INTRODUCTION

In 2009, Somali pirates attacked 217 ships in the Gulf of Aden; 47 of the ships pirates attacked were successfully taken. The captured ships resulted in an estimated $60 million paid in ransom. These numbers continue to rise each year as more ships and cargo are taken on the high seas and with them the odds of American shipping being involved in the fray.

The problem of piracy was not unknown to the members of the Constitutional Convention. Many of the members of the Convention were involved in maritime and other businesses dependent on foreign trade. These men thought the issue significant enough to specifically identify piracy in the Constitution when they created article I, section 8, clause 10: the Offenses Clause.

This article will focus on the prosecution of piracy under the Offenses Clause. In Section I it will define the term pirate and then establish the law against piracy that Congress has created under the Constitution’s Offenses Clause. Section II will provide a brief history of the United States’ experience combating piracy. Section III will discuss jurisdiction over piracy on the high seas. And IV will provide examples of recent cases with U.S. involvement where piracy was an issue. The article will conclude with a brief statement regarding the effectiveness of the Offenses Clause in the modern prosecution of piracy.

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2 Id.
3 See generally James J. Woodruff II, Merchants, Traders, and Pirates: The Birth of the Admiralty Clause, 26 TUL. MAR. L.J. 563 (2002) (discussing the backgrounds of several of the members of the constitutional convention).
I. PIRACY DEFINED

What is piracy? Watching Johnny Depp portray Jack Sparrow or Errol Flynn take the big screen as Captain Blood gives the viewer some idea of what constitutes piracy. However, does Hollywood’s image of a pirate hold up to what the law considers a pirate? What about the portrayal of pirates in the literary world? We all remember Long John Silver and Captain Hook from our childhoods. Are those accurate portrayals of pirates? And are acts of piracy limited to those actions we have seen on the big screen or have read in literature?

The law of piracy is a mix of national and international law that dates back hundreds of years. Most of these laws provide specific acts that an individual must engage in to be considered a pirate. As the world’s political climate, technology, and tactics changed the legal definition of a pirate has remained remarkably stable.

A. The United States

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4 This article will focus on piracy as prosecuted on the high seas and, to a limited extent, foreign territorial waters. It should be understood that American states and municipalities also have authority to issue laws regarding the punishment of piracy and that those laws may be different than those regarding matters occurring outside of domestic territorial waters. The area that comprises territorial waters depends on the custom of the seaside state. States may recognize waters up to 200 nautical miles from their shorelines as their territorial water zone. UNCLOS, infra note 9, art. 86.

5 Johnny Depp portrays the rascal Jack Sparrow in Disney’s series The Pirates of the Caribbean. He is a cunning adversary who gives the outward appearance of a flamboyant drunk. He leads his companions on many adventures, frequently using highly improvised methods to escape from certain doom. See, e.g. Pirates of the Caribbean: The Curse of the Black Pearl (Walt Disney Pictures 2003).

Captain Blood was a popular character portrayed most recently by Errol Flynn in a 1935 film. Capt. Blood is a physician who is wrongfully convicted and sentenced to a life of slavery in the Caribbean. He escapes the chains of slavery and begins a piracy career. Towards the end of the film Capt. Blood receives a pardon and commission in the Royal Navy from King William of Orange. This leads him to defend the colony under attack and he is made governor after successfully defeating the colony’s French aggressor. CAPTAIN BLOOD (Warner Bros. Pictures 1935).

6 Robert Louis Stevenson made famous Long John Silver, the sea cook who was missing a leg and had a constant companion in Captain Flint, his pet parrot. ROBERT LOUIS STEVENSON, TREASURE ISLAND (Macmillian Company 1922) (1883).

Captain Hook has been a villain to children ever since his introduction by J. M. Barrie in his children’s story, Peter and Wendy—more popularly known as Peter Pan—hit the stands. J.M. BARRIE, PETER AND WENDY (Charles Scribner’s Sons 1911). Reference is even made to Long John Silver in Peter and Wendy, a testament to the power the image of Long John Silver had in defining the popular image of pirates in literature. Id. at 168.
1. The Constitution

In the United States, the U.S. Constitution gives Congress the power to “define and punish Piracies” under the Offenses Clause. Pursuant to this clause, Congress set out its definition and punishments under Title 18, Chapter 81 of the United States Code.

2. Statutory Authority: Origins

The first statutory provision under Title 18, Chapter 81 created to define piracy is section 1651. It states that, “Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.” This provision is problematic on a number of fronts. Most blaring is that it delegates the definition of piracy to the law of nations without giving any clear limitations on what nations should be included or what defines “the law of nations.” This makes the definition a little ambiguous and somewhat chameleon. Is a judge interpreting section 1651 required to make a survey of all the foreign nations’ laws regarding piracy? If so, should the judge limit the survey to the law as it existed at the time section 1651 was enacted or survey the nations’ current law on the subject? Alternatively, international treaties do exist that define piracy; may a judge rely solely on such treaties to fulfill the constitutional imperative?

