


2011

Under international standards of justice, can audio or video recordings of distress calls and footage from vessels allegedly subjected to piratical attacks be admitted into evidence? How would authenticity be proved? Does this deny the opportunity to cross-examine?

Baker & McKenzie LLP

Follow this and additional works at: https://scholarlycommons.law.case.edu/war_crimes_memos

 Part of the [Criminal Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Baker & McKenzie LLP, "Under international standards of justice, can audio or video recordings of distress calls and footage from vessels allegedly subjected to piratical attacks be admitted into evidence? How would authenticity be proved? Does this deny the opportunity to cross-examine?" (2011). *War Crimes Memoranda*. 43.

https://scholarlycommons.law.case.edu/war_crimes_memos/43

This Memo is brought to you for free and open access by the War Crimes at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in War Crimes Memoranda by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

**THIS MEMORANDUM IS A PRODUCT OF BAKER & MCKENZIE
WORKING IN PARTNERSHIP WITH PILPG AND THE
PILPG HIGH LEVEL WORKING GROUP ON PIRACY**

OBJECT AND PURPOSE: Legal memorandum to provide assistance to the Kenya Piracy Court and other cooperating state courts and to help to lay the groundwork for a Security Council-created Regional Piracy Court.

ISSUE #9: Under international standards of justice, can audio or video recordings of distress calls and footage from vessels allegedly subjected to piratical attacks be admitted into evidence? How would authenticity be proved? Does this deny the opportunity to cross-examine?

**PREPARED BY: BAKER & MCKENZIE
AUGUST 2011**

I. INTRODUCTION	6
II. SUMMARY OF CONCLUSION	6
III. FACTUAL BACKGROUND	8
IV. LEGAL DISCUSSION	9
A. Summary of Relevant International Law Derived from International Conventions.....	9
1. Convention on the High Seas.....	10
2. United Nations Convention on the Law of Sea.....	10
3. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.....	11
B. Summary of Relevant International Law Derived from Other International Courts.....	12
1. International Criminal Court.....	13
i. Rules of Evidence—Generally.....	13
ii. Rules of Evidence—Prior Recorded Testimony.....	14
iii. ICC Precedent.....	14
2. International Criminal Tribunal for the Former Yugoslavia.....	14
i. Rules of Evidence—Generally.....	15
ii. Rules of Evidence—Witness Testimony.....	16
3. International Criminal Tribunal for Rwanda.....	17
i. Rules of Evidence—Generally.....	17
ii. Rules of Evidence—Witness Testimony.....	18
4. Extraordinary Chambers in the Courts of Cambodia.....	19
C. Summary of Relevant Law in the British Legal System.....	19
1. United Kingdom.....	20
2. Australia.....	22
3. Malaysia.....	24
D. Summary of Relevant Law in the German Legal System.....	25
1. Overview of the German Criminal Law System.....	25
2. Restrictions on Admissibility.....	26
3. Use of Recorded Audio or Video Evidence.....	27
E. Summary of Relevant Law in the French Legal System.....	28
1. Overview of the French Criminal System.....	29
2. The Scope of the Language: Any Mode of Evidence.....	30
3. Exceptions to the General Rule of Broad Admissibility.....	30
4. The Requirement of Adversary Discussion of Evidence.....	32
IV. CONCLUSION	33

INDEX TO SOURCES

BOOKS

1. Heydon, J.D. *Cross on Evidence*, 7th ed. (LexisNexis Butterworths, 2004).

LAW REVIEW AND ARTICLES

2. Bastuck, Burkhard & Gopfert, Burkard, *Admission and Presentation of Evidence in Germany*, 16 LOY. L.A. INT'L & COMP. L.J. 609 (1994).
3. Bradley, Craig M., *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032 (1983).
4. Choo, Andrew & Nash, Susan, *Evidence law in England and Wales: The Impact of the Human Rights Act 1998*, 7 INTERNATIONAL JOURNAL OF EVIDENCE AND PROOF 1 (2003).
5. Diskant, Edward B., *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 YALE L.J. 126 (2008).
6. Frase, Richard S., *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539 (1990).
7. Moise, E. Warren, *British and American Trial Procedure: Hands Across the Water?*, TRIAL EVIDENCE JOURNAL 3, 3 (Winter 2007), available at http://apps.americanbar.org/litigation/committees/newsletter_gratis/trial_evidence.pdf.
8. Pattenden, Rosemary, *Authenticating 'Things' in English Law: Principles for Adducing Tangible Evidence in Common Law Jury Trials*, 12 INTERNATIONAL JOURNAL OF EVIDENCE AND PROOF 4 (2009).
9. Thaman, Stephen C., *"Fruits of the Poisonous Tree" in Comparative Law*, 16 S.W. J. INT'L L. 333 (2010).
10. Williams, Kenneth, *Do We Really Need the Federal Rules of Evidence?*, 74 N. DAK. L. REV. 1 (1998).

CASES

11. *Alexander Henderson, Douglas John Marnoch v. Her Majesty's Advocate*, HCJAC 47 (2005).
12. *Bakri bin Mohamad AH v. Pendakwa Raya*, MLJU 0509 (2009).
13. *Barker v. R, Harper v. R, Campbell v. R*, 127 ALR 280 (1994).
14. *Judgment of January 31, 1973*, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS (BVERFG) (FEDERAL CONSTITUTIONAL COURT) 34 BVerfG 238 (Ger.).
15. *Judgment of June 14, 1960*, BUNDESGERICHTSHOF (BGH) (Federal Court of Justice) BGH, 14 BGHSt 358 (Ger.).
16. *Public Prosecutor v. Dato' Seri Anwar bin Ibrahim (No. 3)*, 2 MLH 1 (1999).
17. *Public Prosecutor v. Jowy Manjoro* 6 MLJ 342 (2007).

18. *Mohd Ali Jaafar v. Public Prosecutor*, 4 MLJ 210 (1998).
19. *R v Bray*, Unreported, July 31 1998.
20. *R v. Curran and Torney*, 50 ALR 745 (1982).
21. *R v. Murphy and another*, NI 306 (1990).
22. *R v. Quinn*, NICC 27 (2010).
23. *Regina v. P*, 1 AC 146 (2000).
24. *Schenk v. Switzerland* (1991) 13 EHRR 242.
25. *Violi and Others v Berrivale Orchards LTD*, 173 ALR 518 (2000).

CONVENTIONS, INTERNATIONAL AGREEMENTS AND RULES GOVERNING INTERNATIONAL CRIMINAL COURTS

26. *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 1678 U.N.T.S. 221, 27 I.L.M. 668 (1988).
27. *Convention on the High Seas*, 29 April 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.
28. Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev.7, 23 Feb. 23, 2011).
29. International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1 (1995), entered into force June 29, 1995.
30. International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev. 45, entered into force Feb. 11, 1994.
31. Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9 (July 1, 2002), *available at* <http://www.icc-cpi.int/NR/rdonlyres/0D8024D3-87EA-4E6A-8A27-05B987C38689/0/RomeStatuteEng.pdf>.
32. Rules of Procedure and Evidence of the International Criminal Court, ICC-ASP/1/3, at 10, and Corr. 1 (2002), *available at* http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf.
33. *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 397, *available at* http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

LEGISLATION

34. French Code of Criminal Procedure (2000).
35. Grundgesetz für die Bundesrepublik Deutschland (“Basic Law”), May 23, 1949, BGBl. I (Ger.).
36. STRAFPROZESSORDNUNG (CODE OF CRIMINAL PROCEDURE) (“STPO”), Apr. 7, 1987, BUNDESGESETZBLATT (FEDERAL LAW GAZETTE) 1074, as amended (Ger.), *available at* <http://www.iuscomp.org/gla/statutes/StPO.htm#255a> (English translation).

