

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA

Norfolk Division

UNITED STATES OF AMERICA	)	
	)	
	)	CRIMINAL NO. 2:10cr56
v.	)	
	)	
MOHAMMED MODIN HASAN,	)	
	)	
GABUL ABDULLAHI ALI,	)	
	)	
ABDI WALI DIRE,	)	
	)	
ABDI MOHAMMED GUREWARDHER,	)	
	)	
ABDI MOHAMMED UMAR,	)	
	)	
Defendants.	)	

**Declaration of Legal Adviser Harold Hongju Koh**

I, Harold Hongju Koh, declare and say as follows:

1. I am the Legal Adviser of the U.S. Department of State. I have served in this position since June 26, 2009. As the General Counsel of the Department of State, the Legal Adviser is a position created by an Act of Congress on February 23, 1931 (P.L. 71-715; 46 Stat. 1214). The Legal Adviser oversees an office of approximately 175 international lawyers and provides advice on all international and domestic legal issues that arise in the course of the State Department's work.
2. Over the past 30 years, I have developed expertise as a governmental official, professor, scholar, and lawyer in the area of U.S. foreign relations and national security law and public international law, including international treaty law and customary international law. I hold

thirteen honorary degrees and have taught international law since 1985 at Yale Law School, and many foreign universities. I am the author or coauthor of eight books and more than 175 articles on various subjects in international law. I am on public service leave from Yale Law School, where I served as the fifteenth Dean from 2004-09, and where I currently hold the Martin R. Flug '55 Professorship of Public International Law. I have served on the Editorial Board of the *American Journal of International Law* and as Counselor of the American Society of International Law. I am a Fellow of the American Academy of Arts and Sciences and a former Member of the Council of the American Law Institute.

3. In my role as Legal Adviser, I have been asked to provide the Department's views on the definition of piracy under the law of nations. I make this declaration on the basis of my personal knowledge as well as information made available to me in the performance of my official duties.

#### **The Law of Nations**

4. 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."<sup>1</sup> As England became the preeminent global power, the law of nations was domesticated first into English common law, then applied to the American colonies, and subsequently incorporated into the law of the new United States of America.
5. With American independence, the law of nations became part of the common law of the United States. 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

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<sup>1</sup> 4 W. BLACKSTONE COMMENTARIES \*66.

*Offences against the Law of Nations.*” (emphasis added). Early American courts regularly decided cases by applying the law of nations. As the Supreme Court has 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.<sup>2</sup> Early American courts regularly decided cases involving piracies and prize jurisdiction, a form of jurisdiction applied to captures of enemy ships as prizes of war.

6. In modern times, the term “Law of Nations” is far less frequently used than the term “international law,” which is defined in § 101 of the American Law Institute’s *Restatement (Third) of the Foreign Relations Law of the United States* (1986) (“*Restatement*”) as “consist[ing] of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical.”
7. Section 102 of the *Restatement* further provides that “(1) A rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world.” The same section states that “[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation,” and that “[i]nternational agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.”

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<sup>2</sup> 1 See Act of Apr. 30, 1790, ch. § 9, 8, 1 Stat. 112, 113-14.

8. The Supreme Court has recognized international law as the modern successor to the law of nations and that courts should apply modern international law in interpreting the law of nations. *The Paquete Habana*, 175 U.S. 677, 708 (1900) (describing “gradual[] ripening [of] a rule of international law” which “courts administering the law of nations are bound to take judicial notice of”); *Sosa*, 542 U.S. at 733 (claim under the law of nations “must be gauged against the current state of international law”).

**The Definition of Piracy under the Law of Nations**

9. Piracy is well-established and specifically and clearly codified in Article 15 of the Convention on the High Seas of 1958 and in Article 101 of the United Nations Convention on the Law of the Sea of 1982.<sup>3</sup> That definition is as follows:

“Piracy consists of any of the following acts:

(1) Any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(3) Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article.”

10. As set forth in detail below, the actions and statements of the Executive Branch over more than six decades reflect the consistent U.S. view that this definition is both reflective of customary international law and universally accepted by states.

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<sup>3</sup> Convention on the High Seas, Geneva, April 29, 1958, 13 UST 2312, 450 UNTS 92; United Nations Convention on the Law of the Sea (“Law of the Sea Convention”), December 10, 1982, 1833 UNTS 397, 21 ILM 1261. The only difference in the definition of piracy between these two conventions is a small grammatical improvement in the first paragraph of the definition. Upon the recommendation of the Drafting Committee, the Third United Nations Conference on the Law of the Sea adopted the phrase “violence or detention, or any act of depredation” in place of the phrase “violence, detention or any act of depredation” found in Article 15 of the 1958 Convention.

### **Convention on the High Seas, 1958**

11. The Convention on the High Seas of 1958 was ratified by the President of the United States of America on March 24, 1961, pursuant to the advice and consent of the Senate provided on May 26, 1960. The treaty entered into force on September 30, 1962.
12. The preamble to the Convention expresses the Parties' desire "to codify the rules of international law relating to the high seas." During the Senate's consideration of the High Seas Convention, the Executive and the Senate supported the view that this treaty generally reflected settled customary international law, including regarding the definition of piracy. With respect to the Executive, the transmittal package for the 1958 law of the sea conventions stated the following:

"Also included in the [High Seas] convention are eight articles dealing with the suppression of piracy. These articles dealing with slavery and piracy correspond closely to those drafted by the International Law Commission and reflect the existing state of international law on the subject."<sup>4</sup>

With respect to the Senate, the Senate Executive Report pertaining to the 1958 conventions quoted as follows from the list of benefits provided by the Department of State:

"While the Convention on the High Seas is generally declaratory of existing principles of international law, by codifying these principles in agreed terms, the convention should help provide stability and avoid disputes in this field of international law."<sup>5</sup>

### **U.N. Law of the Sea Convention, 1982**

13. As stated above, piracy is defined in Article 101 of the U.N. Law of the Sea Convention of 1982, which mirrors the definition found in the Convention on the High Seas of 1958. The fact that the definition of piracy remained substantively unchanged reflects the consistent and universal acceptance by States of this definition of piracy.