Traditional statutory analysis of this provision is not helpful in resolving these questions. When determining the meaning of a statute we must look to the plain meaning of the language used. As noted above, the phrase “the law of nations” is itself open to interpretation. What nations must be surveyed to determine what acts will be considered piratical? Do a certain number of nations need to agree in order for the specified act to be considered that of a pirate? The United States Supreme Court answered these questions in the 1820 decision in United States v. Smith. In 1819, a jury found Thomas Smith committed a number of
acts and submitted a special verdict to the Supreme Court. The trial court, it turned out, was uncertain as to the definition of piracy. While the jury agreed upon the content of the defendant’s actions, they could not determine whether those actions constituted piracy under the law. The special verdict stated as follows:

We, of the jury, find, that the prisoner, Thomas Smith, in the month of March, 1819, and others, were part of the crew of a private armed vessel, called the Creollo, (commissioned by the government of Buenos Ayres, a colony then at war with Spain,) and lying in the port of Margaritta; that in the month of March, 1819, the said prisoner and others of the crew mutinied, confined their officer, left the vessel, and in the said port of Margaritta, seized by violence a vessel called the Irresistible, a private armed vessel, lying in that port, commissioned by the government of Artigas, who was also at war with Spain; that the said prisoner and others, having so possessed themselves of the said vessel, the Irresistible, appointed their officers, proceeded to sea on a cruise, without any documents or commission whatever; and while on that cruise, in the month of April, 1819, on the high seas, committed the offence charged in the indictment, by the plunder and robbery of the Spanish vessel therein mentioned. If the plunder and robbery aforesaid be piracy under the act of the Congress of the United States, entitled, ‘An act to protect the commerce of the United States, and punish the crime of piracy,’ then we find the said prisoner guilty; if the plunder and robbery, above stated, be not piracy under the said act of Congress, then we find him, not guilty.

Upon reaching the Supreme Court, the defendant, Smith, argued that Congress had a duty to define piracy in explicit terms and not to leave the definition to judicial interpretation. He held to the position that the Constitution’s requirement that Congress define piracy

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11 Id. at 154.
12 Id.
13 Id. at 154-55.
14 Id. at 156-57.
illustrated the framers’ belief that the law of nations was an insufficient source for the task. As Congress had been given the task of defining what constitutes piracy it was necessary for Congress to create a definition of acts that amounted to piratical conduct. The defendant believed that if the constitutional framers had confidence in the definition provided by the “law of nations” they simply would have given Congress the power to punish the offenses and thereby relieved the legislative body of the duty to define piracy.

Smith advanced the argument that “Congress must define [piracy] as the constitution has defined treason, not by referring to the law of nations in one case, or to the common law in the other, but by giving a distinct, intelligible explanation of the nature of the offence in the act itself.”

Smith’s argument was strengthened by the historical circumstances of the framers’ choice of language for the Offenses Clause: at the Constitution’s drafting, the law of nations provided a definition for treason, but the constitutional drafters chose to define it in spite of such a body of law. The defendant argued that a crime should have a strict definition as to place the violators on notice that the acts they are engaged in are against the law; and that such matters should not be left to the whims of judicial interpretation. It was also brought to the Court’s attention that the “writers on public law do not define the crime of piracy with precision and certainty.”

The Supreme Court rejected the defendant’s text based arguments as taking “too narrow a view of the language of the constitution.” Instead the majority relied upon “the works of jurists, writing professedly on the public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law” to define the law of nations. In order to develop a definition the Court reviewed a long list of legal scholars’ opinions and cases on the subject and included most of the authorities relied upon in a rather lengthy footnote. Based on these

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15 Id. at 157.
16 Id.
17 Id.
18 Id.
19 U.S. CONST. art. III, § 3.
20 Smith, 18 U.S. at 157.
21 Id.
22 Id.
23 Id. at 158.
24 Id. at 162.
25 Id. at 163 n.h. This footnote compiles a great number of sources in various languages. A
sources, the Court stated the common law defined piracy as a punishable
offense that runs against the law of nations, and a pirate as an enemy of
the human race.\textsuperscript{26}

Of particular interest to the Court were the writings of Sir Charles
Hedges and William Blackstone. The English admiralty court under Sir
Charles Hedges had declared the crime of piracy as “being a robbery
committed within the jurisdiction of the admiralty.”\textsuperscript{27} The Court noted
that Blackstone “considered the common law definition as
distinguishable in no essential respect from the law of nations.”\textsuperscript{28}

In the end, the Court stated the following definition of piracy:

So that, whether we advert to writers on the common
law, or the maritime law, or the law of nations, we
shall find, that they universally treat of piracy as an
offence against the law of nations, and that its true
definition by that law is robbery upon the sea. And the
general practice of all nations in punishing all persons,
whether natives or foreigners, who have committed
this offence against any persons whatsoever, with
whom they are in amity, is a conclusive proof that the
offence is supposed to depend, not upon the particular
provisions of any municipal code, but upon the law of
nations, both for its definition and punishment.\textsuperscript{29}

The Court’s opinion on the matter was not unanimous. Justice
Livingston provided a dissenting opinion that raised serious
constitutional concerns. He believed that Congress was obligated to

\textsuperscript{26} Id. at 161.
\textsuperscript{27} Id. at 161-62. The opinion also describes that the crime of piracy was a civil law offence
 confined to the admiralty courts prior to the statute of 28\textsuperscript{th} of Henry VIII. This treatment of piracy
 in a civil manner was possibly known by some members of the constitutional convention and
taken into consideration when debating the offense clause.
\textsuperscript{28} Id. at 162.
\textsuperscript{29} Id.
give a definition of piracy “in terms, and not to refer the citizens of the United States for rules of conduct to the statutes or laws of any foreign country, with which it is not to be presumed that they are acquainted.”

Justice Livingston found a penalty of death to be particularly unjust when Congress subjected its citizens to a vague and shifting law of nations definition of a crime. The key finding by Livingston was “that there is not to be found in the act that definition of piracy which the constitution requires.”

After Smith highlighted the ambiguity inherent in relying on the law of nations to define the crime of piracy, Congress passed several additional statutes to clarify what acts qualify as piratical. The first of these statutes is currently found at § 1652 of the United States Code. It states as follows:

Whoever, being a citizen of the United States, commits any murder or robbery, or any act of hostility against the United States, or against any citizen thereof, on the high seas, under color of any commission from any foreign prince, or state, or on pretense of authority from any person, is a pirate, and shall be imprisoned for life.

This section specifically addresses the status of a United States citizen privateer who is commissioned under a foreign Letter of Marque to raid U.S. shipping.