MISCELLANEOUS

37. Australian Law Reform Commission Report 102 (“ALRC Report”), “The Uniform Evidence Acts: The movement towards a uniform evidence law,” *available at* <http://www.alrc.gov.au/publications/2.%20The%20Uniform%20Evidence%20Acts/movement-towards-uniform-evidence-law>.
38. European Court of Human Rights, *Barbera, Masegueda and Jabardo*, December 6, 1988, *Series A*, no. 146, br. 68.
39. Extraordinary Chambers in the Courts of Cambodia, Introduction to the ECCC, <http://www.eccc.gov.kh/en/about-eccc/introduction> (last visited 7 June 2011).
40. European Convention on Human Rights (“ECHR”), *available at* <http://www.hri.org/docs/ECHR50.html>.
41. Goddard, Addleshaw, *Tape recording admissibility all at sea*, http://www.addleshawgoddard.com/view.asp?content_id=2099&parent_id=2091 (last visited 7 June 2011).
42. International Criminal Tribunal for Rwanda, General Information, <http://www.unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx> (last visited 7 June 2011).
43. Lemoine, M. Pascal, *La loyauté de la preuve* (2004), www.courdecassation.fr (last visited 7 June 2011).
44. *SUA Treaties*, INT’L MAR. ORG., *available at* <http://www.imo.org/About/Conventions/ListOfConventions/Pages/SUA-Treaties.aspx>.
45. UN ICTY, About the ICTY, <http://www.icty.org/sections/AbouttheICTY> (last visited 7 June 2011).

NEWSPAPER AND JOURNAL ARTICLES

46. Lakota, Beate, “*German Justice Through the Eyes of a Somali Pirate*”, Spiegel Online (7 April 2011), *available at* <http://www.spiegel.de/international/world/0,1518,755340,00.html>.

I. INTRODUCTION

You have asked that we assist the PILPG High Level Working Group (“PILPG”) on various evidentiary issues to provide assistance to the Kenya Piracy Court and other cooperating state courts to help lay the groundwork for a proposed United Nations Security Council-created Regional Piracy Court. We have been asked to provide our opinion with respect to the following questions:

Under international standards of justice, can audio or video recordings of distress calls and footage from vessels allegedly subjected to piratical attacks be admitted into evidence? How would authenticity be proved? Does this deny the opportunity to cross-examine?

II. SUMMARY OF CONCLUSION

International conventions provide little answer to the question of whether audio or video recordings are admissible. Though the Convention on the High Seas makes clear that a state may seize property—including, likely, audio and video recordings—found on a ship, it is silent on whether those recordings can be admitted into evidence at trial. The United Nations Convention on the Law of the Sea is similarly silent on the issue. The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (“SUA”) requires the master of an attacked ship to provide all the evidence in his possession that “pertains to the alleged offense.” Moreover, SUA requires “fair treatment” for the prosecution of individuals charged with piracy. Otherwise, however, the SUA does not directly speak on the issue of the admissibility of recordings.

Given the lack of specificity regarding evidentiary matters contained in United Nations Conventions, we have examined international tribunals to gain insight into how certain evidentiary issues are treated under existing international law. Under the rules of evidence and procedure of a number of international tribunals, the recordings would likely be admissible. In general, the question of admissibility is for each court’s discretion, albeit with certain restrictions. For instance, the International Criminal Court’s (“ICC”) rules of evidence give judges the discretion to admit evidence. In making this determination, the court is to consider the probative value of the evidence and the prejudice it would

cause to a fair trial. The ICC's rules of evidence also allow prior recorded testimony into evidence if the "witness" in the recording is available for cross examination during trial. The rules of evidence of the International Criminal Tribunal for the former Yugoslavia ("ICTY") similarly give judges discretion to admit evidence that has probative value, and to exclude evidence when its probative value is substantially outweighed by the need to ensure a fair trial. Moreover, ICTY rules bar evidence that is obtained by methods that cast substantial doubt on its reliability. Finally, judges of the ICTY are given discretion to admit written evidence in lieu of oral testimony, but if the evidence goes to the "proof of the acts and conduct of the accused," such evidence is admissible only if the witness is present at trial, available for cross examination, and attests to the accuracy of the evidence. The rules of the International Criminal Tribunal for Rwanda ("ICTR") allow for the admission of evidence that will foster a fair determination of the issue and that has probative value. For written statements offered in lieu of oral testimony, the court is given discretion as long as the evidence goes to the "proof of a matter other than the acts and conduct of the accused." The rules for the Extraordinary Chambers in the Courts of Cambodia ("ECCC") grant judges wide discretion in admitting evidence. Under the ECCC's rules, all evidence is admissible unless otherwise provided; with respect to recordings, only evidence that is irrelevant or will lead to time waste would likely be rejected by the court.

In addition to conducting an analysis of the treatment of evidentiary issues under international tribunals, we have also conducted a limited survey regarding the treatment of analogous evidentiary issues within internationally recognized legal systems, including those of British common law countries, France and Germany. For example, British judges are given ample discretion to admit evidence in the three surveyed British common law countries. In all of these, the recordings would likely be admitted. In the United Kingdom, as long as the recording evidence is authenticated, relevant, and not hearsay, it will likely be admitted. Satisfaction of authenticity will require either calling the cameraman to trial or "other evidence" that is "logically probative" of authenticity. Similarly, Australian rules of evidence would admit the recordings as long as the tapes were authenticated, relevant, and did not feature hearsay. Though a number of statutes operate in tandem with each country's rules of evidence, none of them

would seem to bar the recordings at issue. Finally, as long as the recordings were authenticated and shown to be unaltered, Malaysian law would similarly allow for their admission.

Under French law, the recordings would probably be admitted. In France, judges decide whether evidence is admitted “according to [their] innermost conviction,” and not by any formal rules. Again, judges are given total discretion on what evidence to consider. The French Criminal Code identifies very few limitations on admissible evidence. Perhaps the only major, judicial limitation is that evidence infringing on individual rights of dignity and a fair trial cannot be admitted in a trial. Otherwise, the recordings at issue would likely be admitted under French law. Indeed, French courts have ruled that even illegally-obtained evidence is admissible.

The recordings would likely be admissible under German law as well. Under German law, evidence is presumptively admissible, and courts are afforded discretion for the “free evaluation of evidence” as they deem fit. German courts are concerned with the individual rights to develop one’s “personality” and privacy, but concerns for public safety and other public interests can outweigh these concerns. Thus, German law would seem to permit the recordings into evidence.

III. FACTUAL BACKGROUND

Kenya is the southern neighbor of Somalia. Mombasa, one of Kenya’s largest cities, is a major port serving the international shipping industry. Consequently, the rising incidence of ship hijacking off of Somalia’s coast has plagued maritime traffic and affected the port’s operations. In April 2010, Kenya’s foreign minister announced that Kenya would not accept any additional Somali pirate cases. This led the United Nations to urge other nations to provide assistance to Kenya to erect a high security courtroom, resulting in international donations totaling \$9.3 million to fund piracy trials. On June 24, 2010, Kenya announced that it was opening a fast-track piracy court in Mombasa, a move well-received by the international community.

However, on November 9, 2010, the High Court of Mombasa ruled that Kenya did not have jurisdiction outside its national waters, resulting in the release of nine suspected Somali pirates at the

conclusion of their trial. The basis for the ruling was the 2009 modification of the country's penal code that limited Kenya's jurisdiction over piracy outside of its national waters.

IV. LEGAL DISCUSSION

This memorandum examines various sources of international and domestic law that may shed light on whether audio or video recordings of distress calls and footage from vessels allegedly subjected to piratical attacks can be admitted into evidence and related issues. First, in Part A of this Section, the memorandum examines international conventions, particularly the Convention on the High Seas, the United Nations Convention on the Laws of the Sea, and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation. In Part B of this Section, this Memorandum examines relevant legal standards as applied by other selected international tribunals: the International Criminal Court, the International Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda. Parts C, D and E of this Section describe and analyze relevant laws in selected countries considered to be internationally recognized standards of justice: Great Britain (and other nations following British common law), Germany and France, respectively.

A. Summary of Relevant International Law Derived from International Conventions

This section provides a summary of international law found within the three international conventions (the "Conventions") most pertinent to discussions of the prosecution of individuals accused of piracy. These Conventions provide guidance on the rights and responsibilities of participating member states ("States") regarding piracy and safety of maritime navigation. The Conventions generally provide substantive laws and do not address procedural law. Therefore, they are generally silent about the use of evidence in a judicial proceeding for piracy by a state; however, various provisions under each Convention bear consideration.

