Rascals, Scoundrels, Villains and Knaves: The Evolution of the Law of Piracy from Ancient Times to the Present

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“Where there is a sea there are pirates.”

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Abstract:

This paper begins by tracking the history of piracy from Greek and Roman times, to the Golden Age of piracy, into modern day. It also looks at the motivations for becoming a pirate and the “piracy cycle.” The paper then moves into a discussion of how piracy has influenced the law, such as its impact on Universal Jurisdiction and international treaties like the UN Convention on the Law of the Sea; however, a stable definition of what constitutes “piracy” has become troublesome, even with the abundance of legal sources related to the subject. The paper then moves into a discussion of three US court cases dealing with the issue of piracy: the first from the Golden Age of piracy, the second in the early part of this century showing how piracy is not always prosecuted in the traditional sense, and finally with the case of the famous pirate the US Navy SEALS captured during the rescue of Captain Richard Phillips of the *Maersk Alabama*. Finally, the paper concludes the discussion using the modern day situation of Somalia to show how the “piracy cycle” is still capable of explaining what draws people to piracy, how that particular situation has been combated by the international community, and how neighboring countries, like Kenya, are using their own court systems to the advantage of the rest of the world.
Cicero once said, “Pirates are the most hated enemies of Rome, and not just of Rome, but of all mankind.”\(^1\) Pirates have never been popular among their victims. Pirates are not a new occurrence and did not first arise when nations began to explore the circular globe. Instead, it is perhaps one of the oldest crimes, dating back to ancient times. While not always termed “pirate,” sometimes being called freebooters, rogue adventurers or mercenaries, buccaneers, or corsair, all encompass forms of illegal maritime activity.\(^2\)

Through the course of history, pirates have arisen in different times and in different situations, but they usually arise for the same reason. Economic prosperity allows pirates a life


\(^2\) Patricia Risso, *Cross-Cultural Perceptions of Piracy: Maritime Violence in the Western Indian Ocean and Persian Gulf Region during a Long Eighteenth Century*, 12 J. World History 293, 297 (2001). Privateers were another name often used. Privateers were essentially a legalization of piracy, with explicit authorization from their government to attack enemy ships. By authorizing these pirates with “letters of marquee,” they were able to avoid being charged with piracy and its accompanying mandatory life sentence. The most famous privateer was Francis Drake, who after attacking Spanish ships and sharing his profits with Elizabeth I, was knighted. Buccaneers often were pirates who operated in the West Indies, and Corsairs were Muslim or Christian pirates operating in the Mediterranean from the sixteenth through nineteenth centuries. See *Piracy: A Brief History of Piracy*, Royal Naval Museum Library, http://www.royalnavalmuseum.org/info_sheets_piracy.htm [hereafter Royal Navy].
otherwise not available to them. However, because they commit their crimes outside the
territory of any state a special category of laws have been created as a response to this problem.
Now, piracy laws encompass customary international law, treaty law, and domestic law.

Piracy is still a modern day occurrence, but the most notable attacks of piracy in the last
few years have been in the Gulf of Aden, off the coast of Somali. This situation has presented
significant difficulties to the international community trying to combat piracy. The situation is
exacerbated by the lack of a stable government in the country. To Somali pirates the threat of
prosecution is not seen as a possibility outweighed by life on shore, where “Somalia remains
violent, poor, and unstable.” Therefore the international community has needed to band together in
order to create new ways to combat piracy collectively.

II. History of Piracy

a. Piracy through the ages

Pirates have been sailing the high seas since ancient times; the oldest evidence of pirates
is an inscription on a clay tablet from around 1350 BC. During the Greek and Roman period
ships used to sail near the coast making them easy targets to pirates, and thus piracy a common
occurrence. Even in these earliest of periods, the purpose of pirates was to acquire wealth,
though this was often done through the acquisition of human beings. In fact, some of the most
famous historical figures were not immune to pirate attacks; Plato was once captured and was
sold as a slave, but was only saved because a friend saw him on the auction block and bought

3 Sayyid Azim, Somali Pirates Appear in Kenyan Court, USA Today, Apr. 23, 2009,
4 Ancient Pirates: Greek and Roman Pirates, http://www.thewayofthepirates.com/history-of-
piracy/ancient-piracy.php [hereinafter Ancient Pirates].
5 Id.
6 Bradford, supra note 1, at 4. Often, pirates found that selling a ships’ crew as slaves or asking for ransom
was more lucrative and profitable than the ships’ cargo. Royal Navy, supra note 2.
and freed him, and Julius Caesar was captured by pirates and was not released until a ransom was paid. Among the Greeks, Homer often wrote about pirates, like Odysseus, and the stories of pirates are some of the most well known Greek myths, like the kidnapping of Helen by Paris, leading to the Trojan War.

While pirates were often in war against the legitimate governments, they were tolerated for various reasons. For instance, the Romans tolerated the very strong Cilician pirates because they provided the Empire with slaves. In fact, it was the infighting between city-states and the lack of a central government that enabled pirates to thrive. Individuals who lived near or worked on the sea were responsible for their own security. Pirates were often used on behalf of the city-states, as well, in their battles between each other. However, with the strength of governments and their ability to control territories, piracy became more difficult. This was seen around 67 BC with the strength of the Roman Empire. While the word “pirate” comes from the Greek language, it was the Romans who defined the word. In Rome, a “pirata” was defined as “an enemy of all humanity.” It was then that the Senate determined the pirates’ threat to the food supply was too great to tolerate them any longer, and gave the general Pompey the Great plenary power to rid the seas of pirates.

