



# White Paper

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## **The Rule of Mammon or the Rule of Law?**

Critical questions governing the use of armed guards  
in the fight against maritime piracy

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# THE RULE OF MAMMON OR THE RULE OF LAW?

## *Critical questions governing the use of armed guards in the fight against maritime piracy*

### ABSTRACT

If laws proscribe and prohibit, there are cases of crimes that all systems of law proscribe and prohibit. These are crimes against all humanity. Piracy is the oldest of these crimes and no matter whether there is Rule of Law or rule by law, piracy is prohibited as a crime. In international law there is the concept of *jus cogens*. This means a crime within certain fundamental, overriding principles of international law, from which no derogation is ever permitted. Ultimately armed guards are present to protect property from theft and to protect persons against injury. However, under the Rule of Law such actions must be lawful as to property and marauder and defender.

The question arises about piracy's rise in the latter day and civilization's reaction to it. Is the concern here the Rule of Law that is being violated or is it the Rule of Mammon that is being violated? Of the forces of the universe, only two—physics and money—follow immutable laws. Law is not immutable. Let us now inquire into Law and Money.

### THE RULE OF LAW

What exactly is the Rule of Law? The definition is much more slippery than one would expect. The generalized concept is often thought of as the authority, and therefore the influence, of law in society. In that sense, law describes behavior, proscribes that which ought not be done, prescribes that which ought be done, prohibits that that which cannot be done and encourages that which should be done.

Law in these senses includes the behaviors of both natural and corporate persons, and private as well as public persons and bodies. The modern phrase has been used since at least the 16th century. Most are wholly in favor of the Rule of Law as an intuitive concept, however it is elusive to define and has many formalized dimensions beyond its merely intuitive and essentially phraseological appeal.

### LAW AND JUSTICE

A basic premise one must accept is that law and justice are not the same. Law is a way toward justice, which may or may not be the only way. On the one hand, one school contemplating the Rule of Law makes no

judgments about how just a law may be but merely defines the framework in which any system of laws needs to comply with the notion of the Rule of Law. On the other hand, some concepts of the Rule of Law include rights derived from or somehow found in the Rule of Law.

## **THE EARLY YEARS**

In the West, Plato tended to be a person looking for the best people to rule. Aristotle on the other hand looked at the law as a separate and distinct set of concepts that ruled, rather than entrusting ruling to people of good, bad or indifferent sort. Laws then are easier to classify than people. Cicero tended to the Aristotelian side but Roman rulers were immune from suit, although if one were aggrieved he or she could go after the treasury. In the East, a Rule by Law school arose analogous to the Platonic concept. Another school proposed a sort of natural law to which even the rulers would adhere.

## **THE MIDDLE YEARS**

In medieval law of the seventh century, Islamic jurisprudence flirted with the concept that no person is above the law but then developed Shariah law, wherein in this religious code the Caliph was exempt. It is beyond the scope of this paper to enquire into how a law of universal religion could exempt a ruler of that religion. In Western law in 1218, John Lackland, King of England, was forced to agree to the Magna Carta by a band of pesky barons—with a set of concepts relating taxes and rights governing the monarchy. These selfsame money and rights concepts found their way into the United States Constitution half a millennium later.

## **MODERN TIMES**

Oracles of the modern law such as Sir Edward Coke asserted that the Crown was not above the law. By 1634, Samuel Rutherford argued a full reversal of the concept that the Crown is the law. John Locke discussed the matter in 1690, as did Montesquieu in 1748. Even Dr. Johnson took a stab at defining Rule of Law in 1755. This was all background to the United States Constitution and Thomas Paine saying that in America, the law is king, a concept put in the Massachusetts Constitution by John Adams in 1780, where a government of laws and not of men was proposed.

This can all be summarized by the insights of the modern Li Shuguang saying that the difference under the Rule of Law is that law is preeminent and can check abuse of power; rule by law makes law a tool for government suppression in a legalistic way.

## **THEN THERE IS PIRACY**

If laws proscribe and prohibit, there are cases of crimes that all systems of law proscribe and prohibit. These are crimes against all humanity. Piracy is the oldest of these crimes and no matter whether there is Rule of

Law or rule by law, piracy is prohibited as a crime. In international law there is the concept of *jus cogens*. This means a crime within certain fundamental, overriding principles of international law, from which no derogation is ever permitted.

Piracy thus is the first crime against humanity and the first *jus cogens*. If there is *jus cogens*, then there are those who perpetrate such crimes. In piracy these are pirates. Crimes of *jus cogens* are actionable by all states. However, if there is a Rule of Law then persons accused of piracy must be afforded the same rights as any other accused. This notion arises because the Rule of Law requires that there be due process of law and that a criminally-accused have certain rights against the state to avoid the overbearing rule by law antithetical to Rule of Law. Thus, the person accused of armed robbery and other crimes at sea under the Rule of Law must be treated as any other accused.