1. Convention on the High Seas

The Convention on the High Seas (“CHS”)¹, adopted in 1958 by the United Nations Conference on the Law of the Sea, embodies “established principles of international law” regarding the rights and responsibilities of States in ensuring the freedom of all States to the use of the high seas.² CHS includes a definition of piracy and establishes rights and responsibilities of States in the suppression of piracy on the high seas.³

According to Article 19 of CHS, any State can seize a pirate ship or a ship captured by and under the control of pirates, including property found on any ship which is seized:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.⁴

In summary, the right within CHS to seize property found on a ship that is seized likely includes any audio or video recordings of distress calls found on board the vessel. Article 19 further states that the seizing State has authority to determine the outcome of the seized property, subject to the rights of third-parties in the property. But CHS is silent on procedural matters, including whether audio or video recordings that are seized by a State can be admitted into evidence in a trial and, if so, the evidentiary procedural rules that would govern admissibility and cross-examination.

2. United Nations Convention on the Law of the Sea

The United Nations Conference on the Law of the Sea drafted the United Nations Convention on the Law of the Sea (“UNCLOS”)⁵ following a General Assembly resolution in 1970. UNCLOS reflects changes in international law since the United Nations’ 1958 and 1960 conferences, and provides a framework for the protection of the marine environment and the safe usage of the seas and oceans for all

¹ Convention on the High Seas, 29 April 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.

² *Id.*

³ *Id.* at art. 14–19.

⁴ *Id.* at art. 19

⁵ United Nations Convention on the Law of the Sea, Dec. 10 1982, 1833 U.N.T.S. 397, *available at* http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

nations, whether land-locked or coastal.⁶ UNCLOS also includes a definition of piracy and establishes rights and responsibilities of States in the suppression of piracy on the high seas.⁷

Article 105 of UNCLOS includes the exact language discussed above in Article 19 of CHS.⁸ Like CHS, UNCLOS is silent on procedural matters, including whether audio or video recordings that are seized by a State can be admitted into evidence in a trial and, if so, the evidentiary procedural rules that would govern admissibility and cross-examination.

3. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation

The International Maritime Organization, the United Nations' specialized agency responsible for improving maritime safety, adopted the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (“SUA”)⁹ in 1988 out of concern for increasingly common unlawful acts against ships in the 1980’s, which had resulted in increased threats on the lives of ship crews and passengers.¹⁰ SUA appears to be the most relevant United Nations Convention addressing whether audio or video recordings that are seized by a State can be admitted into evidence in a trial and, if so, the evidentiary procedural rules that would govern admissibility and cross-examination.

Article 8(4) of SUA addresses delivery of persons and evidence obtained in connection with alleged acts of piracy:

The flag State shall ensure that the master of its ship is obliged to furnish the authorities with the evidence in the master’s possession which pertains to the alleged offence.¹¹

In addition, Article 14 of SUA imposes an affirmative obligation on a participating State to provide “any relevant information in its possession to those States which it believes would be the States having

⁶ *Id.* at 25

⁷ *Id.* at art. 100–07.

⁸ *Id.* at art. 105.

⁹ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, May 1988, 1678 U.N.T.S. 221, 27 I.L.M. 668 (1988).

¹⁰ *SUA Treaties*, INT’L MAR. ORG., available at <http://www.imo.org/About/Conventions/ListOfConventions/Pages/SUA-Treaties.aspx>.

¹¹ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *supra* note 9, at art. 8(4).

established jurisdiction” over the alleged offense.¹² Finally, Article 10(2) of SUA requires that States must provide fair treatment when prosecuting individuals for unlawful acts, including piracy, under the Convention. Specifically, the offender or alleged offender

shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided for such proceedings by the law of the State in the territory of which he is present.¹³

While not dispositive, the language of Article 10(2) of SUA suggests that an offender or alleged offender may be entitled to the benefit of any applicable laws of evidence (possibly including the right to cross-examine witnesses) or procedure guaranteed by the laws of the participating State conducting the tribunal.¹⁴

More importantly, because Article 10(2) of SUA requires fair treatment, an argument could be made that international law places overarching restrictions on the application of the laws of the participating State conducting the tribunal where there is a question about the fundamental fairness of the proceedings. However, regardless of this impact, because SUA’s language is general in nature and does not specifically address what “fair treatment” would require in respect of admissibility of evidence and/or evidentiary procedural rules, it is necessary to look to other sources of international law to answer the question presented as to whether audio or video recordings that are seized by a State can be admitted into evidence in a trial and, if so, the evidentiary procedural rules that would govern admissibility and cross-examination.

B. Summary of Relevant International Law Derived from Other International Courts

In determining whether the admission of audio or video recordings of distress calls or alleged piratical attacks into evidence comport with international standards of justice, this section addresses the treatment of such evidence under other representative international courts. Such courts include the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Extraordinary Chambers in the Courts of Cambodia.

¹² *Id.* at art. 14.

¹³ *Id.* at art. 10(2).

¹⁴ *Id.*

1. International Criminal Court

The International Criminal Court (“ICC”), as established by the Rome Statute of the International Criminal Court (“Rome Statute”), has jurisdiction over “the most serious crimes of concern to the international community as a whole,” including crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.¹⁵ The ICC’s Rules of Procedure and Evidence (the “ICC Rules of Evidence”) “are an instrument for the application of the Rome Statute” and are subordinate to the Rome statute in all cases.¹⁶ Thus, in determining whether recordings may be admissible as evidence, the ICC Rules of Evidence must be read and considered in conjunction with the Rome Statute.

i. Rules of Evidence – Generally

Rule 63 of the ICC Rules of Evidence governs the general admissibility of evidence and states that such rules apply to the court in conjunction with Article 69 of the Rome Statute. The Rome Statute provides that the “testimony of a witness at a trial shall be given in person” but that the “Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology.”¹⁷ While this does not directly address the admissibility of audio and video recordings of distress calls and certain acts of piracy, the Rome Statute further provides that “[a] Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9,¹⁸ to assess freely all evidence submitted in order to determine its relevance or admissibility.”¹⁹ Although the use of audio or video recordings of alleged acts of piracy is neither expressly permitted nor prohibited under the general rules of evidence, it appears the discretion to admit such evidence rests in the chamber.

Additionally, the Rome Statute states that the “Court may rule on the relevance or admissibility of any evidence, taking into account . . . the probative value of the evidence and any prejudice that such

¹⁵ Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9 (July 1, 2002), *available at* <http://www.icc-cpi.int/NR/rdonlyres/0D8024D3-87EA-4E6A-8A27-05B987C38689/0/RomeStatuteEng.pdf> (“Rome Statute”).

¹⁶ Rules of Procedure and Evidence of the International Criminal Court, ICC-ASP/1/3, at 10, and Corr. 1 (2002), *available at* http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf (“ICC Rules of Evidence”).

¹⁷ Rome Statute, *supra* note 15, at art. 69.

¹⁸ Article 64, paragraph 9 grants the Trial Chamber discretion to rule on the admissibility or relevance of evidence.

¹⁹ Rome Statute, *supra* note 15, at rule 63, ¶2.

evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness.”²⁰ Again, it appears that the ICC Rules of Evidence provide discretion in the admission of evidence. Since there are no express provisions regarding the admissibility of audio or video recordings (other than prior recorded testimony), as discussed below, the admissibility of such evidence may reasonably rest in the discretion of the court.

ii. Rules of Evidence – Prior Recorded Testimony

Rule 68 of the ICC Rules of Evidence govern prior recorded testimony. Generally, “previously recorded audio or video testimony of a witness...or other documented evidence of such testimony” may be allowed into evidence if: 1) although the witness is unavailable at trial, both the prosecutor and defense had the opportunity to examine the witness who gave the recorded testimony, or 2) in the event the witness is available at trial, the witness does not object to the submission of the recording and the prosecutor, defense, and trial chamber have the opportunity to examine the witness during the course of proceedings.²¹ While not directly on point, previously recorded testimony is similar in nature to audio or video recordings of distress calls or alleged acts of piracy. The ICC’s rules surrounding audio or video testimony seem concerned with the right and ability to cross-examine a witness. Reasoning by analogy suggests that, under the discretion of the chamber, the ICC may allow recordings of a distress call or alleged acts of piracy into evidence if the “witness” in the recording is available for cross examination during the course of the trial.

iii. ICC Precedent

While the ICC will not apply national laws governing evidence, the ICC may apply the principles of its previous decisions under Article 21, paragraph 2 of the Rome Statute.