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7 Id. at 24.  
8 Ancient Pirates, supra note 4. Caesar eventually got his revenge by killing all of the pirates responsible for his kidnapping.  
9 Bradford, supra note 1, at 4.  
11 Bradford, supra note 1, at 12.  
12 Id. at 4.  
13 See generally, id. at 19-24.  
14 Ancient Pirates, supra note 4.  
15 Risso, supra note 2, at 297.  
16 Anderson, supra note 10, at 184.  
17 Bradford, supra note 1, at 50.
complete this task within a matter of months.\textsuperscript{18} In addition, any pirates caught in the act could be executed, and were cleverly done so with beheadings, crucifixions, and throwing them to the beasts, among many other creative means of execution.\textsuperscript{19} However, with the fall of the Roman Empire, there was also a return of piracy.\textsuperscript{20}

The Golden Age of Piracy was during the 18\textsuperscript{th} Century,\textsuperscript{21} with the years 1716 until 1722 the height of this prosperity.\textsuperscript{22} A “golden age” is a period of great happiness, prosperity, and achievement.\textsuperscript{23} Trade routes across the seas became well established after the discovery of the New World and exploration into Asia for the Spice Trade, and these routes were constantly vulnerable to attack.\textsuperscript{24} The Golden Age began around the 1680s with the end of many wars and a lack of naval employment, resulting in many former sailors turning to piracy as their best economic option.\textsuperscript{25} Nearly every ocean and sea was terrorized by pirates, and many pirates, like Blackbeard and Bartholomew Roberts,\textsuperscript{26} gained wide-spread notoriety.\textsuperscript{27} Pirates held a strong presence in the Bahamas and the Caribbean waterways, the Gulf of Mexico, the Atlantic Ocean

\textsuperscript{18} Anderson, \textit{supra} note 10, at 184.
\textsuperscript{19} Bradford, \textit{supra} note 1, at 41. Pompey showed some leniency, giving pirates who surrendered lands. The rest were put to death. Among other nations that also had creative ways of getting rid of their piracy problem included Caesar who slaughtered them; the English who hung the pirates from the main mast; and the French who condemned pirates to the torture of the wheel, a device used to stretch a person until his limbs dislocated, often considered the most gruesome and painful means of medieval torture. Debra Doby, \textit{Piracy Jure Gentium: The Jurisdictional Conflict of the High Seas and Territorial Waters}, 41 J. Mar. L. & Com. 561, 565-566 (2010).
\textsuperscript{20} Ancient Pirates, \textit{supra} note 4.
\textsuperscript{24} Golden Age of Piracy, \textit{supra} note 21.
\textsuperscript{25} \textit{Id}. Piracy also held appeal for sailors formerly serving on merchant ships because it allowed them to be free of national laws, were often treated better than they would on merchant or naval ships, and prize money was equally shared. When pirates attacked merchant ships, they often asked the crew of the attacked ships for any volunteers to join the pirates, and many would accept the offer since “life on a merchant ships was often harsh and conditions awful.” Royal Navy, \textit{supra} note 2.
\textsuperscript{26} Leeson, \textit{supra} note 22, at 1054.
\textsuperscript{27} Golden Age of Piracy, \textit{supra} note 21.
where colonies connected with the motherland, the waters around Africa, the Indian Ocean, and the Mediterranean.\textsuperscript{28}

To enter this trade, only a very small amount of equipment was needed. To become a pirate captain, all that was needed was a boat.\textsuperscript{29} In addition, crews were often voluntary, and would bring their own supplies, including their own guns, bullets, and powder.\textsuperscript{30} Occasionally, captives would be taken on as additional crew members.\textsuperscript{31} Pirates thrived particularly in the Caribbean, because the colonies were too far away from their central governments for effective control to be enforced, often leaving the responsibility of punishing pirates to the governors of these settlements.\textsuperscript{32} An additional catalyst to this prosperity was the constant fighting between the Spanish, French and British, all fighting for a niche in the area where they could effectively exert superior control over the other two.\textsuperscript{33} During this period of time, pirates occupied the island of Tortuga, taken from the Spanish, and inhabited this island as a pirate utopia.\textsuperscript{34} The Golden Age ended around the 1730s due to an increased military presence and international laws implemented to fight piracy.\textsuperscript{35}

