered into by States under which persons accused of piracy or armed robbery at sea are transferred with a view to prosecution; and
- (c) the role of international, regional, and subregional organizations regarding the prevention and repression of acts of piracy and armed robbery at sea.

Law and practice of the United States

For centuries, the law of the United States has established jurisdiction to prosecute anyone who commits the crime of piracy, as defined by the law of nations, on the high seas and who is later brought to or found in the United States. The English lawyer William Blackstone’s Commentaries described the law of nations as “a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world . . . to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each.”¹ The law of nations was domesticated into English common law, then applied in the American colonies, and subsequently incorporated into the law of the new United States of America. Article I, Section 8, Clause 10 of the Constitution expressly conferred upon Congress the power to define and punish “Piracies . . . committed on the high Seas, and Offences against the Law of Nations.” Early U.S. courts regularly decided cases by applying the law of nations. As the U.S. Supreme Court has

¹ 4 W. BLACKSTONE COMMENTARIES *66.

explained, “[t]here was . . . a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships,” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004). In this sphere were offenses against the common law, which paradigmatically included piracy. *Id.* (citing Blackstone); *see also* U.S. Const. art. I, sec. 8, cl 10. The first Congress passed statutes criminalizing piracy,² and early American courts regularly decided cases involving piracies. *See, e.g., United States v. Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820) (upholding an 1819 U.S. anti-piracy statute, which defined “piracy” by reference to the law of nations, and concluding “that piracy, by the law of nations, is robbery upon the sea”).³ Since 1819, the offense of piracy under U.S. law has remained essentially unchanged,⁴ and is currently codified at Title 18, United States Code, section 1651, which provides:

Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.

This and other U.S. laws criminalizing piracy and related offenses are found in Title 18, United States Code, Chapter 81. Additionally, other provisions of the U.S. Code, while not directed by name at acts of “piracy,” may in certain circumstances be used to prosecute piratical conduct, or conduct which does not necessarily fall within the international law definition of piracy, including acts not committed on the high seas.⁵ These include Title 18, United States Code,

² *See* Act of Apr. 30, 1790, ch. IX § 9, 8, 1 Stat. 112, 113-14.

³ U.S. courts have continued to recognize that the definition of piracy under U.S. law is tied to the definition of piracy under international law. *See, e.g., United States v. Dire*, 680 F.3d 446, 469 (4th Cir. 2012) (“Congress intended in § 1651 to define piracy as a universal jurisdiction crime. In these circumstances, we are constrained to agree with the district court that § 1651 incorporates a definition of piracy that changes with advancements in the law of nations.”).

⁴ The only significant difference between the current statute and the offense established by the Act of 1819 is the substitution of the penalty of mandatory life imprisonment for the mandatory penalty of death. *See, e.g., United States v. Hassan*, 747 F.Supp.2d 599, 612-15 (E.D. Va. 2010) (discussing history of the implementation of the offense of piracy in U.S. law).

⁵ *See, e.g., United States v. Lei Shi*, 525 F.3d 709 (9th Cir. 2008) (upholding defendant’s conviction for several violations of 18 U.S.C. § 2280, where defendant, a crew member of a Republic of Seychelles flagged Taiwanese fishing vessel, killed the ship’s captain and first mate and took control of the ship while it was on the high seas approximately 60 miles from Hawaii, and rejecting due process argument because charged conduct constituted acts of piracy, which are subject to “universal condemnation” and thus defendant was “put[] on notice that his acts will be prosecuted by any state where he is found”). Additionally, because the offense of piracy under § 1651 is subject to a mandatory sentence of life imprisonment, conduct constituting acts of piracy may be charged under such other provisions where sentencing flexibility is desired, or a lesser punishment may be warranted. *Cf. United States v.*

section 2280, which criminalizes acts constituting “violence against maritime navigation”⁶; section 1203 criminalizing hostage taking⁷; as well as acts such as murder (section 1111) and kidnapping (section 1201), when occurring in the special maritime and territorial jurisdiction of the United States (section 7).⁸

In international law, piracy is well-established and is clearly codified in Article 15 of the 1958 Convention on the High Seas, and Article 101 of the UN Convention on the Law of the Sea (LOS Convention). While the United States is not party to the LOS Convention, the United States views its piracy-related provisions, including the definition of piracy in Article 101, as reflective of customary international law.⁹ Acts falling outside of the definition in Article 101 do not constitute piracy under international law. Further, as established in Article 101, read in combination with Article 58(2), acts must occur seaward of the territorial sea of any State to constitute acts of piracy under international law.¹⁰ Other similar acts that do not come within this

Said, 798 F.3d 182, 199 (4th Cir. 2015) (holding § 1651 requires imposition of mandatory life sentence and reversing lower court’s imposition of lesser penalty); *id.* at 200 (Davis, J., concurring) (observing that, while not reflected in the U.S. piracy statute, “not all piracy offenses are equal in severity...[and not] all those who participate in such offenses [are] deserving of life in prison....”).

⁶ 18 U.S.C. § 2280 was enacted to implement domestically the United States’ obligations under the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention) and criminalizes the acts set out in SUA Convention Article 3.