This statutory language was at issue in the case of United States v. Baker. In Baker, the crew of a private armed schooner named Savannah took an American vessel, the Joseph, by force on June 3, 1861. Prior to taking the Joseph, the Savannah, its captain and its crew had received a commission from President Jefferson Davis of the Confederate States of America to carry out raids on U.S. shipping during the War Between the States.

30 Id. at 182.
31 Id.
32 Id. at 183.
34 United States v. Baker, 5 Blatchf. 6, 24 F.Cas. 962 (C.C.S.D.N.Y. 1861).
35 Id. at 964.
36 Id. at 962. The full statement of the commission as given by the court is as follows:

Jefferson Davis, President of the Confederate States of America, to All Who Shall See These Presents-Greeting: Know ye, that by virtue of the power
The prosecutors brought multiple counts against the captain and crew. In addition to being charged with piracy under the language of § 1651, four of the crew were also charged with violating the language of § 1652.\(^{37}\) The defendants argued that they were operating under the “commission of a foreign state” and as such could not violate § 1652. The court disagreed. It first decided that four of the crew members – “Baker, Howard, Passalaigue, and Harleston” – were citizens of the United States.\(^{38}\) The court refused to decide the question of whether the Confederate states constituted a separate sovereign state, as the executive and legislative branches of the U.S. government had not formally recognized the Confederate States as a foreign nation.\(^{39}\) In an effort to avoid what it saw as a political question, the court put the question to the jury as to whether either branch had, through their actions, \textit{de facto} acknowledged the Confederate States of America as a foreign nation.\(^{40}\)

The jury was unable to come to a verdict and was discharged.\(^{41}\) Based on the questions presented to the judge from the venire it appears the major issues arose around whether or not the Confederate states had been recognized as a foreign power and the intent element of robbery.\(^{42}\)

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\(^{37}\) \textit{Id.} at 964. The language of both section 1651 and 1652 is the same as the predecessor statutes. I have chosen to keep the current numbering in the discussion in order to avoid confusion.

\(^{38}\) \textit{Id.}

\(^{39}\) \textit{Id.} at 965-66.

\(^{40}\) \textit{Id.}

\(^{41}\) \textit{Id.} at 967.

\(^{42}\) \textit{Id.} at 966. The jury asked two questions. The first was “whether, if the jury believed that civil war existed, and had been so recognized by the act of our government, or if the jury believed that the intent to commit a robbery did not exist in the minds of the prisoners at the time, it may influence their verdict.” \textit{Id.} The second was that it was “understood you honor to charge that there must be an intent to take the property of another for your own use.” \textit{Id.}

These questions illustrate the problems with prosecution under § 1652 when the nation is fighting a state or territory that has seceded. To clear up any citizenship issues the members of the Savannah’s crew should have individually revoked their U.S. citizenship prior to engaging in
3. Statutory Authority: Increasing the Scope of “Piracy”

Congress has, under the Offenses Clause, not left a number of situations to the whims of the “laws of nations.”\(^{43}\) Over time, Congress has enlarged and clarified the definition of piracy to include both non-citizens and citizens acting under certain circumstances.

As to matters arising from interactions with non-U.S. citizens, if a citizen of a foreign state engages in acts of war on the United States, he is considered a pirate, and therefore prosecutable, as long as his actions are contrary to treaties in effect between the U.S. and the pirate’s State.\(^{44}\) This is an interesting method of dealing with actions that may lead to a war between nations. Rather than leave it to the offending parties’ nation state to deal with the transgressions, the U.S. had already established a method for resolving the dispute. In the United States, justice can be done quickly by taking the offending party, defining him as a pirate, and prosecuting him.

The definition of piracy likewise now includes U.S. citizens who invest in piratical enterprises. U.S. citizens are not allowed to prepare or take command of a private vessel “to cruise or commit hostilities” against U.S. citizens or their property.\(^{45}\) If citizens engage in such conduct they will be considered pirates. The statute’s language includes individuals who attempt to create or those who invest in such a vessel in their actions as privateers. Such revocation may lead to other legal ramifications, but for the purposes of § 1652, it would clearly remove them from falling thereunder.

\(^{43}\) U.S. CONST. art. I, § 8, cl. 10.

\(^{44}\) 18 U.S.C. § 1653 (2006) states as follows:

> Whoever, being a citizen or subject of any foreign state, is found and taken on the sea making war upon the United States, or cruising against the vessels and property thereof, or of the citizens of the same, contrary to the provisions of any treaty existing between the United States and the state of which the offender is a citizen or subject, when by such treaty such acts are declared to be piracy, is a pirate, and shall be imprisoned for life.

\(^{45}\) 18 U.S.C. § 1654 (2004) states as follows:

> Whoever, being a citizen of the United States, without the limits thereof, fits out and arms, or attempts to fit out and arm or is concerned in furnishing, fitting out, or arming any private vessel of war or privateer, with intent that such vessel shall be employed to cruise or commit hostilities upon the citizens of the United States or their property; or

> Whoever takes the command of or enters on board of any such vessel with such intent; or

> Whoever purchases any interest in any such vessel with a view to share in the profits thereof—

> Shall be fined under this title or imprisoned not more than ten years, or both.
its prohibitions.\textsuperscript{46} Interestingly, punishment of individuals under § 1654 is limited to less than ten years while offenders under the other piracy statutes may have to endure life sentences.

Congress has also included violence against a vessel’s commander by a “seaman” as an act of piracy.\textsuperscript{47} The conduct specifically mentioned is that of a “seaman” attacking his commander so as to keep the commander from defending his vessel or vessel’s cargo.\textsuperscript{48} This section resolves any issue that may arise regarding the necessity of two vessels for an act of piracy to occur. It also creates clarity regarding a seaman’s conduct towards his vessel and her master.