### **SO WHERE DO ARMED GUARDS FIT IN?**

Armed Guards hired under the Rule Law deter putative pirates. If a person who appears to be a pirate attempts to attack with clear intent to harm, self-defense can be argued under the Rule of Law. That is, the state has no more right to shoot the armed guard because it believes the guard to have shot a pirate unjustly than the guard has to shoot the imputed pirate merely because he believes that the person is a pirate, unless there is some concrete observable behavior reasonably indicating that the person is a pirate. Hence the rule goes to all parties in this sense.

Ultimately armed guards are present to protect property from theft and to protect persons against injury. However, under the Rule of Law such actions must be lawful as to property and marauder and defender. Thus, in the words of the United Nations, the Rule of Law becomes a principle in which all persons, institutions and entities, public and private and including the state, are accountable to laws that are publicly issued, equally enforced, independently adjudicated and consistent with international human rights standards. It requires measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, the separation of powers of governments, participation in decision making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.

Hence pirates, guards and ships under the Rule of Law are all protected in their rights—no matter how blatant the behavior—until properly and fairly adjudicated.

### **SO WHAT DOES THIS MEAN FOR MONEY?**

Money under the Rule of Law arises from contracts. In developed societies, the sanctity of contract is protected under the Rule of Law. The economist F.A. Hayek proposed that the Rule of Law is beneficial to the free market. Thus individuals under the Rule of Law can make wise contract decisions, investments and future plans with the confidence that under the Rule of Law the government is prevented from diverting individual efforts by arbitrary acts. Thus, within the rules of the economic system, the individual is free to pursue ends and desires with some certainty that the powers of the state will not be used deliberately to

frustrate the economic efforts. This does not mean unfettered gangster capitalism comprising unlawful contracts and unlawful enforcement and the complete rule of Mammon over all other laws. It means contract under the rule of law.

### **SO HOW MUCH MONEY IS INVOLVED IN PIRACY?**

The world trade economy by sea was approximately twenty trillion USD in 2012. Of that sum, some 6 percent is taken by shipping. That is approximately USD 1.2 trillion. Assuming that USD 1 billion is lost to piracy in its various forms annually, 0.08 percent of the trade value is lost. If one assumes USD 2.0 billion, the number is 0.16 percent lost, and so forth. In relative terms, the numbers are trivial and in cash terms to the owners, the sums are largely covered. So where is the problem with piracy? The Rule of Mammon or the Rule of Law?

### **THE RULE OF LAW OR THE RULE OF MAMMON?**

The general queasiness brought about by piracy is the basic belief of civilized states and persons that the Rule of Law which has taken so many centuries to develop and implement is being attacked directly by the *jus cogens* of piracy. Thus to commercial and other persons it is a much greater fundamental insult than the loss of money. Hence, I suggest that the concern is over the Rule of Law and not over the Rule of Mammon. Piracy corrupts the rule. Piracy makes making money less certain. Only the enforced Rule of Law can reduce the uncertainty piracy introduces.

### **WORLD JUSTICE**

The World Justice Project has developed a multivariate measurement of the states of the world looking at how well the Rule of Law is carried out. These measurements can be seen in the Rule of Law Index comprising nine factors and 52 subfactors.

### **NO SURPRISES HERE**

It is no surprise to see piracy arising from states at the low end of the Index, such as Somalia, Nigeria and elsewhere—no matter where the acts of piracy are found. It is no surprise that the advanced trading states are at the high end of the scale. It is no surprise that the states offering registries of convenience are at the middle low end of the scale.

Ultimately then, to stamp out piracy there must be Rule of Law. Mammon then does not rule here. Law does and must rule.



## **ABOUT ADVANFORT**

A recognized global leader with ever-growing reach, AdvanFort provides high-quality, comprehensive security solutions for commercial shipping, port and terminal operations, and oil and gas industries. Our world-class reputation is a result of our laser-like priority of understanding clients' businesses in order to create security services that integrate seamlessly with your needs.

In an increasingly integrated world, we work closely with those complex networks of relationships that both need and support our state-of-the-art standards and practices, and proud history of commercial experience, thus providing the most cost-effective security possible.

The result: Unparalleled customer experiences.

Protecting lives and maritime assets against any type of threat and assuring their arrival in safe waters, AdvanFort prides itself with strategic and innovative responses to sea piracy in the Gulf of Aden and its growing reach in other places in the world. The unique quality assurance system employed by AdvanFort has proved 100 percent successful in support of our clients' vessel transits, resulting in the complete failure of pirates boarding their ships.

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