⁷ 18 U.S.C. § 1203 criminalizes hostage taking occurring outside the United States where the offender or victim is a U.S. national, or where the offender is later found in the United States.

⁸ *See, e.g.*, *United States v. Beyle*, 782 F.3d 159 (4th Cir. 2015) (upholding conviction of defendant in relation to a Somali pirate attack on a U.S.-flagged vessel and murder of four U.S. citizens on the high seas, on charges including violations of 18 U.S.C. § 1651 and 18 U.S.C. § 2280(a)(1)(H) and (G)).

⁹ U.S. courts interpreting 18 U.S.C. § 1651 have repeatedly concluded that in enacting the statute, Congress intended to incorporate subsequent developments in the definition of piracy under the law of nations and have recognized most recently that certain provisions of the LOS Convention, including Article 101, reflect customary international law. *See, e.g.*, *Dire*, 680 F.3d at 459, 469 (interpreting U.S. law to limit piracy to “robbery upon the sea” following *Smith* incongruous with modern law of nations); *Said*, 798 F.3d at 189 (quoting and affirming *Dire*). The UN Security Council has also recognized that the LOS Convention’s piracy-related provisions reflect customary international law. *See, e.g.*, S/RES/1976 (2011), PP8.

¹⁰ However, while piracy is limited geographically to areas that are high seas or an exclusive economic zone, inchoate offenses such as aiding and abetting piracy may not be so limited. *See, e.g.*, *United States v. Ali*, 718 F.3d 929, 938-40 (4th Cir. 2013) (analyzing Article 101, concluding that “international law permits prosecuting acts of aiding and abetting piracy committed while not on the high seas...” and “[w]hile the offense he aided and abetted must have involved acts of piracy committed on the high seas, his own criminal liability is not contingent on his having facilitated these acts while [on the high seas] himself”).

definition may, however, be prohibited by other international agreements, or criminalized under a State's domestic laws, to the extent consistent with that State's jurisdiction under international law.

The United States moreover recognizes that customary international law, as reflected in the LOS Convention, permits every State to stop, board, search, and seize pirate ships and ships overtaken by pirates on the high seas and in the EEZ. The LOS Convention reflects the well-established understanding that States may exercise universal jurisdiction with respect to acts that constitute piracy as defined in the LOS Convention.

Regarding instruments that would permit the transfer of individuals sought to face prosecution for crimes of piracy and armed robbery at sea, the United States has concluded general bilateral extradition treaties with more than 100 countries, which, either alone or in combination with various multilateral instruments to which the United States is party, would in many instances permit the extradition of persons sought for prosecution on these or related charges. The United States has also pursued in specific circumstances, notably in the context of piracy off the coast of Somalia, memoranda of understanding with States in the region to facilitate the transfer to those States of suspected pirates and armed robbers at sea for the purpose of prosecution.¹¹

The role of international, regional, and subregional organizations regarding the prevention and repression of acts of piracy and armed robbery at sea

The United States has long encouraged and supported efforts by international, regional, and subregional organizations to prevent and counter piracy and armed robbery at sea. For instance, the United States was one of the founding participants of the Contact Group on Piracy Off the Coast of Somalia (CGPCS), served as its Secretariat in helping the Contact Group successfully reduce the threat of Somali pirates, and continues to participate in the recently renamed Contact Group on Illicit Maritime Activities in the Western Indian Ocean, and other initiatives such as the Regional Cooperation Agreement on Combating Piracy and Armed

¹¹ The United States does not routinely publish such arrangements.

Robbery against Ships in Asia (ReCAAP), as well as the G7++ Friends of the Gulf of Guinea, for which the United States served as a co-chair in 2020. The United States has supported numerous UN Security Council resolutions addressing piracy and armed robbery at sea, including most recently resolution 2634 concerning the situation in the Gulf of Guinea.¹² Recently, in a June 2023 statement at a Security Council briefing on the Gulf of Guinea, the United States highlighted the importance of supporting national, regional, and international efforts to counter armed robbery and piracy in the Gulf of Guinea, including the need to criminalize and prosecute such acts, and noted in particular the efforts of regional organizations in coordinating to enhance cooperation and in operationalizing the Yaoundé Architecture.¹³

The work of such organizations and intergovernmental coordination mechanisms is vital, particularly in supporting the development of affected States' domestic capacities to criminalize, investigate, prosecute, and punish acts of piracy and armed robbery at sea. The United States has supported and encouraged such efforts, including, for example, by contributing to a shared toolbox of resources to support investigations and prosecutions in the context of the CGPCS.

¹² See S/RES/2634 (2022), ¶¶ 2, 5-7, 9-10.

¹³ Remarks of Ambassador Jeffrey DeLaurentis, Acting Deputy U.S. Representative to the United Nations, UN Security Council Briefing on Maritime Security in the Gulf of Guinea (June 21, 2023), <https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-maritime-security-in-the-gulf-of-guinea/>. See also Remarks of Ambassador Richard Mills, Deputy U.S. Representative to the United Nations, UNSC Briefing on the Gulf of Guinea (November 22, 2022), <https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-the-gulf-of-guinea/>.