\textsuperscript{28} Leeson, supra note 22, at 1053.
\textsuperscript{29} Bradford, supra note 1, at 85. A boat that had as shallow a depth as possible was often preferred by pirates because it allowed them to navigate in shallow waters and hide in coves and inlets, enabling them to surprise their victims. Schooners, galleys, and junks were the preferred boats, depending on what area of the world the pirates victimized. Royal Navy, supra note 2.
\textsuperscript{30} Bradford, supra note 1, at 85.
\textsuperscript{31} Id. at 86. Pirates, as many of us already know, used flags to identify themselves. Originally flown to frighten passing ships, they were blood red to indicate no mercy would be shown and induce the passing ships into surrendering without a fight. Eventually, these flags became call signs, with the most famous of pirate flags being the skull and crossbones, a symbol used in ships’ logs to represent a death on board, was adopted by the Jolly Roger. Royal Navy, supra note 2.
\textsuperscript{32} Anderson, supra note 10, at 185.
\textsuperscript{33} Bradford, supra note 1, at 82.
\textsuperscript{34} Id. at 90. Becoming a pirate did not come without its own rules and laws. Extreme loyalty was expected. Called “going on the account,” once a pirate he was expected to live by the rules of the ship, and breaking them could result in flogging or death. If a pirate stole from his comrades or abandoned them during battle, they would be marooned on a deserted island with only meager supplies, which more often than not resulted in slow starvation if the marooned pirate did not have hunting or fishing skills. Royal Navy, supra note 2.
\textsuperscript{35} Golden Age of Piracy, supra note 21.
b. The Piracy Cycle

Pirates usually began life as peasants looking for better economic status, and eventually rose as their success grew. The nature of piracy can be described as a “piracy cycle:”

Piracy is initially conducted by small and independent groups of individuals using their boats for piracy as desperation of poverty dictates or as the opportunity presents. Success in this venture equips the groups with more and larger vessels, and an organization can emerge to coordinate their activities, these changes making predation increasingly effective. With further success the pirates' strength becomes such as to make them a virtually independent power, when they may choose to enter into an alliance with some recognized state. At that point the pirates have become in effect a mercenary navy, paid by plunder. Success will legitimize their power; failure and defeat will lead to disintegration of the organization into the small, furtive outlaw groups from which the force originated.  

Because of this, they were able to articulate to the elite and powerful the world of the peasant and the underclasses. "They were of the peasant world but not totally in it." No matter what area of the world pirates were terrorizing, nearly all of them turned to piracy due to the difficulties inherent to being a part of that peasant class of society.

Piracy has maintained a certain amount of moral relativism. Depending on what point in time or who perceived them, pirates could be considered either legal or illegal. While pirates had a significant economic impact, often their activities became a predictable cost of doing business in many parts of the world. This type of intrinsic contribution to commercial activity effectively becomes de facto, with coastal communities becoming dependent on this maritime

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36 Anderson, supra note 10, at 183-4.
38 Id.
39 Anderson, supra note 10, at 195.
40 Risso, supra note 2, at 297.
41 See generally, Gallant, supra note 37.
42 Id. at 37.
activity on their customs, revenues, prestige, or territorial integrity, again clouding the difference between right and wrong.43

Because of why piracy is often resorted to as a trade, as well as how it is capable of succeeding in various areas of the world, piracy often has a direct effect on the formation or strengthening of states. There are two main aspects of a state that piracy can be seen to have significantly contributed to: economically and politically. In addition, these two areas often overlap. Essentially, piracy forces weak states to enhance these two areas, expanding central enforcement and governance, in order to extricate the detrimental activities of pirates on the fringes of its territory.

The activities of pirates enable coastal cities to become profitable mercantile centers, increasing the economic prowess of the nations those cities belonged to. Particularly in the sixteenth to the nineteenth centuries, pirates and privateers were able to prey upon maritime commerce because seas remained beyond the control of most states.44 Pirate enclaves sometimes grew into regional market centers in their own right.45 In numerous different settings, pirates participated actively and directly in the slave trade, as was already mentioned in Roman times, as well as in the Atlantic during the seventeenth and eighteenth centuries.46 Pirates needed a place where they could unload their cargo, including slaves, as well as repair their boat and replace crewmen.47 Coastal cities became these required secure bases that helped piracy thrive. In addition, piracy contributed to competition, with legitimate governments paying known pirates for safe passage of their ships through commercial waterways, a practice they would hope was

43 Anderson, supra note 10, at 185.
45 Gallant, supra note 37, at 38.
46 Id. at 38-9. In the early nineteenth century, the term “picaroon” developed to describe a person who was both a pirate and a slaver. Royal Navy, supra note 2.
47 Bradford, supra note 1, at 29-30.
denied to their foreign competitors.⁴⁸ Thus, pirates did not solely exist on the seas, but were merchants in coastal towns themselves, or helped the existing merchants thrive. The activity of pirates helped capitalism to reach the fringes of territories that due to a lack of central government would not have seen otherwise.⁴⁹

Pirates have also made significant political contributions to states. Particularly looking at wars, war makes states and the existence of piracy contributed to wars on the side of states, or their activities lead to war between states.⁵⁰ An example is the war between the Persians and the Greeks in ancient times.⁵¹ When central governments were unable to maintain control over the state, there was an inclination for a class of men at arms to develop.⁵² This same absence of control led states to employ them as legitimate security forces.⁵³ States had to choose between tolerating pirates or become subject to attack, so states chose somewhere in between and used pirates to their advantage.⁵⁴ Thus, pirates could be both the buccaneers and the navy; inlaw or outlaw status was determined by the relationship to the state at any specific point in time.⁵⁵ In addition, weak, uncentralized states encouraged challenges to the state and it was armed outlaws, not just pirates, which provided the armed muscle for these movements and increased the number of men at arms; when conflict was resolved, the winners became legitimate security forces, and the losers remained outlaws.⁵⁶

Finally, sometimes politics and economics could not be separated, and there was an overlap between the two areas. The magnitude of pirate activity could constitute a serious threat