2. International Criminal Tribunal for the former Yugoslavia

The International Criminal Tribunal for the former Yugoslavia (“ICTY”) was established in May 1993 and was the first war crimes court created by the United Nations in order to try the individuals

²⁰ *Id.* at art. 69, ¶4.

²¹ ICC Rules of Evidence, *supra* note 16, at rule 68.

responsible for war crimes that took place during the conflicts in the Balkans during the 1990s.²² The ICTY's Rules of Procedure and Evidence (the "ICTY Rules of Evidence") govern the conduct of proceedings before the ICTY.²³

i. Rules of Evidence – Generally

The ICTY Rules of Evidence do not specifically address the admissibility of evidence such as audio or video recordings of distress calls or alleged acts of piracy. Under Rule 89, which outlines the general provisions for the rules of evidence, "[I]n cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law."²⁴ Moreover, the "Chamber may admit any relevant evidence which it deems to have probative value."²⁵ Conversely, the Chamber has the discretion to "exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial."²⁶ The Chamber may also "request verification of the authenticity of evidence obtained out of court" and may "receive the evidence of a witness orally or, where the interests of justice allow, in written form."²⁷ These rules suggest that in the case of audio or video recordings of distress calls or alleged acts of piracy, which are not explicitly addressed by the ICTY Rules of Evidence, the Chamber has the discretion to enter such items into evidence (as long as the probative value is not substantially outweighed by the need to ensure a fair trial) if admitting the evidence will foster a fair determination of the matter and adhere to the general principle of law.

Despite the apparent discretion granted to the ICTY under Rule 89, Rule 95 states that "[n]o evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability."²⁸ Assuming that audio or video recordings of distress calls or alleged acts of piracy can be reliably traced

²² See UN ICTY, About the ICTY, <http://www.icty.org/sections/AbouttheICTY> (last visited 7 June 2011).

²³ International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev. 45, entered into force Feb. 11, 1994 ("ICTY Rules of Evidence").

²⁴ *Id.* at rule 89.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at rule 95.

back to the relevant vessel or emergency response unit, it is unlikely that Rule 95 would have a chilling effect on their admissibility at trial.

ii. Rules of Evidence – Witness Testimony

Rule 92*bis* governs the admission of written statements and transcripts in lieu of oral testimony. Although the ICTY Rules of Evidence do not address evidence such as the audio or video recordings of distress calls or alleged acts of piracy, the rules surrounding written statements may be useful in determining when the ICTY will allow the admission of evidence other than oral testimony. The trial chamber has the discretion to “dispense with the attendance of a witness in person, and instead admit, in whole or in part . . . a written statement . . . in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.”²⁹ Additionally, under Rule 92*bis*(C), the trial chamber has the discretion to decide whether to require a witness to appear for cross examination.³⁰

Rule 92*bis*(A)(ii) lists factors against admitting evidence in the form of a written statement, including: 1) the objecting party can demonstrate that the nature and source of the evidence renders it unreliable, 2) that the prejudicial effect of the evidence outweighs its probative value, or 3) it is appropriate for the witness to be subject to cross examination.³¹ For a written statement to be admissible, the person making the statement must make a declaration as to the truthfulness of the written statements and such declaration must be witnessed by an appropriate official. If the witness is unavailable, a written statement may nonetheless be admissible if the trial chamber is: 1) satisfied of the person’s unavailability, and 2) finds that the circumstances in which the statement was made and recorded lends to its reliability. Once again, the ICTY Rules of Evidence leave it to the discretion of the trial chamber whether to admit written evidence in such an instance.

²⁹ ICTY Rules of Evidence, *supra* note 23, at rule 92*bis*. The requirement that evidence go “to proof of a matter other than the acts and conduct of the accused” is similar, but not identical, to the definition of hearsay: an out-of-court statement offered to prove the truth of the matter asserted.

³⁰ *Id.* at rule 92*bis*(c).

³¹ *Id.* at rule 92*bis*(A)(ii).

Rule 92*ter* gives the trial chamber discretion to enter evidence of a witness in the form of a written statement, even if such evidence “goes to the proof of the acts and conduct of the accused,” if three conditions are met: 1) the witness is present in court, 2) the witness is available for cross-examination, and 3) the witness attests that the statement is an accurate reflection of the witness’s declaration.³² An application of Rule 92*ter* to audio or video recordings of distress calls or alleged acts of piracy implies that such evidence would be admissible as long as the witness in the recording is present at trial, available for cross examination, and attests to the accuracy of the recording.

3. International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda (the “ICTR”) was established in November 1994 for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law.³³ The ICTR’s Rules of Procedure and Evidence³⁴ (the “ICTR Rules of Procedure”) establish a framework by which the ICTR is to function.

i. Rules of Evidence – Generally

While the ICTR Rules of Procedure do not specifically address the admissibility of evidence such as audio or video recordings of distress calls or alleged acts of piracy, Rule 89 states that for “cases not otherwise provided for in this Section, a chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.” Additionally, the “Chamber may admit any relevant evidence which it deems to have probative value” and “may request verification of the authenticity of evidence obtained out of court.” These rules suggest that in the case of audio or video recordings of distress calls or alleged acts of piracy, which are not addressed by the ICTR Rules of Procedure, the chamber has the discretion to enter such

³² *Id.* at rule 92*ter*.

³³ See International Criminal Tribunal for Rwanda, General Information, <http://www.unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx> (last visited 7 June 2011).

³⁴ International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1 (1995), entered into force June 29, 1995.

items into evidence if doing so will foster a fair determination of the matter and adhere to the general principle of law.

Rule 95 states that “[n]o evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability...” As previously mentioned, it is unlikely that Rule 95 has a chilling effect on the use of audio or video recordings of distress calls or alleged acts of piracy.

ii. Rules of Evidence – Witness Testimony

Rule 90, which governs the testimony of witnesses, generally requires that witness testimony be heard directly by the chambers. While Rule 90 indicates a preference for oral testimony, Rule 92 outlines when a written statement may be admitted instead of oral testimony. It is for the discretion of the trial chamber to “admit, in whole or in part,...a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused...”³⁵ Since the ICTR Rules of Procedure do not contain rules directly related to evidence such as the audio or video recordings of distress calls or alleged acts of piracy, the rules surrounding written statements may be useful in determining when the ICTR will allow the admission of evidence other than oral testimony. The ICTR Rules of Procedure leave the admissibility of written, rather than oral, testimony to the discretion of the trial chamber (as long as such evidence “goes to proof of a matter other than the acts and conduct of the accused”).

Rule 92*bis* (A)(ii) lists factors against admitting evidence in the form of a written statement, including: 1) the objecting party can demonstrate that the nature and source of the evidence renders it unreliable, 2) that the prejudicial effect of the evidence outweighs its probative values, or 3) it is appropriate for the witness to be subject to cross examination. Furthermore, for a written statement to be admissible, the person making the statement must make a declaration as to the truthfulness of the written statements and such declaration must be witnessed by an appropriate official. If the witness has died, cannot be reasonably traced, or is unable to testify orally, written evidence may nonetheless be admissible if the trial chamber is: 1) “satisfied on a balance of probabilities,” and 2) finds that the circumstances in

³⁵ The requirement that evidence go “to proof of a matter other than the acts and conduct of the accused” is similar, but not identical, to the definition of hearsay in the United States: an out-of-court statement offered to prove the truth of the matter asserted.

which the statement was made and recorded lends to its reliability. Once again, the ICTR Rules of Procedure leave it to the discretion of the trial chamber whether to admit written evidence in such an instance.