The issue of mutiny is also governed under the Offenses Clause through the United States Code. Under the code, a ship’s captain or her officers are determined to be pirates if they “piratically or feloniously” take their vessel.\textsuperscript{49} The statute includes the term mariner along with the terms captain and officer; mariner, however, is not defined. Based on its usage in other parts of the code, it appears to cover any person employed in a maritime capacity on the ship.\textsuperscript{50} The Black’s Law Dictionary definition of mariner includes, “persons employed aboard ships or vessels.”\textsuperscript{51}

Those who attempt to get a captain or any other crew member to take the vessel, cargo, “or to turn pirate” are also covered by Congresses broad constitutional authority.\textsuperscript{52} The same section also includes the

\begin{flushright}
\textsuperscript{46} Id.
\textsuperscript{47} 18 U.S.C. § 1655 (2006) states as follows:
“Whoever, being a seaman, lays violent hands upon his commander, to hinder and prevent his fighting in defense of his vessel or the goods intrusted to him, is a pirate, and shall be imprisoned for life.”
\textsuperscript{48} Id.
\textsuperscript{49} 18 U.S.C. § 1656 (2006) states: Whoever, being a captain or other officer or mariner of a vessel upon the high seas or on any other waters within the admiralty and maritime jurisdiction of the United States, piratically or feloniously runs away with such vessel, or with any goods or merchandise thereof, to the value of $50 or over; or Whoever yields up such vessel voluntarily to any pirate--
Shall be fined under this title or imprisoned not more than ten years, or both. Sec. 1656.
\textsuperscript{51} Black’s Law Dictionary 967 (6th ed.).
\textsuperscript{52} 18 U.S.C. §1657 states:
Whoever attempts to corrupt any commander, master, officer, or mariner to yield up or to run away with any vessel, or any goods, wares, or merchandise, or to turn pirate or to go over to or confederate with pirates, or in any wise to trade with any pirate, knowing him to be such; or Whoever furnishes such pirate with any ammunition, stores, or provisions of any kind; or Whoever fits out any vessel knowingly and, with a design to trade with, supply, or correspond with any pirate or robber upon the seas; or Whoever consults, combines, confederates, or corresponds with any pirate or robber upon
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confine the ship’s master by a seaman.\footnote{53}

And to deter opportunists, Congress included punishments for those who would plunder ships and seamen in distress. Up to ten years of imprisonment or a fine awaits the person who “plunders, steals, or destroys” any cargo or other items belonging to a vessel in distress.\footnote{54} This includes the plundering of a vessel that has been “wrecked, lost, stranded, or cast away.”\footnote{55} The penalties are even greater for a person who “willfully obstructs the escape of any person endeavoring to save his life” from a distressed or wrecked vessel.\footnote{56} In that situation the offending person is to receive a minimum of ten years in jail.\footnote{57} Such individuals are grouped together by the statute with those who would use false signals to bring a vessel into danger, distress, or shipwreck.\footnote{58} Those who assist in piratical operations by receiving stolen vessels, cargo, or other property can also be prosecuted under the piracy statutes.\footnote{59} For their assistance in the piracy operation the law authorizes a period of imprisonment of up to ten years.\footnote{60}

For those thinking of avoiding liability for piracy by raiding commerce ashore, think again. The members of Congress were probably aware of the history of pirates making amphibious landings from their vessels to attack towns.\footnote{61} The piracy statutes include provisions

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the seas, knowing him to be guilty of any piracy or robbery; or
Whoever, being a seaman, confines the master of any vessel--
Shall be fined under this title or imprisoned not more than three years, or both. Id.
53 Id.
54 18 U.S.C. § 1658 (2006) deals with plunder of a distressed vessel. It states as follows:
(a) Whoever plunders, steals, or destroys any money, goods, merchandise, or other effects from or belonging to any vessel in distress, or wrecked, lost, stranded, or cast away, upon the sea, or upon any reef, shoal, bank, or rocks of the sea, or in any other place within the admiralty and maritime jurisdiction of the United States, shall be fined under this title or imprisoned not more than ten years, or both.
(b) Whoever willfully obstructs the escape of any person endeavoring to save his life from such vessel, or the wreck thereof; or
Whoever holds out or shows any false light, or extinguishes any true light, with intent to bring any vessel sailing upon the sea into danger or distress or shipwreck--
Shall be imprisoned not less than ten years and may be imprisoned for life. 1659.
55 Id.
56 Id. at (b).
57 Id.
58 Id.
59 18 U.S.C. § 1660 (2006) deals with the receipt of pirate property. It states:
Whoever, without lawful authority, receives or takes into custody any vessel, goods, or other property, feloniously taken by any robber or pirate against the laws of the United States, knowing the same to have been feloniously taken, shall be imprisoned not more than ten years.
60 Id.
61 Pirates have been known to engage in amphibious landings to assault and sack land based towns. One of the most daring on record is Captain Morgan’s sacking of Panama. See generally, Peter Earl, The Sack of Panama: Captain Morgan and the Battle for the Caribbean, St. Martin’s Press (1981).
\end{verbatim}
3. Courts

In addition to the statutory framework established by the legislature, the courts have also jumped into the mix of defining who is a pirate. Even though the legislature offered a clear set of guidelines regarding who is a pirate, the courts have felt a need to create their own definitions. One court has defined a pirate as “one who acts solely on his own authority, without any commission or authority from a sovereign state, seizing by force, and appropriating to himself, without discrimination, every vessel he meets with.”

B. International Treaties

As the United States Congress has stated that the “law of nations” determines the definition of who is a pirate, international treaties play an important role in lending detail to that definition as adopted by the international community in the 20th century. Both the Convention on the High Seas and the United Nations Convention on the Law of the Sea, signed by numerous countries, define piracy.