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⁴⁸ Anderson, supra note 10, at 188.  
⁴⁹ Gallant, supra note 37, at 39.  
⁵⁰ Id.  
⁵¹ Bradford, supra note 1, at 3.  
⁵² Gallant, supra note 37, at 40.  
⁵³ Id.  
⁵⁴ Bradford, supra note 1, at 41-2.  
⁵⁵ Gallant, supra note 37, at 40.  
⁵⁶ Id. at 39.
to a region’s economy, justifying a state-level initiative to eradicate this type of activity. When states expand, peripheries often are left behind the central system, leaving an opening for groups like pirates to mediate between the center and its margins. For example, when pirates participated in the slave trade between Africa and the Americas, playing an important role in the economy, politically, they assisted the expansion of European power in Asia and Africa by bringing information of the local situation back to the European powers, by discovering new trade routes, and by enabling Westerners to enter new markets. Piratical activities in these far-flung locales only ended when the European states gained enough economic and political power to control the areas themselves.

Consequently, pirates have played an important role since ancient times in the formation of numerous states. Whenever piracy can be found to have had relative success in a particular period, it can be linked to the “pirate cycle.” Starting out as peasants, pirates turn to their illicit activities out of necessity, but their success often leads to the success of the weak states they formed from. Either pirates directly help in this state formation, by enhancing market centers or becoming part of the security forces, or indirectly, by motivating states to take initiatives to curb this type of activity around their territory. It was the success of the Golden Age that motivated states to work together and make piracy a violation of international law.

57 Id.
58 McCoy, supra note 44, at 130.
59 Gallant, supra note 37, at 46.
60 Id.
61 Organized piracy finally ended around the early nineteenth century when the Barbary Corsairs were defeated in the Mediterranean in 1816 and other states increased patrols conducted by their navies. Privateers still flourished, however, until 1856 when the majority of maritime nations signed the Declaration of Paris outlawing letters of marque. The navies of these countries were responsible for enforcing this law. While piracy has continued, it has never reached the level it was once at. Modern day pirates often still use the same tactics their predecessors used, namely speed and surprise. Royal Navy, supra note 2.
III. Definition of Piracy

While piracy for many is romanticized in our minds by either literature or film, or both, and with the images invoked a general understanding of what “piracy” is seems rather straightforward, an internationally agreed upon definition is not so easily found. Particularly in recent years, which acts fall under the term “piracy” has been much debated. Among the main focus of the debates is whether, especially in light of attacks carried out in recent years, is it comprehensive enough, as well as what acts actually are required to be considered “piracy.”

As for the first debated issue, although no authoritative definition exists, that enumerated in the United Nations Convention on the Law of the Sea (UNCLOS) is considered to have codified customary international law and therefore is seen as the closest to definitive authority as exists. Under UNCLOS, piracy is “any illegal acts of violence or detention, or any act of depredation, committed… on the high seas…” The problem with this definition, it has been argued, is that by restriction acts that constitute piracy only to the “high seas” eliminates many acts that otherwise would be piracy and limits effective enforcement because most (up to ninety percent) piratical attacks occur inside territorial seas.

Limiting this definition to the “high seas” and excluding from universal enforcement areas inside territorial waters accompanies with it a major assumption, often unsupported, that all states with coastal areas are capable of protecting and enforcing laws within their territorial waters. If an attack occurs within territorial waters, that attack is exclusively under the jurisdiction of the coastal state who “owns” those waters. In addition, there is no contingency written into UNCLOS in the event any coastal state cannot or will not effectively take action

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63 Doby, supra note 19, at 568.
64 Id. at 569.
against acts of piracy occurring within its territorial waters. Because of the limitation of pursuing piracy “on the high seas,” any foreign vessel pursuing a suspected pirate boat must cease that pursuit as soon as the suspected boat crosses into those territorial waters, even if the pursuing boat knows there will be no further pursuit by the State who owns those territorial waters.

While there are international definitions, each State has its own definitions of the term “piracy” which can often influence the way in which suspected pirates are charged and convicted in domestic courts. As an example of this, in April of 2009, almost exactly a year from when the Maersk Alabama was attacked, pirates approached the USS Ashland in the Gulf of Aden and shot a firearm at the Ashland. The Ashland returned fire and destroyed the skiff the pirates were firing from, and eventually arrested the pirates, who were brought before U.S. Federal Court in the Eastern District of Virginia. However, the pirates never boarded, nor attempted to board, the Ashland. When the defendants challenged the count in the indictment against them that they “committed the crime of piracy as defined by the law of nations,” in violation of 18 U.S.C. §1651, Judge Jackson spent the majority of his opinion discussing the definition of “piracy” under U.S. law. In this particular decision, Judge Jackson acknowledged that the statute referred to piracy as “defined by the law of nations,” which itself refers to customary international law; however, he also noted that under U.S. Constitutional law, the requirements of due process necessitate a fair warning of the charged conduct.