4. Extraordinary Chambers in the Courts of Cambodia

The Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) was created in order to prosecute the senior leaders of the Khmer Rouge for crimes against humanity.³⁶ The ECCC’s Internal Rules (the “Internal Rules”) provide the applicable rules of evidence for the ECCC.³⁷

Rule 87 of the Internal Rules governs the rules of evidence. Under rule 87, paragraph 1, all evidence is admissible unless otherwise provided in the Internal Rules.³⁸ Additionally, the chamber has the discretion during trial to “summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth.”³⁹ Conversely, the chamber may reject evidence if the evidence is irrelevant, impossible to obtain in a reasonable amount of time, unsuitable to prove the facts it purports to prove, not allowed under the law, or frivolous.⁴⁰ The ECCC Internal Rules are broadly written and grant wide discretion to the chamber. Thus, audio or video recordings of distress calls or alleged acts of piracy would likely be admissible under the ECCC Internal Rules.

C. Summary of Relevant Law in the British Legal System

The British, German and French bodies of law are well-established and have been continually developed over centuries of jurisprudence. They have served as the basis for the legal systems of many countries and influence countless more. Any thorough analysis of “international standards of justice” requires a discussion of these expansive and influential bodies of law.

This section of the memorandum will present the relevant laws of three such countries: the United Kingdom, Australia, and Malaysia. It will show that, generally speaking, these countries have permissive

³⁶ Extraordinary Chambers in the Courts of Cambodia, Introduction to the ECCC, <http://www.eccc.gov.kh/en/about-eccc/introduction> (last visited 7 June 2011).

³⁷ Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev.7, Feb. 23, 2011) (the “Internal Rules”).

³⁸ *Id.* at rule 87, ¶1.

³⁹ *Id.*

⁴⁰ *Id.*

systems of evidentiary law, so that the admissibility of the recordings in question tends to look favorable under each.

1. United Kingdom

The British rules of evidence are quite similar to their United States progeny.⁴¹ Perhaps the most significant difference is that American evidentiary rules have become codified in the Federal Rules of Evidence, while Britain's rules remain grounded in statutes and the common law.⁴² Thus, like its American counterparts, British rules generally exclude hearsay⁴³ and require that evidence be relevant: both logically relevant—that is, the evidence must “affect the probabilities of a fact in issue”⁴⁴—and also legally relevant—the probative value of the evidence must not be outweighed by the danger of unduly wasting the court's time.⁴⁵ To be admissible under the British system, evidence must also be authentic. In *R v. Murphy and another*,⁴⁶ the Northern Ireland Court of Appeal laid out a number of principles relating to the authentication of recordings (specifically video recordings) that other British courts have followed.⁴⁷ It stated that “relevant video evidence will be admissible if it is shown to be prima facie authentic.”⁴⁸ The court noted two ways to authenticate a video recording: to call the cameraman who filmed, or, in her absence, to present “other evidence [that] will suffice if it is logically probative that the video was authentic.”⁴⁹ If the original tape is unavailable, “then the ‘provenance and history’ of the copy will be a necessary requirement to prove authenticity.”⁵⁰

⁴¹ E. Warren Moïse, *British and American Trial Procedure: Hands Across the Water?*, TRIAL EVIDENCE JOURNAL 3, 3 (Winter 2007), available at http://apps.americanbar.org/litigation/committees/newsletter_gratis/trial_evidence.pdf (“The bulk of evidence rules are the same in Britain as in America.”).

⁴² *Id.*

⁴³ *Id.* (Though apparently not as strictly as in the United States).

⁴⁴ Rosemary Pattenden, *Authenticating ‘Things’ in English Law: Principles for Adducing Tangible Evidence in Common Law Jury Trials*, 12 INTERNATIONAL JOURNAL OF EVIDENCE AND PROOF 4 (2009).

⁴⁵ *Id.*

⁴⁶ NI 306 (1990).

⁴⁷ See, e.g., *R v. Quinn*, NICC 27 (2010).

⁴⁸ *R v. Murphy and another*, NI 306 (1990).

⁴⁹ *Id.*

⁵⁰ *Id.* The court summarized admissibility thusly: “[I]n the case of video recordings, the issue for the judge is, is it relevant? If it is, is it prima facie authentic? If it is, then it is admissible . . .” *Id.*

Perhaps the most elemental feature of Britain's law of evidence is its pragmatic nature. Judges—who are given much discretion—will usually admit evidence if it is “highly relevant.”⁵¹ This of course bodes well for the admissibility of the recordings in question. But the British system's pragmatism also leads to much unpredictability and lack of clarity. This is because the admissibility of a given piece of evidence is potentially affected by a number of statutes.⁵² For instance, Section 32.1 of England's Civil Procedure Rules gives the judge the power to exclude evidence that, although otherwise admissible, is either unfairly obtained or would lead to unfair process.⁵³ The Regulation of Investigatory Powers Act of 2000, which governs the admissibility of telecommunication intercepts, and particularly those on private telecommunication systems, is not directly applicable but can also provide insight into English law's potential treatment of audio or video recordings in similar circumstances.⁵⁴

One of the statutes that is most often disputed in cases on the admissibility of recordings is the European Convention on Human Rights (the “ECHR”), which was incorporated into English law by the Human Rights Act of 1998.⁵⁵ Article 6 of the ECHR states that criminal defendants are “entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”⁵⁶ Article 8 of the ECHR confers a right to privacy.⁵⁷ The Police and Criminal Evidence Act of 1984 (“PACE”) is another important statute that bears on admissibility of evidence. Section 78 of PACE gives courts the discretion to exclude prosecutorial evidence “if its admission would, taking into account all the circumstances including the circumstances in which the evidence was obtained, adversely affect the fairness of the proceedings to an unacceptable degree.”⁵⁸

⁵¹ Addleshaw Goddard, *Tape recording admissibility all at sea*, available at http://www.addleshawgoddard.com/view.asp?content_id=2099&parent_id=2091.

⁵² *See id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ European Convention on Human Rights (“ECHR”), available at <http://www.hri.org/docs/ECHR50.html>. *See also*, Andrew Choo & Susan Nash, *Evidence law in England and Wales: The impact of the Human Rights Act 1998*, 7 INTERNATIONAL JOURNAL OF EVIDENCE AND PROOF 1 (2003).

⁵⁶ ECHR, *supra* note 55, at art. 6, available at <http://www.hri.org/docs/ECHR50.html#C.Art6>.

⁵⁷ *Id.* at art. 8, available at <http://www.hri.org/docs/ECHR50.html#C.Art8>.

⁵⁸ Choo & Nash, *supra* note 55.

Criminal defendants often cite both ECHR and PACE when challenging the admissibility of tape recordings, particularly those obtained unlawfully by police surveillance.⁵⁹ Courts have consistently stated that compliance with Section 78 of PACE ensures the satisfaction of Article 6 of ECHR.⁶⁰ In keeping with the permissive nature of British evidentiary rules, courts have interpreted both statutes rather narrowly.⁶¹ Thus, even though both ECHR and PACE are putatively concerned with the broad goal of “fairness,” judges have mostly focused on ensuring that the evidence is reliable and accurate.⁶² The end result of this narrow construction is that evidence improperly obtained in contravention of one or more provisions of ECHR and PACE will be nonetheless admitted because, as one court noted, it is “simply unaffected by the . . . illegality” surrounding its procurement.⁶³

Distress calls and vessel footage would likely be held to these standards. If the recordings could pass the preliminary evidentiary requirements—that they are authentic, relevant, and not hearsay—they should be admitted. The recordings would not appear to violate any of the relevant statutes affecting admissibility, and their admission would conform to British law’s general permissiveness on evidentiary questions.

2. Australia

Australia’s evidence laws share several features with their British counterparts: they are permissive and, though perhaps more codified, consist of a mixture of statutory and common law.⁶⁴ Australian evidence law varies by state and territory, but the federal courts and the courts in the Australian Capital Territory apply the Evidence Act of 1995 (along with common law rules), and the territories of New South Wales, Tasmania, and Norfolk have adopted mirror legislation. Collectively,

⁵⁹ Indeed, those cases dealing with improperly obtained evidence occupy the bulk of cases on recordings. *See, e.g., Regina v. P*, 1 AC 146 (2000); *Alexander Henderson, Douglas John Marnoch v. Her Majesty’s Advocate*, HCJAC 47 (2005).