The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) will not be analyzed here as it

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62 18 U.S.C. § 1661 discusses robbery by pirates on shore. It states as follows: Whoever, being engaged in any piratical cruise or enterprise, or being of the crew of any piratical vessel, lands from such vessel and commits robbery on shore, is a pirate, and shall be imprisoned for life.

63 Davison v. Seal-Skins, 7 F.Cas. 192. (Thompson, Circuit Justice, C.C.D. Conn. 1835).


Article 3 covers the definition of piracy in the convention. The extensive comments to that article shed light on the disagreements that arose in creating a definition of piracy and the appropriate legal methods for its punishment. The comments to article 3 state that creating a definition for piracy was the most difficult issue that faced the convention. Id. at 769. The comment reflects that the definition they had created did not touch upon “many practical and technical problems in the field of piracy . . . .” Id. The comments to article 3 comprise 53 pages.

65 International Maritime Organization: Convention and Protocol from the International
does not expand the definition of piracy. The SUA does cover crimes on the high seas, but does not consider perpetrators pirates and as such does not fall under the strict instruction of the Constitution that the Congress “define and punish Piracies.”


The Convention on the High Seas requires treaty members to cooperate in combating piracy “on the high seas or in any other place outside the jurisdiction of any State.” Under the convention, piracy has been defined by describing a series of acts listed under article 15. These acts are as follows:

1. Any illegal acts of violence, 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.

The Convention also states that if a government-owned vessel or aircraft is taken by a mutinous crew it will be treated as a private vessel.


U.S. CONST. art. I, § 8, cl. 10.


Id. at art. 15.
and subject to article 15. Article 16 provides clarity to the question of when a mutinous crew falls under the pirate definition. Notably, it attempts to protect a government crew from becoming pirates by mutiny alone.

Under article 17, a ship’s piratical status depends on who has control of that vessel. Once an individual or crew take over a vessel and intend to use it in a manner violating article 15 it is a pirate vessel. The language of article 17 also leads to the conclusion that once the article 15 pirates have left the vessel, it returns to its status as non-piratical. The nationality of the pirate vessel is determined by the laws of the State who currently registers the vessel.

Penalties for piracy are left to the “courts of the State” who seizes the pirate vessel or pirates. It is also left to the “courts of the State” what actions will be taken regarding the vessel and property seized by the State. Article 19 leaves the pursuit and prosecution of piracy to the will of the signatory States.

If a State wrongfully seizes a ship that later turns out was not engaged in piracy, that State is liable for damages to the State who registered the wrongfully seized vessel. This convention should be rewritten as the damage for a seized vessel would ordinarily be to the vessel owner and cargo owners, not the State. The convention also establishes that only government vessels or aircraft may seize ships suspected of piracy.

The United Nations Convention on the Law of the Sea mirrors much of what is stated in the Convention on the High Seas when dealing with pirates. UNCLOS’s article 100 is the same as article 14 of the Convention on the High Seas. UNCLOS’s article 101 is the same as article 15 found in the Convention on the High Seas. The language is the same throughout both conventions on the articles regarding the issue of piracy.

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69 Id. at art. 16.
70 Id. at art. 18.
71 Id. at art. 19.
72 Id.
73 Article 19 states in relevant part: “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.”
74 Id. at art. 20.
75 Id. at art. 21.
II. A Brief History of the United States’ Efforts Combating Piracy

Among the ancients piracy was almost the only international maritime relation. So far from being a disgrace, and an illegal occupation, it was considered an honourable calling, and looked upon much in the same light as deeds of arms in the days of chivalry.\footnote{A. T. Whatley, *Historical Sketch of the Law of Piracy*, 3 LAW. MAG. & REV. (3d Series) 536, 536 (1874). Mr. Whatley goes on to describe how the heroes portrayed by Homer “boasted” of their actions that would today send them “to the gallows.” \textit{id.} at 536-37. He describes a time when pirates were greeted as a respected trade in ancient Greek society. \textit{id.} at 537. Sadly, the Greeks eventually turned on the pirates and suppressed piratical activities in order to improve the returns on commerce produced by newly acquired islands. \textit{id.}}

The United States has dealt with piracy since its birth as a colonial holding of Britain.\footnote{For a historical perspective on piracy dating back to Homer’s time I recommend Milena Sterio, *Fighting Piracy in Somalia (and Elsewhere): Why More Is Needed*, Research Paper (----Working Paper No. 09-178) 3-7 (September 2009). The focus of this article is on piracy efforts of the United States. As such, I have confined the history of piracy presented to the history starting with the British American Colonies through modern day.} In order to understand the development of piracy law in the United States the reader must know something about the history of the problem. This brief review of the history will focus on the post-colonial period (1783—to present).

A. The Barbary Pirates

The Americans first dealt with piracy immediately following the formation of the United States of America. Prior to the nation’s founding, colonial American shipping had fallen under the protection of the British Crown.\footnote{Robert F. Turner, *State responsibility and the war on terror: the legacy of Thomas Jefferson and the Barbary Pirates*, 4 Chi. J. INT’L L. 121, 122 (2003). Prof. Turner has done an excellent job of detailing the events of the conflict with the Barbary pirates. I highly recommend you read his article on the subject for greater detail than I have provided here.} The British had preexisting treaties and a large naval presence that allowed colonial shipping to navigate with limited harassment from pirate attack. Americans’ lost this protection with the start of the American Revolution. From 1778 until the end of the revolutionary war, France protected American shipping as part of its alliance with the American states. The Americans finally were on their
own to protect their shipping routes with the signing of the Treaty of 1783.

In 1784, the Mediterranean states of Algiers, Morocco, Tripoli, and Tunis turned their sights on American shipping. The States were collectively known as the Barbary States. In an effort to avoid the plundering and taking of American ships, the Congress paid the Barbary states a $80,000 tribute in 1784 for protection from piracy and the release of crew of the Betsy, an American commercial vessel. The European nations had established a tradition of paying tribute to the Barbary states in exchange for protection from piracy. Congress simply followed in that tradition.