As the main source for his conclusion, Judge Jackson cited Justice Story’s opinion in United States v. Smith, discussed infra, a 1820 decision that is the only decision in U.S. history

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65 Doby, supra note 19, at 569. An obvious example of this in action is the current situation in Somalia, a coastal state with 3,025 km of coastline and also a failed state, who has no effective police power within its territorial land, let alone the abilities to effectively patrol its territorial waters.
67 Id. at 2.
“to ever directly examine the definition of piracy under §1651.”68 Under that Supreme Court decision, piracy as defined by the law of nations was determined to be “robbery on the sea.” As Justice Story wrote in that Supreme Court decision, “whatever may be the diversity of definitions, all writers concur, in holding, that robbery or forcible depredations, animo furandi, upon the sea… is piracy.”69 To support Judge Jackson’s reliance on Smith, he cites other lower court cases that also cite Smith, including Taveras v. Taveras (“a fundamental element of piracy is that the acts of robbery or depredation must have been committed upon the high seas.”), United States v. Madera-Lopez (citing Smith, “piracy, by the law of nations, is robbery upon the sea, and that it is sufficiently and constitutionally defined.”), and United States v. Barnhart (“piracy is robbing on the high seas, is a violation of this common or universal law.”).70 Elaborating, Judge Jackson states that “piracy” has a much narrower meaning that “piratical” acts, and citing an 1885 case, The Ambrose Light, states “our statutes do not make criminally punishable piratical undertakings or aggressions merely.”71

In opposition to the motion, however, the Government supported their argument that piracy does not require robbery by citing the British Privy Council, the 1958 Geneva Conventions and UNCLOS,72 all highly respected international sources defining piracy. Under the Privy Council, it was determined “a completed act of actual robbery was not an essential element of piracy, but rather an attack alone was sufficient under the law of nations.”73 This determination, made in 1934, was supported by later international conventions, with both the 1958 Geneva Convention and UNCLOS defining piracy as “any illegal acts of violence or

68 Id. at 4.
70 Said, supra note 66, at 4.
71 Id. at 5, citing The Ambrose Light, 25 F. 408, 415 (S.D.N.Y. 1885).
72 Discussed in further detail, infra.
detention, or any act of depredation” and the intention to rob or the act of robbing were not required.74 In addition, the government cites an influential international law treatise by Professor Oppenheim which states “piracy, in its original and strict meaning, is every unauthorized act of violence committed by a private vessel on the Open Sea against another vessel with intent to plunder.”75 Judge Jackson did not find the arguments and supporting international documents persuasive, and ruled piracy, as defined by 18 U.S.C. §1651 and defined by the Supreme Court in Smith, must include robbery, and therefore dismissed the count against the defendants.

IV. Universal Jurisdiction

Piratical attacks during the Golden Age disrupted the commerce and navigation of the high seas, and continue to pose that same threat today. “Such lawlessness was especially harmful to the world at a time when intercourse among states occurred primarily by way of the high seas, thus making piracy the concern of all states.”76 International law, in the eighteenth and nineteenth centuries, did not exist in the way it does today. However, even with international law in its infancy, pirates were considered outlaws, hostis humani generis, the enemy of all mankind. Because of this view of pirates, states felt they needed to create laws that would enable any state to prosecute them. The answer to this problem was “universal jurisdiction.”

Jurisdiction typically includes the powers to prescribe, adjudicate and enforce a state's laws, including over a specific person; these powers stem from the idea of state sovereignty.77

Traditionally, to prosecute a person for a crime, a nation needs a nexus to the crime, the alleged

74 Said, supra note 66, at 8.
75 Id. at 9, citing Oppenheim, International Law, §276, 325 (1905).
offender, or the victim.\textsuperscript{78} Thus, jurisdiction is typically constrained to a state’s territory.\textsuperscript{79} “Universal jurisdiction allows any nation to prosecute offenders for certain crimes even when the prosecuting nation lacks a traditional nexus.”\textsuperscript{80} This doctrine was developed by courts to address the piracy that threaten and terrorized international trade; piracy is the oldest offense that invokes universal jurisdiction.\textsuperscript{81} Piracy was attributed \textit{jus cogens} status and enable states to invoke universal jurisdiction.\textsuperscript{82} Now, through its development, universal jurisdiction is usually reserved for the most serious international crimes, such as war crimes, crimes against humanity, and genocide,\textsuperscript{83} considered the most heinous and widely condemned offenses.\textsuperscript{84} This principle is justified because the acts that fall under this jurisdiction are “of an international character and are of serious concern to the international community as a whole.”\textsuperscript{85} 

Piracy under universal jurisdiction is justified by labeling a pirate \textit{hostis humani generis}.\textsuperscript{86} Piracy and slave trading are the model offenses that any state can punish under this principle because pirates and slave traders have long been considered the enemies of all humanity, as the term \textit{hostis humani generis} exemplifies.\textsuperscript{87} Thus, a court exercising jurisdiction over a person \textit{hostis humani generis} is carrying out that jurisdiction \textit{actio popularis}.\textsuperscript{88} Modern courts still accept this exception to the nexus requirement and the idea any state may punish piracy.\textsuperscript{89} While customary international law does not provide a standard definition for piracy