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<sup>4</sup> Exec. J-N, 86<sup>th</sup> Cong. 1<sup>st</sup> Sess. (1959) at p.9.

<sup>5</sup> No. 5 86-2 (1960) at 10-11.

14. One hundred fifty-nine States and the European Union are now party to the Law of the Sea Convention, reflecting its near-universal acceptance. Although the United States is not party to this convention, recent Republican and Democratic Administrations alike have urged that the United States become a party. Moreover, the United States' consistent view has been that this Convention -- like the Convention on the High Seas of 1958 -- reflects customary international law with respect to the definition of piracy.

#### **The Reagan Administration and the Law of the Sea Convention**

15. After the conclusion of the Law of the Sea Convention negotiations, the United States government indicated that it did not intend to become a party due to concerns relating to the Convention's deep seabed mining provisions.<sup>6</sup> In expressing opposition to these particular provisions, however, President Ronald Reagan clarified in his 1983 Ocean Policy Statement that "the convention also contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states."<sup>7</sup> The definition of piracy is one of the provisions of existing law "confirmed" by the Convention, as it was adopted unchanged from 1958.

16. In his Ocean Policy Statement, President Reagan also announced a decision that "the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans -- such as navigation and overflight." The phrase "traditional uses of the ocean" -- which is intended to exclude Part XI of the Convention concerning deep seabed mining -- includes Part VII of the Convention concerning the high seas. The definition of piracy is contained in this section dealing with the high seas. Thus, since 1983, it has been the established policy and practice of the United States to accept and act in

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<sup>6</sup> President Ronald Reagan's Statement on United States Participation in the Third United Nations Conference on the Law of the Sea, January 29, 1982.

<sup>7</sup> President Ronald Reagan's Statement on United States Oceans Policy ("Ocean Policy Statement"), March 10, 1983 (emphasis added).

accordance with the Convention on the Law of the Sea with respect to traditional uses of the ocean, including all matters relating to piracy.

17. For instance, the U.S. Navy and U.S. Coast Guard apply the definition of piracy in the 1958 and 1982 Conventions to their operations, as reflected in *Commander's Handbook on the Law of Naval Operations*, which is designed to provide officers in command and their staffs with an overview of the rules of law governing naval operations.<sup>8</sup> This publication has informed the operational doctrine of many navies around the world, which similarly apply the definition of piracy in the 1982 Convention to their naval operations.

#### **Submission of the Law of the Sea Convention for Consideration by the U.S. Senate**

18. After the deep seabed mining provisions of the Convention were changed to the satisfaction of the United States and other countries through the 1994 Implementing Agreement,<sup>9</sup> President William J. Clinton submitted the Convention and its Implementing Agreement to the Senate for its consideration. The Executive Branch's transmittal package of the treaty to the United States Senate treats piracy in the following manner:

**“Piracy (Articles 100-107).** Despised by all nations since earliest recorded history, piracy continues to be a major problem in certain parts of the world. Articles 100-107 reaffirm the rights and obligations of all States to suppress piracy on the high seas. The U.S. Constitution (article I, section 8) provides that:

The Congress shall have Power ... to define and punish piracies and felonies committed on the high seas, and offences against the Law of Nations:

Congress has exercised this power by enacting 18 U.S.C. § 1651, which provides that:

Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards

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<sup>8</sup> *Commander's Handbook on the Law of Naval Operations*, 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A (2007), § 3.5. See also 1989 and 1997 Annotated Supplements to the Commander's Handbook, citing Article 101 of the LOS Convention, at § 3.4.2 and § 3.5.2, respectively.

<sup>9</sup> Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, with Annex, adopted at New York, July 28, 1994.

brought into or found in the United States, shall be imprisoned for life.

. . . Th[is and related] statutes provide a firm basis for implementing the relevant provisions of the Convention and other applicable international law.”<sup>10</sup>

### **United Nations Security Council**

19. The international community continues to recognize as authoritative the definition of piracy found in the 1982 U.N. Law of the Sea Convention. In its most recent resolution relating to piracy, the United Nations Security Council unanimously “Reaffirm[ed] that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 (“the Convention”), in particular its articles 100, 101 and 105, sets out the legal framework applicable to combating piracy and armed robbery at sea. . . .”<sup>11</sup> The Council made particular reference to Article 101 of the Convention which, as noted above, provides for the definition of piracy. This article, together with related provisions in the Convention, constitutes the specific legal framework relating to piracy that is universally agreed among states.
20. For the reasons set forth in this declaration, it is my legal opinion that it is a matter beyond question that the definition of piracy contained in Article 15 of the Convention on the High Seas of 1958 and in Article 101 of the United Nations Convention on the Law of the Sea of 1982 constitutes the definition of piracy under the law of nations.

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<sup>10</sup> Law of the Sea Convention: Letters of Transmittal and Submittal and Commentary, at 18. Dispatch Supplement, February 1995 Vol. 6, Supplement No. 1.

<sup>11</sup> Resolution 1918 (2010), adopted by the Security Council at its 6301st meeting, on April 27, 2010.

I declare under penalty of perjury that the foregoing is correct and true.

September 3, 2010

A handwritten signature in black ink, appearing to read "Harold Hongju Koh", written over a horizontal line.

Harold Hongju Koh

Legal Adviser

United States Department of State