⁶⁰ Choo & Nash, *supra* note 55.

⁶¹ *Id.*

⁶² *See id.* (“The tendency of the appellate courts has been to interpret section 78(1) narrowly, and in effect as being concerned primarily with ensuring accurate fact-finding.”).

⁶³ *R v Bray*, Unreported, July 31, 1998.

⁶⁴ Australian Law Reform Commission Report 102 (“ALRC Report”), *The Uniform Evidence Acts: The movement towards a uniform evidence law*, available at <http://www.alrc.gov.au/publications/2.%20The%20Uniform%20Evidence%20Acts/movement-towards-uniform-evidence-law>.

these federal and territorial laws are referred to as the Uniform Evidence Acts (the “Acts”).⁶⁵ Though these acts are not intended as a code, they operate as one—the Australian analog to the United States’ Federal Rules of Evidence.⁶⁶

Like the United States’ Federal Rules of Evidence, the Acts exclude hearsay and requires that evidence be relevant.⁶⁷ In keeping with the Acts’ permissive thrust, relevance is defined broadly in Section 55 as evidence that “could rationally effect the assessment of probability of a fact in issue in the proceedings.”⁶⁸ The Acts also require that evidence be authentic. According to one treatise, in order to satisfy the applicable standards for authenticity, it is necessary to include sufficient evidence “defining and describing the provenance and history of the recording up to the moment of its production in court.”⁶⁹ This chain of custody condition mirrors the language used by British courts on the subject.

Also pertinent to the admissibility of recordings is the Acts’ discretionary provisions. Section 135 gives courts discretion to exclude otherwise admissible evidence where “the probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party, misleading, or result in undue waste of time.”⁷⁰ Section 137 provides that a judge must refuse evidence adduced by a prosecutor in a criminal proceeding if the probative value is outweighed by the danger of unfair prejudice to the defendant.⁷¹ Finally, Section 138 provides that evidence illegally or improperly obtained should be excluded. But, as in Britain, this exclusion is not ironclad: under 138(1), a court is to balance the desirability of admitting such evidence with its undesirability. And, like in Britain, courts have consistently interpreted the statute in favor of admitting evidence, even when it is improperly obtained.⁷²

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Heydon, J.D. *Cross on Evidence*, 7th ed. (LexisNexis Butterworths, 2004).

⁷⁰ ALRC Report, *supra* note 64.

⁷¹ *Id.*

⁷² See *Barker v. R*, *Harper v. R*, *Campbell v. R*, 127 ALR 280 (1994); *R v. Curran and Torney*, 50 ALR 745 (1982); *Violi and Others v Berrivale Orchards LTD*, 173 ALR 518 (2000).

Thus, the admissibility of the recordings in question stands on the same ground in Australia as it does in Britain. If authentic, relevant, and not hearsay, these recordings will likely be admitted. They would not appear to be the kind of evidence excluded under any of the discretionary rules of the Uniform Evidence Acts. Indeed, Australian courts have admitted far more problematic evidence in the past.⁷³

3. Malaysia

Though the amount of writing in English about Malaysian law—both cases and secondary materials—is relatively scarce compared to British and Australian law, some things can be gleaned. First, Malaysia’s rules of evidence appear to have their origins in both the common law (including the judicial decisions of other countries⁷⁴) and statute⁷⁵, but cases on the subject seem almost exclusively preoccupied with the rules laid down in the former. Second, all of the cases dealing with the admission of recordings into evidence are focused on authenticity issues, reflecting a particular concern with tampering. The benchmark decision on the subject is *Mohd Ali Jaafar v. Public Prosecutor*,⁷⁶ in which Judge Augustine Paul—who would later serve on the Federal Court of Malaysia, the nation’s highest tribunal—outlined two evidentiary principles that appear again and again in Malaysian cases on recordings: that it is “irregular” to have a mini-trial on the admissibility of recordings⁷⁷; and, that such evidence is only admissible after certain elements have been established. These are: the cleanliness of the tape prior to recording; the machine’s proper working order at the time of recording; the lack of tampering or alteration of the tape; the identification of the individuals in the tape after it is recorded by those who made it; the preparation of a transcript of the recording; a confirmation by the makers of the recording that the recording matches the transcript.⁷⁸ In brief, “if there is no evidence to show that a taped conversation is an accurate account of a conversation that occurred, then it is not admissible.”⁷⁹ Though *Mohd Ali Jaafar*

⁷³ See, e.g., *R v. Curran and Torney*, 50 ALR 745 (1982) (admitting recordings obtained in violation of Australian law at the prison cell of the defendant).

⁷⁴ See, e.g., *Mohd Ali Jaafar v. Public Prosecutor*, 4 MLJ 210 (1998) (citing Canadian and Australian cases).

⁷⁵ See *Public Prosecutor v. Dato’ Seri Anwar bin Ibrahim (No. 3)*, 2 MLH 1 (1999) (mentioning the Evidence Act of 1950).

⁷⁶ 4 MLJ 210 (1998).

⁷⁷ *Id.* at 223.

⁷⁸ *Id.* at 224-225.

⁷⁹ *Bin Ibrahim*, *supra* note 75, at 167.

dealt with audio recordings, the above principles have also been applied to the admission of video recordings.⁸⁰ The concern with authenticity and tampering is reflected in other cases as well, but the courts have been flexible in their application of this standard. For instance, the defendant in *Bakri bin Mohamad AH v. Pendakwa Raya*⁸¹ argued that the appearance of a mysterious individual in the chain of custody for a certain recording rendered that evidence inadmissible. The court disagreed, stating that the missing link in the chain of custody was “not fatal to the prosecution’s case.”⁸²

From this limited amount of literature, the admission of the recordings in question under Malaysian law seems simple enough: if they can meet the authenticity requirements outlined in the above cases, they will likely be admitted.

D. Summary of Relevant Law in the German Legal System

German courts have the right to “free evaluation of evidence,” such that audio or video recordings of distress calls and footage from vessels allegedly subject to piratical attacks should be admissible, given certain constraints. German courts are concerned primarily with the individual rights to develop one’s “personality” and privacy, as well as the integrity of the judicial system. But the concern for public safety and other overriding public interests can outweigh these concerns, depending on the seriousness of the charges against a defendant. The authenticity and admissibility of the evidence is determined by the judge, the ultimate fact-finder in the German inquisitorial system.

1. Overview of the German Criminal Law System

German courts use an inquisitorial system that favors “liberty of proof”—the concept that “evidence is presumptively admissible.”⁸³ German courts do not use a jury; instead, a panel of judges reviews and presents evidence collected by the attorneys and then determines which evidence will be used or excluded from trial. If, after the judges have reviewed all evidence supplied by the attorneys, a defendant succeeds on a motion to suppress evidence, the chief judge instructs the other panelists to

⁸⁰ See, e.g., *Public Prosecutor v. Jowy Manjoro*, 6 MLJ 342 (2007).

⁸¹ MLJU 0509 (2009).

⁸² *Id.*

⁸³ Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 YALE L.J. 126, 157 (2008).

disregard the evidence. The same panel that reviews the evidence to determine what will be presented determines whether the defendant is innocent or guilty.⁸⁴

Because German courts do not use juries and follow a principle requiring the free evaluation of evidence,⁸⁵ they are more liberal in decisions of admissibility. “When a jury hears the facts of a case, more protection is required than in a system controlled by professional jurists.”⁸⁶ What is admissible in German courts is very different from what is considered admissible in American courts: hearsay evidence and character evidence are both generally admissible in Germany.⁸⁷ “[T]he admission and weighing of evidence are within the discretion of the court.”⁸⁸

2. Restrictions on Admissibility

There are restrictions on the admissibility of evidence in German criminal courts, though, based on the German Constitution, *Grundgesetz* (the “Basic Law”),⁸⁹ and the Code of Criminal Procedure (the “StPO”).⁹⁰ Under the Basic Law, “the dignity of man is inviolable. To respect and protect it is the duty of all state authority.”⁹¹ The Basic Law protects the rights of every citizen to freely develop his or her personality,⁹² to privacy,⁹³ and to protect his or her home from searches without a judge’s order.⁹⁴ The StPO further defines the scope of searches and the use of evidence in courts.⁹⁵

To determine whether evidence should be excluded, German courts follow a multi-step process. First, the process involves a determination of whether the use, or seizure, of the evidence violates procedural provisions of the Basic Law or StPO. If it does not, the evidence will probably be admitted. If

⁸⁴ Craig M. Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032, 1063 (1983).