\textsuperscript{78} Randall, \textit{supra} note 76, at 785.
\textsuperscript{79} Bassiouni, \textit{supra} note 77, at 90.
\textsuperscript{80} Randall, \textit{supra} note 76, at 785.
\textsuperscript{81} Id.
\textsuperscript{83} Bassiouni, \textit{supra} note 77, at 82.
\textsuperscript{84} Jeffrey L. Dunoff et al., \textit{INTERNATIONAL LAW: NORMS, ACTORS, PROCESS}, 380 (2nd ed., 2006).
\textsuperscript{85} Id.
\textsuperscript{86} Randall, \textit{supra} note 76, at 785.
\textsuperscript{87} Id. at 788.
\textsuperscript{88} Bassiouni, \textit{supra} note 77, at 96.
\textsuperscript{89} Randall, \textit{supra} note 76, at 791.
(and this presents a problem for enforcement), piracy is typically viewed as embodying three elements: an unauthorized act of violence, occurring outside the territory of any state, committed through the use of one vessel against another vessel.90

The philosopher Hugo Grotius was the first to posit universal jurisdiction should be exerted over acts of piracy, though he was not necessarily the first to discuss the idea of universal jurisdiction in general. Expanding on theories from Aristotle and Cicero,91 Grotius based his theory on the growing principle of *mare liberum*, the idea of freedom of navigation on the high seas.92 During the seventeenth century, the principle of freedom of the high seas began to take hold.93 Under this principle, every state has an equal right to navigate on the high seas, and no one state can be sovereign over the entire sea.94 Because *mare liberum* was applicable universally, acts *hostis humani generis* infringing on that right, namely piracy, could be universally punished.95

Consequently, the rationale for granting universal jurisdiction is that piracy is usually committed only aboard vessels on the high seas or any place outside a state’s jurisdiction, and states, their rights being infringed by pirates acting outside the authority of any other state, therefore may patrol the high seas for pirates without violating any state’s territorial sovereignty.96 The authority of every state to capture pirates and their vessels is an exception to the general rule limiting each state’s jurisdiction on the high seas to its own vessels and nationals because engaging in acts of piracy is seen as denationalizing the vessel they are operating.97 In

90 Garmon, *supra* note 82, at 261.
91 Bassiouni, *supra* note 77, at 108.
92 *Id.* at 99
93 Randall, *supra* note 76, at 792.
94 *Id.*
95 Bassiouni, *supra* note 77, at 99.
96 Randall, *supra* note 76, at 792.
97 *Id.* at 793.
addition, this embodies the fact that there is no international maritime peacekeeping force and no
international tribunal has jurisdiction to try pirates, particularly at the development of universal
jurisdiction.98 Since no state has any superior association to pirates and their vessels than any
other, every state has jurisdiction to capture and punish pirates.99 However, it must be noted that
this is seen more as a pirate relinquishing the ability to claim allegiance to a specific state, rather
than a state losing its ability to impose obligations, such as its own jurisdiction, over that
individual.100

While universal jurisdiction over piracy began under customary law, states ultimately
acknowledged this jurisdiction under treaty law, like the United Nations Convention on the Law
of the Sea.101 The Convention is only the most recent of treaties that dealt with piracy. Others
Convention on the Law of the Sea.102 As exemplified by these treaties, universal jurisdiction for
the crime of piracy is well established.103 These two types of law, conventional and customary,
often overlap, as is the case concerning criminal prosecution over piracy. 104 Because of this
overlap, non-parties to these treaties may still assert universal jurisdiction over piracy under
customary international law.105 Even though customary and treaty law gives a state the right to
assume jurisdiction over acts of piracy, it does not impose an obligation on any state.106
However, there seems to be no state practice where a state resorts to universal jurisdiction

99 Randall, supra note 76, at 793.
100 Id. at 794.
101 Id. at 791.
102 Bassiouni, supra note 77, at 111.
103 Id. at 112.
104 Id. at 107.
105 Randall, supra note 76, at 792.
106 Id.
without national legislation in place as well.\textsuperscript{107} Although many states have domestic laws that impose their own laws over piracy, universal jurisdiction can only be imposed over those who fall under the international law’s definition of piracy. If the acts fall under this international definition, any state has universal jurisdiction under international law to punish persons who commit such acts.\textsuperscript{108} However, if an act falls outside of this definition, even if it is within domestic law, the state cannot obtain universal jurisdiction over those actors.\textsuperscript{109}

V. UN Convention on the Law of the Sea

The leading treaty that codifies customary international law concerning piracy is the United Nations Convention on the Law of the Sea (UNCLOS). It is within this Convention that the international definition of piracy can be found. According to UNCLOS,

\begin{quote}
Piracy consists of any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) 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; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).\textsuperscript{110}
\end{quote}

In addition, Articles 100 through 107 deal specifically with piracy. According to UNCLOS, all states are to cooperate in the repression of piracy on the high seas or anywhere outside the jurisdiction of any state.\textsuperscript{111} Furthermore, any ship that intends to be used, or has been used to commit any of the acts referred to in Article 101, is to be labeled a pirate ship, if it remains under

\begin{flushright}
\textsuperscript{107}Bassiouni, \textit{supra} note 77, at 106. \\
\textsuperscript{108}Randall, \textit{supra} note 76, at 795. \\
\textsuperscript{109}Id. \\
\textsuperscript{110}UNCLOS, \textit{supra} note 62, art. 101. \\
\textsuperscript{111}Id. art. 100.
\end{flushright}
the control of the persons guilty of committing such an act. Article 105 provides that any state may seize a pirate ship and arrest the persons on board, and the capturing state also has the right to determine any penalties, as well as what action is to be taken concerning the ship and any property on board. This Article also notes “Parties have the right, not the obligation to assume jurisdiction over piratical acts with which they have no connection.” Other provisions concern acts of piracy committed by government owned ships, the retention of nationality of the ship, liability should a ship be seized without adequate grounds, and who and what types of ships have proper authority to make seizures.