This purchased peace did not last long as the Algerians captured two American ships two weeks after the release of the Betsy’s crew. The crews of those two vessels would not be released until 1796. It was in 1796 that a new treaty was entered into with Tripoli.

Things went well until 1801 when the United States stopped paying Tripoli the increased tribute demands it was seeking. As a result, Tripoli declared war on the United States.

President Thomas Jefferson eventually sent a fleet to the Mediterranean to stop piracy. Under Commodore Dale the American squadron appeared off the coast of Tripoli on July 24, 1801. A week later, one of the squadron’s vessels, the Enterprise, fought and beat a larger cruiser from Tripoli. The armed conflict would rage on until 1805 when a peace treaty was signed with Tripoli; the treaty did not contain a clause requiring payment of tribute.

B. The Brigadier of the Mexican Republic and Generalissimo of the Floridas

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80 Id. The Betsy and its eleven member crew had been taken on the high seas by Moroccan pirates, Id.
81 Id.
82 Id.
83 Id. at 123. Of the 131 crew members captured only 85 would survive imprisonment. Id.
84 Treaty of Peace and Friendship, June 28 and July 15, 1786 [hereinafter Treaty of Peace].
85 Turner, supra note 78, at 124. The United States had entered into several additional agreements with Tripoli that required payment of an annual tribute to Tripoli. Id. In 1801 the leader of Tripoli declared war on the United States. Id.
86 Id.
87 Id. at 128-29.
88 Id. at 129.
89 Id. The crew aboard the Enterprise did not suffer any casualties in the engagement. Id.
90 Id. at 135-36.
In April 1818, Ralph Klintock, a United States citizen, was sailing as first lieutenant of the *Young Spartan*.\(^ {91}\) Klintock’s vessel had received a commission from Aury, an individual who cast himself as Brigadier of the Mexican Republic and Generalissiomo of the Floridas.\(^ {92}\) General Aury granted the *Young Spartan* the commission at Fernandina after its possession by the United States.\(^ {93}\)

After receiving its commission, the *Young Spartan* captured the *Norberg*.\(^ {94}\) After capture, the Norberg’s crew was left on an island off of Cuba.\(^ {95}\) The second officer took command of the *Norberg* and impersonated the captain.\(^ {96}\) The *Norberg* was taken to Savannah and the *Young Spartan* was taken to a port in the vicinity of Savannah.\(^ {97}\) The crew was convicted of piracy by a U.S. district court.\(^ {98}\)

The United States argued that while Mexico was a State, no State known as the Mexican Republic existed.\(^ {99}\) Furthermore, Denmark was not at war with any of the Spanish American provinces.\(^ {100}\) As such, the captain and crew were guilty of piracy and did not fall under the exception of being State actors.\(^ {101}\) The Supreme Court agreed and stated that the captain and crews’ good faith belief that they were acting under a State’s commission cannot justify a finding that they are not pirates based on the facts of the case.\(^ {102}\) The Court held that persons using non-state owned vessels and acting unlawfully while demonstrating obedience to no known government fall under the jurisdiction of all government.\(^ {103}\)

### C. Prohibition

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\(^ {91}\) United States v. Klintock, 18 U.S. 144, 144-45 (1820).

\(^ {92}\) *Id.* at 145.

\(^ {93}\) *Id.*

\(^ {94}\) *Id.*

\(^ {95}\) *Id.* This case presents the only case of marooning to come before the United States Supreme Court. Marooning was a practice common to the pirates of the West Indies. David Cordingly, *Under the Black Flag: The Romance and the Reality of Life Among the Pirates*, 135 (Random House New York 1995). Marooning is the practice of placing individuals on an island which has been used against both disobedient pirates by the members of their crews as well as crews of captured vessels. *Id.* at 135-36.

\(^ {96}\) *Klintock*, 18 U.S. at 144.

\(^ {97}\) *Id.*

\(^ {98}\) This is an assumption based on the facts and procedure of the case. The case does not clearly state the exact proceedings at the trial court level.

\(^ {99}\) *Klintock*, 18 U.S. at 146.

\(^ {100}\) *Id.*

\(^ {101}\) *Id.*

\(^ {102}\) *Id.* at 149.

\(^ {103}\) *Id.* at 152.
Shortly after prohibition went into effect, pirates began raiding ships transporting alcohol. Alcohol suppliers would smuggle their goods to the U.S. by ship. Sometimes the ships would sit outside the territorial waters and peddle their goods “over the rail.” As rumors began to circulate about the amount of money being made by these purveyors of spirits, the interest of society’s criminal elements also increased.

In the case of the *J. M. Hankensen*, a group of Americans boarded a Canadian rum ship in international waters off of Massachusetts and robbed the vessel and crew. In addition to running off with all the money they could find on the vessel, the boarding party also shot the captain and cook during the assault. Such occurrences were not unheard of and occurred on both coasts.

D. Somalia

During the early twenty-first century, Somalia has become a hot bed of piracy. The Somali pirates have demonstrated no discretion in the types of vessels taken as they have captured vessels of various size and type. A number of pirate crews have even attacked the warships of several nations.

The common method employed by these scoundrels is to use a vessel able to sustain operations at least 100 miles off the coast. This blue water vessel is frequently referred to as a mother ship and tows smaller, faster craft used to attack their targets. Once a command of a vessel is taken, then that vessel is moved to a port on the Somalia coast.

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105 Id.
106 Id.
107 Id. at 355.
108 Id.
109 Id.
113 Id.
A disturbing trend has emerged as these attacks have progressed. Several pirate crews have engaged warships in the shipping lanes off the Somalia coast. The pirate crews’ attacks on warships in small boats is telling of the level of some of the pirates’ sophistication. Those crews clearly lacked the skill of distinguishing vessel types and points to the entry of inexperienced labor into the pirate labor market.