⁸⁵ StPO, *infra* note 90, at §261 (“The court shall decide on the result of the evidence taken according to its free conviction gained from the hearing as a whole.”)

⁸⁶ Burkhard Bastuck & Burkard Gopfert, *Admission and Presentation of Evidence in Germany*, 16 LOY. L.A. INT’L & COMP. L.J. 609, 612 (1994).

⁸⁷ Diskant, *supra* note 83.

⁸⁸ Bastuck, *supra* note 86.

⁸⁹ Grundgesetz für die Bundesrepublik Deutschland (“Basic Law”), May 23, 1949, BGBl. I (Ger.).

⁹⁰ STRAFPROZESSORDNUNG (“STPO”) (CODE OF CRIMINAL PROCEDURE), Apr. 7, 1987, BUNDESGESETZBLATT (FEDERAL LAW GAZETTE) 1074, as amended (Ger.), available at <http://www.iuscomp.org/gla/statutes/StPO.htm#255a> (English translation).

⁹¹ Bradley, *supra* note 84, at 1037 (citing GRUNDGESETZ, art. 1(1) (W. Ger. 1949, amended 1973)).

⁹² *Id.* (citing Basic Law, at art. 2).

⁹³ *Id.* (citing Basic Law, at art. 10).

⁹⁴ *Id.* (citing Basic Law, at art. 13).

⁹⁵ *Id.*

it does, a determination is then made as to whether the violated provision serves to protect a defendant. Finally, if the violated provision serves to protect a defendant, the court undertakes a consideration of proportionality. The court weighs the seriousness of the crime against the violation of the procedural provision in deciding on the admissibility of the evidence in question.⁹⁶

German courts are highly concerned with the admission of confessions obtained under torture,⁹⁷ and evidence that violates privacy rights or rights to development of personality.⁹⁸ However, if the crime is serious enough, the evidence will be admitted.⁹⁹

3. Use of Recorded Audio or Video Evidence

A German court might find that unauthorized video footage of suspected pirates violates their privacy rights, but would likely find that the seriousness of the crime outweighs these privacy concerns. In *Judgment of January 31, 1973*, the German federal constitutional court reviewed the use of a secretly audio taped conversation between a couple selling their home and the defendant purchaser, who requested the couple understate the price of the sale for tax fraud purposes.¹⁰⁰ The court determined that because of the small number of easily identifiable individuals recorded, the defendant's privacy rights were violated and the interest of the state to prosecute for tax fraud was insufficient to permit use of the tapes as evidence. However, notably, the court warned that the result would probably be different if the crime alleged was a violent one.¹⁰¹

In 1960, the German Federal Court of Justice indicated a recording of a telephone call by kidnappers during a kidnapping was admissible.¹⁰² More recently, the German courts have been confronted with this exact question. On April 5, 2010, a Dutch warship captured ten Somali pirates who had seized a German container ship, the *MV Taipan*. The *MV Taipan* crew had sent out a distress call and

⁹⁶ Stephen C. Thaman, "Fruits of the Poisonous Tree" in *Comparative Law*, 16 SW. J. INT'L L. 333, 349–50 (2010). See also Bradley, *supra* note 84, at 1042.

⁹⁷ Thaman, *supra* note 96, at 355–56.

⁹⁸ *Id.* at 350; Bradley, *supra* note 84, at 1042.

⁹⁹ Bradley, *supra* note 84, at 1042.

¹⁰⁰ *Id.* at 1044 (citing ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS (FEDERAL CONSTITUTIONAL COURT) 34 BVerfG 238 (Ger.)).

¹⁰¹ *Id.* at 1045.

¹⁰² *Id.* at 1048, n.83 (citing Judgment of June 14, 1960, BUNDESGERICHTSHOF (Federal Court of Justice) BGH, 14 BGHSt 358, 361 (Ger.)).

went to a hidden safe room.¹⁰³ The Dutch warship captured video of the Somali pirates on the German ship which was viewed during trial of the Somali pirates. The captain of the *MV Taipan* testified after the court watched the video.¹⁰⁴ This is the first piracy case tried in Germany in 400 years, and may one day be a seminal case applying Western standards to modern piracy claims; however, the trial is ongoing and many determinations regarding relevant evidentiary issues are still pending. This case should be followed closely in the ensuing months, as its high-profile nature affords it the opportunity to contribute to the development of internationally-accepted standards for piracy.

E. Summary of Relevant Law in the French Legal System

The French legal system is a “free proof system,” meaning that outside of a few narrow exceptions, all evidence, legally or illegally obtained, is considered by the presiding judge. Article 427 of the French Code of Criminal Procedure states:

Except where the law otherwise provides, offences may be proved by any mode of evidence and the judge decides according to his innermost conviction.

The judge may only base his decision on evidence which was submitted in the course of the hearing and adversarially discussed before him.¹⁰⁵

Article 427 and the language therein present four issues that require further consideration. First, do recordings fall under the “any mode of evidence” language? Second, if recordings do fall under “any mode of evidence,” what are the exceptions referred to by the language, “[e]xcept where the law otherwise provides”? That is, is there an exception to the general rule that excludes audio or video broadcasts or other recordings? Third, if recordings do not fall under any exceptions, how is the second line of Article 427 satisfied? Finally, what are the features of the French criminal system that enable the free proof system to be fair?

¹⁰³ Beatte Lakota, *German Justice Through the Eyes of a Somali Pirate*, SPIEGELONLINE (Apr. 7, 2011), <http://www.spiegel.de/international/world/0,1518,755340,00.html>.

¹⁰⁴ *Id.* at 4.

¹⁰⁵ French Code of Criminal Procedure, Article 427 (“French Criminal Code”) (2000) (“Hors les cas où la loi en dispose autrement, les infractions peuvent être établies par tout mode de preuve et le juge décide d’après son intime conviction. Le juge ne peut fonder sa décision que sur des preuves qui lui sont apportées au cours des débats et contradictoirement discutées devant lui.”)

1. Overview of the French Criminal System

Understanding how the rules of evidence are positioned in the broader context is essential in evaluating whether the French free proof system can be incorporated into a tribunal dedicated to piracy prosecution.¹⁰⁶ There are two important features of the system as a whole: (1) the court employs a unique method of evidence gathering and (2) judges are typically the fact-finders.

Article 12 of the French Criminal Code states that “judicial police operations are carried on under the direction of the district prosecutor by the officers, civil servants and agents.”¹⁰⁷ The most noteworthy feature of the criminal court system is the role of the investigating judge and the judicial police officers who conduct information gathering.¹⁰⁸ The investigating judge collects evidence that is placed on a dossier and presented to the judge for fact-finding.¹⁰⁹ The free proof system is made possible because information is gathered by a servant of the court, which theoretically minimizes the prejudice to the defendant caused by admitting all evidence.

Moreover, the free proof system is also feasible because judges participate in the fact-finding, which “tends to ensure that inflammatory evidence is not misused in the deliberation process.”¹¹⁰ Once all evidence is collected on the dossier, the parties “adversarially discuss” the evidence on the dossier in front of a judge. The free proof system is an integral part of a very “hands-on” investigative and judicial process where courts and judges closely works with police and can collect evidence that they themselves evaluate. The essential feature of the system, then, is the ability of the parties to adversarially discuss the evidence and for the judge to rule on the case based on his “innermost convictions.”¹¹¹ In order to

¹⁰⁶ In fact, other international tribunals emulate the French, free proof system. See Williams, *supra* note 10 at 16–17.

¹⁰⁷ French Criminal Code, *supra* note 105, at art. 12.

¹⁰⁸ *Id.* at art. 18 (“When acting in accordance with an express rogatory letter from the investigating judge or upon a requisition made by the district prosecutor taken in the course of a preliminary police enquiry or a flagrancy enquiry, judicial police officers may proceed with the operations prescribed by the judge or prosecutor over the entire national territory.”).