Opened for signature in 1982, UNCLOS did not enter into force until November 1994. One hundred sixty states have signed the convention thus far, with the most recent being Chad on August 14, 2009. Clearly, this is a treaty that has received wide acceptance. While the treaty deals with numerous maritime activities and issues, not just piracy, this treaty represents the world’s legal definition of piracy and how to approach that specific issue. There are signatories from every single continent. On Europe, the European Community has signed, as well as nearly all European states individually. On Asia, signatories include Russia, China,
and India, but among coastal states not party to the convention includes North Korea, Iran, Israel, Turkey, and the United Arab Emirates. On the continent of Africa, signatories include Somalia, Kenya, and South Africa, but do not include the coastal states of the Eritrea, and Libya. On South America, Brazil and Argentina are parties, but Colombia, Peru and Venezuela are not. On North America, both Mexico and Canada are, but the United States is not a party to UNCLOS. Finally, Australia is also a party to the Convention. From this small sample, it is evident that many of the most important and most powerful nations are party to this convention, but many, particularly the United States, are not.

While UNCLOS clearly gives a straightforward definition of piracy which customary international law does not provide, the Convention does have its own problems. For instance, the Convention, which took its definition straight from the 1958 Geneva Convention on the Law of the High Seas, clearly states acts of piracy are to be done in pursuance of private gains. So what of other purposes, such as terrorism and other politically motivated purposes? From the exact wording of the Convention, it seems such situations are expressly excluded, and the current status of the law in fact does not enable enforcement of such incidents. This difference has become increasingly more important as a rising number of pirate attacks have occurred for political, rather than personal, purposes. The only way to reconcile this is to read “private” broadly, perhaps as “personal.” In addition, it never defines what acts would be sufficient to fall

122 Id.
123 Maritime Space, supra note 119.
124 Oceans and Law of the Sea, supra note 120.
125 Maritime Space, supra note 119.
126 Oceans and Law of the Sea, supra note 120.
127 Maritime Space, supra note 119.
128 Oceans and Law of the Sea, supra note 120.
129 Maritime Space, supra note 119.
130 Oceans and Law of the Sea, supra note 120.
131 Garmon, supra note 82, at 258.
132 Randall, supra note 76, at 797.
under the definition of piracy. It is obviously vague here. The question it presents is whether the “violent acts” are defined by domestic or international law.\(^{133}\) This lack of clarity can lead to a lack of universal means of enforcement.

Another problem the Convention raises has to do with exclusive economic zones (EEZs). The Convention, as already mentioned, expanded on past treaties. While the articles about piracy went untouched, it largely expanded on the concept of EEZs.\(^{134}\) As a result, 200 miles of the coast of a state falls within its EEZ, but not its territorial water. As far as enforcement goes, it is left unclear whether enforcement of piracy, which must occur “on the high seas or in any other place outside the jurisdiction of any State,”\(^{135}\) is now exclusively up to the state’s whose EEZ was where the acts of piracy were committed, or whether it remains limited to a state’s territorial waters.\(^{136}\) Also, a state who wishes to apprehend pirates in these waters must be cautious not to interfere with the rights of the state whose zone it is.\(^{137}\)

For these and many other reasons, many have argued that the Convention should encompass a much broader definition of piracy, as well as a more detailed and explanatory one in order to make enforcement easier.\(^{138}\)

VI. US Piracy Laws and Court Cases

Within the United States, piracy has not been seen in a very long time. Despite this, the United States is still capable of punishing piracies. There are various sources of law from which the United States has the power to punish piracies, including the US Constitution, statutes, and

\(^{134}\) Noyes, supra note 98, at 108.
\(^{135}\) UNCLOS, supra note 62, art. 100.
\(^{136}\) Noyes, supra note 98, at 108.
\(^{137}\) Menefee, supra note 133, at 146.
\(^{138}\) Randall, supra note 76, at 798.
treaty law. However, the United States, as already mentioned, is not a party to the UN Convention on the Law of the Sea, and therefore cannot invoke its provisions when applying the law. It must be remembered, though, that UNCLOS codifies customary international law, and that non-parties to treaties may still invoke universal jurisdiction under customary international law to punish piracies. Therefore, while the United States cannot invoke the provisions of UNCLOS, its provisions could still be persuasive in a US court case. To examine US piracy laws, it is helpful to look at two different cases, one from 1820, right at the end of the Golden Age of piracy, and one from 2002, the first and only US maritime piracy case in nearly 200 years.

a. **United States v. Smith**

In the first case, *United States v. Smith*, in March 1819, Thomas Smith was involved in the mutiny of the ship *Creollo*. During the mutiny, Smith and other crew members confined their officer and left the vessel. They then, by the use of violence, captured another armed vessel and it was on this boat in April 1819, plundered and robbed the vessel. The jury in this case found a special verdict, where they found Smith committed the offence charged, but was indecisive on whether the acts were “piracy” as defined by the Congress of the United States. If so, Smith is guilty, if not, he would be not guilty. Because of this special verdict, the question was certified to the Supreme Court for a determination of the law.