Today U.S. interests are victims of piracy all over the world. While the recent press frenzy has focused on Somalia, it has been misguided and presented a skewed picture of the actual landscape. Piracy does occur in other regions and involves motives other than capturing ships and crews in an attempt to recover a ransom payment.115

During the 1990’s, Southeast Asia was the hotbed of piratical operation.116 In that region pirates would capture vessels, kill the crews, sell the cargo, and sell or convert the vessel to their own use.117 This is much different that the conduct of Somali pirates currently capturing the headlines.

II. Can the United States properly exercise jurisdiction over pirates in international waters?

The U.S. courts have jurisdiction over piratical acts conducted on the high seas and “any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State … .”118 This universal jurisdiction is based on the doctrine of hostes humani generis.119 Jurisdiction also exists on

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114 Id.
115 Id.
117 Id. at 349.
118 18 U.S.C. § 7 states in relevant part as follows:

The term “special maritime and territorial jurisdiction of the United States”, as used in this title, includes:

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.
American flagged vessels regardless of their location.\footnote{United States v. Flores, 289 U.S. 137 (1933).}

Foreign vessels subject themselves to U.S. law when they enter U.S. waters. However, the Supreme Court has held that jurisdiction should not be exercised unless the acts committed on the foreign vessel affect the “peace and dignity of the country.”\footnote{InMali v. Keeper of the Common Jail of Hudson County, 120 U.S. 1, 12 (1887).}

Those alleged to have been engaged in piratical acts need not be caught on the high seas in order to be prosecuted. Congress passed 16 U.S.C. § 1851 clarifying that life imprisonment awaits a person who “commits piracy and is brought into or found in the United States.”\footnote{“Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.” 16 U.S.C. § 1851 (2006).}

International law has also commented on the issue of jurisdiction. Specifically, Article 27 of the United Nations Convention on the Law of the Sea addresses criminal jurisdiction. Under Article 27, several limitations are placed upon the enforcement of international law. For example, if a ship passes through a nation’s territorial sea the coastal State will only exercise its jurisdiction in a few instances. Those enumerated instances limit enforcement to when the crime committed onboard the vessel extends to the coastal State, the crime disturbs the country or territorial sea, the ship’s master or a diplomatic agent of the flag state has requested the assistance of local authorities, or the boarding of the vessel is done to suppress the traffic in illegal narcotic or psychotropic substances.\footnote{High Seas, supra note 62, at art. 27(1)(a)-(d).} Article 27 further limits the enforcement of the international law on piracy by not allowing for the investigation of or the arrest of a person on a vessel that engaged in piratical operations outside the coastal State’s territorial waters as long as the vessel is only passing through the State’s territorial waters.\footnote{Id. at art. 27(5).}

The Convention on the High Seas also extends jurisdiction to “any State” to seize and prosecute pirates on the high seas.\footnote{Id. at art. 19.} There is much in common between the American jurisprudence and the international law on the issue of jurisdiction. Both bodies of law are in favor of a finding of jurisdiction when any State captures a pirate and intends to prosecute that pirate. However, as discussed, there are limitations from international law on jurisdiction.
III. Recent cases involving the United States that illustrate the prosecution of pirates

A. United States v. Shi

The case of United States v. Shi is a great example of how prosecution of piracy under the Offenses Clause is troublesome. Every aspect of the Shi case lacks a connection to the United States. The crew was foreign, the ship flew a flag of a nationality other than the crew, and the acts of violence occurred on the high seas.126 Yet, despite all these complications, the protagonist was prosecuted and imprisoned in the United States.127 The relevant facts are as follows:

On March 14, 2002, Lei Shi was a sailor aboard a Taiwanese fishing vessel.128 On that date he killed the Captain and First Mate while the vessel was in international waters.129 The Captain was Taiwanese and the 29 crewmembers were from the People’s Republic of China.130 The vessel was under the flag of the Republic of the Seychelles131 at the time of the events in question.132 In fact, no connection to the United States of America is stated in the facts of the case.

After the killings, Lei Shi ordered the Second Mate to take the ship to China.133 Lei Shi then ordered the remaining crewmen to throw the Captain’s body overboard.134 For the next two days Lei Shi was in command of the vessel.135 On March, 16, 2002, Lei Shi was overpowered by the crew and imprisoned in a storage container on the vessel.136 The crew then started steaming for Hawaii.137 The United States Coast Guard intercepted the vessel 60 miles from Hilo, Hawaii.138

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126 United States v. Shi, 525 F.3d 709, 718 (9th Cir. 2008).
127 Id.
128 Id.
129 Id.
130 Id.
131 Id.
132 Id.
133 Shi, 525 F.3d at 718.
134 Id.
135 Id.
136 Id.
137 Id.
138 Id.

The Republic of Seychelles is a collection of islands a 1,000 miles off the African coast. There are 115 islands in the Indian Ocean that comprise the Seychelles. It was originally settled by Europeans in 1770. Today it is known for its white sandy beaches and beautiful coral reefs. Ministry of Foreign Affairs – Republic of Seychelles, http://www.mfa.gov.sc/content.php?content_id=3 (last visited August 16, 2010).
The ship’s owner, having not heard from the ship in days, had notified the Coast Guard of its disappearance.139

Upon reaching the fishing vessel, the Coast Guard cutter was informed of the situation by crew members.140 While the Coast Guard did not attempt to take control of the fishing vessel, they did board the vessel.141 On March 21, Lei Shi was arrested by FBI agents for violation of 18 U.S.C. § 2280.142 Lei Shi was thereafter transported to Honolulu, Hawaii.143