¹⁰⁹ *Id.* at art. 49 (“The investigating judge is in charge of judicial investigations.”).

¹¹⁰ Kenneth Williams, Do We Really Need the Federal Rules of Evidence?, 74 N. DAK. L. REV. 1, 17 (1998).

¹¹¹ The “innermost conviction” standard is similar to the “preponderance of the evidence” standard of U.S. courts. Again, the free proof system is successful because the judge makes decisions based on the “innermost conviction,” standard which is a heightened standard, and therefore looks at all of the evidence as a whole.

effectively implement such a free proof system in a regional piracy tribunal, the court should couple liberal evidentiary rules with some of the other protections afforded in French criminal procedure.

2. The Scope of the Language: Any Mode of Evidence

The French Code of Criminal Procedure allows for all materials, legally or illegally obtained, to be admitted into evidence.¹¹² Because there are no formal rules for determining admissibility of evidence in the French criminal system, the trial judge has total discretion on what evidence to consider. In contrast to countries with stringent exclusionary rules of evidence, in France, a judge may consider all evidence, including “evidence bearing on the accused’s prior convictions, general behavior, family history, hearsay testimony, and documentary evidence.”¹¹³

The Court of Cassation has confirmed that even illegally acquired evidence is admissible. In a 1994 decision, the Court of Cassation determined that “while a continuous recording of an employee without his knowledge . . . is illegal,” evidence of his theft, recorded on the illegal tapes, is admissible. It is up to the judge to assess its probative value. Therefore, the language “any mode of evidence” would likely encompass recordings of maritime distress calls.

3. Exceptions to the General Rule of Broad Admissibility

The French Criminal Code identifies very few limitations on admissible evidence, none of which refer to audio or video recordings.¹¹⁴ The exceptions typically refer to a judicial officer’s deviations from the prescribed methods of information gathering. For example, the French Criminal Code states that if certain processes are not followed during questioning, evidence received during an interrogation may be inadmissible.¹¹⁵ Even then, the exceptions are narrow. Article 81 gives great latitude to investigative judges, allowing the judge to “undertake[] in accordance with the law any investigative step he deems

¹¹² Williams, *supra* note 110, at 16-17.

¹¹³ *Id.*

¹¹⁴ See Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539, 586-587 (1990); *see generally*, French Criminal Code, *supra* note 105.

¹¹⁵ *Id.* at art. 173. For example, the use of torture is prohibited so any evidence received by an interrogator who tortured the defendant or witness would be deemed inadmissible.

useful for the discovery of the truth.”¹¹⁶ Ultimately, nothing in the French Criminal Code specifically limits the admissibility of recordings.

Because there are not explicit exceptions in the French Criminal Code prohibiting recordings, the relevant outer boundary for admissibility is the Convention for the Protection of Human Rights and Fundamental Freedoms (the “Convention on Human Rights”) and the International Convention on Civil and Political Rights (the “Convention on Civil and Political Rights”) (collectively, the “Rights Conventions”). Under French law, evidence procured in violation of these Rights Conventions may be deemed inadmissible.¹¹⁷ The Court of Cassation (France’s highest court) has endorsed the Rights Conventions’ positions that evidence that infringes on individual rights of dignity and fair trial must be excluded from trial.¹¹⁸

On a practical level these Rights Conventions have little effect on evidence of broadcasts and recordings. The European Court of Human Rights has determined that the right of dignity and fair trial is a domestic law issue, and that the Rights Conventions merely “ascertain[] whether the proceedings, as a whole, including the format of the evidence, is a fair one.”¹¹⁹

In ascertaining whether proceedings are fair, the European Court of Human Rights has taken a position consistent with Article 427’s free proof system and has not prohibited unfair or illegally acquired evidence.¹²⁰ In fact, in the *Schenk* decision, the European Court of Human Rights determined that an unlawfully obtained telephone recording is admissible evidence and falls within the boundaries of the Rights Conventions.¹²¹ In that case, the court first noted that domestic law, as opposed to the Convention on Human Rights, regulates admissibility of evidence gathered illegally. The Court then concluded that illegally admitted evidence is admissible because it was presented in the course of a fair trial.¹²²

¹¹⁶ *Id.* at art. 81.

¹¹⁷ M. Pascal Lemoine, *La loyauté de la preuve* (2004), www.courdecassation.fr (last visited 7 June 2011).

¹¹⁸ *Id.*

¹¹⁹ *Id.* (citing European Court of Human Rights, *Barbera, Messegue and Jabardo*, December 6, 1988, *Series A, no. 146, br. 68.*)

¹²⁰ *Id.*

¹²¹ *Schenk v. Switzerland* (1991) 13 EHRR 242.

¹²² Lemoine, *supra* note 117.

Therefore, it is likely that pursuant to the Rights Conventions, French courts would allow the submission of audio or video recordings.

4. The Requirement of Adversary Discussion of Evidence

In its reference to the *Schenk* decision, the Court of Cession emphasized that a factor in the fairness calculus was the ability of the defendant to challenge the authenticity of the recording.¹²³ Therefore, according to French law, defendants in piracy proceedings typically would have to authenticate the recordings of broadcasts of maritime distress calls. However, even if such authentication is not possible, the recordings will likely be admitted because of the broad range of evidence admissible under French law.

In summary, while the above is not a summary of the laws of every State which would be considered to comport with international standards of justice, the evidentiary standards utilized in British common law-based countries, Germany and France provide valuable insight into the evidentiary standards and practices of countries that have helped shape the policies and procedures of judicial systems throughout the world. While the evidentiary standards of certain British common law-based countries appear to place significant weight on the provenance and history of evidence in requiring proof of the authenticity of items of evidence, a review of case law suggests that highly relevant evidence for which the probative value exceeds the prejudicial effect on the defendant is more likely than not to be admitted by such courts. Moreover, Germany's largely discretionary system of analyzing evidence and France's "free proof" method of evaluating evidence also routinely result in the admission of relevant, non-prejudicial evidence; consequently, under all three of the judicial systems surveyed above, audio or video recordings of distress calls and footage from vessels allegedly subjected to piratical attack would most likely be admitted into evidence, absent extenuating circumstances or well-founded questions as to the authenticity of such evidence. Because these legal systems represent important international standards of justice, they should be instructive in forming a piracy tribunal.

¹²³ Lemoine, *supra* note 117.

CONCLUSION

An analysis of international conventions, rules of international tribunals, and the domestic laws of selected countries that created the foundation for much of the world's bodies of law, provides some insight into (i) whether, under international standards of justice, audio or video recordings from vessels subject to piratical attacks can be admitted into evidence; (ii) how authenticity would be proved in such a case; and (iii) whether such admission would deny the opportunity to cross-examine. Although in most jurisdictions, there are no explicit international standards to address these issues, most sources of law make determinations about audio and video recordings by considering the rights of a defendant, the probative value and potential prejudicial impact of the evidence, and other public policy concerns. In balancing these interests, the courts look at the absence or presence of a jury as well as the credibility of the evidence, including the source of the evidentiary investigations and findings. Depending on these factors, certain courts require authentication of evidence or even a right to cross-examination; however, many courts afford judges significant latitude in determining the admissibility and probative value of audio or video recordings and are willing to overlook other requirements to ensure adequate prosecution of criminals. Such judicial discretion seems to be the primary underlying principal in global criminal procedure, and should be an important factor in drafting a set of procedural and evidentiary rules for any piracy court.

Consequently, under the surveyed international standards of justice, audio or video recordings of distress calls and footage from vessels allegedly subjected to piratical attack would most likely be admitted into evidence so long as the probative value of the evidence outweighs the prejudice to the defendant. Moreover, in the majority of tribunals and jurisdictions surveyed, the absence of a jury and the utilization of judges as fact-finders make it more likely that such evidence would be admitted based on the assumption that a judge would be able to weigh the evidence carefully and without prejudice. Although the evidentiary standards under certain States' laws require detailed authentication of evidence and/or a right to cross-examination of witnesses, the prevailing international standards of justice militate in favor of the admission of such evidence in trials or tribunals designed to address acts of piracy.