Lei Shi did not violate the traditional international law against pirates as he was attempting to take command of a vessel without using another vessel or aircraft.144 This, along with the fact that there was no U.S. connection to the case, made prosecution pursuant to the Offenses Clause impossible. Regardless of this impediment, adequate means of prosecution were available under the more recent addition to international law under the SUA as well as other domestic U.S. laws.145

B. The Attack on the Delta Ranger

On January 21, 2006, the United States Navy captured its first band of pirates in “recent memory.”146 Five days prior to their capture the Somali pirates had taken an Indian dhow.147 The pirates used the captured dhow to extend their operations well outside of Somali territorial waters.148 Using the dhow as a mother ship, they launched their attacks by small boat.149

The pirates had attacked the Delta Ranger the day before they were captured by the USS Winston Churchill.150 This attack is what prompted the U.S. Navy’s involvement in pursuit.151

After capture, the pirates were taken to Mombasa, Kenya where they were tried for the crimes of piracy.152 All ten of the pirates were

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139 Id.
140 Id.
141 Id.
142 Id.
143 Id.
144 High Seas, supra note 9, at art. 15.
145 See SUA, supra note 64.
146 Bahar, supra note 155, at 3.
147 Id.
148 Id.
149 Id.
150 Id.
151 Id.
152 Id. at 3-4.
convicted and sentenced to seven years in prison. While this case could have been resolved in U.S. courts under the Offenses Clause, the use of a foreign court to seek justice was also available pursuant to an agreement entered into with Kenya.

C. Maerske Alabama

At 7:30 a.m. on April 8, 2009, Somali pirates boarded and took command of the U.S.-flagged Maerske Alabama. By 9 a.m. the Bainbridge received orders to intercept the Alabama. Visual observation of the Alabama was made by a P-3 Orion at 2:30 p.m. with Bainbridge arriving on scene shortly after midnight. The crew of the Alabama had retaken the ship by the time the Bainbridge arrived.

Four pirates had taken the Alabama’s captain and escaped in one of the Alabama’s lifeboats by the time Bainbridge had arrived. A boarding team from the Bainbridge took control of the Alabama at some point on April 9. Soon after securing the Alabama, she was taken into Kenyan waters to avoid further pirate attack.

Negotiations between the Bainbridge and the pirates in the lifeboat went on for several days. On April 12, Abduwali Abdukhakir Muse, the leader of the pirate crew, was transported to the

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153 Id. at 4.
154 See generally James Thuo Gathii, Jurisdiction to Prosecute Non-National Pirates Captured by Third States Under Kenyan and International Law, last updated March 31, 2010, Albany Law School Research Paper number 39, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1360981 (last visited October 16, 2010). Dean Gathii discusses the jurisdictional limitations that should be considered when choosing the Kenyan court for prosecution. Like many jurisdictions in the United States, “Kenya has a three-tiered judicial system.” Id. at 5. According to Dean Gathii, the proper Kenyan court for prosecution of extra-territorial crimes (e.g., piracy) is the High Court. Id. at 6. The High Court’s jurisdiction extends from the Kenya’s Constitution and provides the court “unlimited original jurisdiction in civil and criminal matters.” Id. at 7.
157 Id.
158 Andrew Scutro, Sailors recount their roles in dramatic rescue that ended pirate siege, Navy Times, April 27, 2009, at 14.
159 Id.
161 Id.
162 Id.
163 Press Release, United States Attorney Southern District of New York, Somali pirate pleads guilty in Manhattan federal court to maritime hijackings, kidnappings, and hostage takings
Bainbridge. At 7:19 p.m. on April 12 SEAL snipers killed the remaining three pirates in the lifeboat and freed the Alabama’s captain.164

Sometime thereafter, the U.S. government transported Abduwali Abdukhadir Muse to New York for prosecution.165 The indictment charged Muse on 10 counts: piracy under the law of nations; seizing a ship by force; conspiracy to seize a ship by force; possession of a machinegun during and in relation to seizing a ship by force; hostage taking; conspiracy to commit hostage taking; Possession of a machinegun during and in relation to hostage taking; kidnapping; conspiracy to commit kidnapping; and possession of a machinegun during and in relation to kidnapping.166 All but two of the counts carried the possibility of life sentences.

On May 18, 2010, Muse pled guilty to six counts; the count of piracy under the law of nations was not included in the plea.168 Muse was sentenced to “405 months in prison for hijacking three ships and taking hostages” on February 16, 2011.169

While the key crime under the Offenses Clause, piracy under the law of nations, did not ultimately result in a conviction it did provide the prosecution leverage in plea negotiations. It also proved that the Offenses Clause is still alive and kicking.

CONCLUSION

The United States has had a long, storied history dealing with piracy. While it has had success in getting convictions under the

164 The Rescue, supra note 159.
165 Press Release, supra note 162.
167 Id. at 3. The counts of seizing a ship by force and conspiracy to seize a ship by force both carried 20-year terms. Id. The count of engaging in piracy under the law of nations carried a mandatory life sentence. Id.
168 Press Release, supra note 162 (Muse pled guilty to seizing a ship by force; conspiracy to seize a ship by force; hostage taking; conspiracy to commit hostage taking; kidnapping; and conspiracy to commit kidnapping).
Offenses Clause against pirates who attacked U.S. flagged shipping it does have its limits. Prosecution is not always the best political choice, as illustrated though the nation’s dealings with the Barbary Pirates. Regardless of political ramifications, I believe that the clause has been very effective when called upon to prosecute acts of piracy in U.S. courts. The prosecution of Abduwali Abdukhadir Muse provides us an example of this.

The maximum punishment for piracy being death, and jurisdiction being universal under the law of nations, the Offenses Clause provides prosecutors with a real solution when combating piracy. A solution that has teeth and a far reach as seen most recently in the *Maerske Alabama* case. As long as we continue to engage in maritime transportation of goods and people there will always be pirates. The strong body of case law existing in the United States provides a strong weapon to use in the prosecution of piracy.