The law in question in the case provided: “If any person... shall, on the high seas, commit the crime of piracy, *as defined by the law of nations*, and such offender... shall

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140 *Id.*
141 *Id.*
142 *Id.*
143 *Id.* at 154-5.
144 *Smith*, 18 U.S. at 155.
afterwards be… found in, the United States, every such offender… shall… be punished with death.” 145 While this law is no longer in force, its descendant takes nearly exactly the same wording. 146 “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.” 147 Thus, the way the court ruled in this court could help interpret the law in future cases.

In this case, the issue was how does the law of nations define piracy, wording that is exactly the same in the newer law, and could present the same issue. To determine what piracy is according to “the law of nations,” one must first look at the Constitution. Article I of the U.S. Constitution grants Congress the power “To define and punish Piracies and Felonies committed on the High Seas, and Offenses against the Law of Nations.” 148 Defense counsel suggested that Congress did not act pursuant to their constitutional authority when passing the act because they did not define piracy, but rather left it to judicial interpretation; “to refer to the law of nations for a definition of the crime, is not a definition,” and Congress is bound to define piracy in terms. 149

Justice Story, delivering the opinion for the court, rejects this view, claiming defense counsel suggest too narrow an interpretation of the constitution. 150 Thus, Congress properly acted by reference to the law of nations, as other similar crimes make reference to the common law in order to ascertain meaning of the words. 151 Since Congress could constitutionally refer to the law of nations for a definition of piracy, the next question arises to what that definition

145 Id. at 154.
146 Noyes, supra note 98, at 117.
148 U.S. Const. art. I, §8, cl. 10.
149 Smith, 18 U.S. at 156-7.
150 Id. at 158.
151 Id. at 160. With respect to crimes defined by common law, Justice Story mentions murder with “malice aforethought.” Other crimes defined by common law include larceny (see People v. Dumar, 106 N.Y. 502, 508 (1887)), burglary (see Neal Kumar Katyal, Architecture as Crime Control, 111 Yale L.J. 1039, 1126 (2002)), and rape (see Henry F. Fradella, Integrating the Study of Sexuality into the Core Law School Curriculum: Suggestions for Substantive Criminal Law Cases, 57 J. Legal Educ. 60, 71 (2007)), among many other felonies, as well as many criminal defenses.
actually is. Again, defense counsel suggests the law of nations does not provide a sufficient
definition of piracy in order to determine what the crime of piracy entails.\footnote{Smith, 18 U.S. at 157.}

Justice Story once again rejects this argument. Instead, he finds the law of nations, as
represented by writers, provides a definition for piracy that is “settled and determinate.”\footnote{Id. at 161.} He
admits there may be some discrepancies and differences in the definitions, but determines “all
writers concur, in holding, that robbery or forcible depredations upon the sea, \textit{animo furandi}, is
piracy.”\footnote{Id.} He supports this by referencing the common law, which defines piracy as “an offense
against the universal law of society, a pirate being deemed an enemy of the human race.”\footnote{Id.}
Justice Story definitively concludes, “Piracy, by the law of nations, is robbery upon the sea, and
that it is sufficiently and constitutionally defined by [Congress].”\footnote{Id. at 162.} In support of his conclusion,
Justice Story provides the writings of numerous contributors to the law of nations, all defining
piracy in similar terms.\footnote{Smith, 18 U.S. at 163 n.h.} Thus, should a similar issue arise with the newer law piracy “as
defined by the law of nations,” has been judicially decided.

\subsection*{b. United States v. Shi}

The second case is \textit{United States v. Shi}. In March 2002, a Taiwanese fishing vessel,
registered in the Seychelles was sailing in international waters off Hawaii.\footnote{United States v. Shi, 525 F.3d 709, 718 (9th Cir. 2008).} Shi, the ship’s
cook and a Chinese national, murdered the Captain and First Mate, and then retained control of
the ship by threat for two days. Finally, the crew overpowered Shi and started sailing towards Hawaii. After several days of silence from the boat, the U.S. Coast Guard was contacted and they intercepted the boat sixty miles from Hawaii. Once Seychelles waived their jurisdiction, the Coast Guard took control. A few days later the FBI boarded and arrested Shi under 18 U.S.C. §2280 prohibiting acts of violence that endanger maritime activity.

Section 2280 is a codification of the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Maritime Safety Convention). The Maritime Safety Convention covers many vast areas having to do with maritime issues, including safety on board. The provisions of the US codification that are particularly important in this case involve seizing control of a ship by force and performing an act of violence likely to endanger the safety of the ship. In addition, Shi’s actions resulted in death, elevating the maximum penalty to twenty years to life. Shi received 36 years.

Convicting persons guilty of piracy under this Convention, as opposed to UNCLOS solves some problems posed by UNCLOS. For instance, the Maritime Safety Convention allows for acts of piracy conducted for political reasons. It also does not require that the act of piracy

\[\text{159 Id.}\]
\[\text{160 Id.}\]
\[\text{161 Id.}\]
\[\text{162 Id.}\]
\[\text{163 Shi, 525 F.3d at 719.}\]
\[\text{164 Id. at 720.}\]
\[\text{165 18 U.S.C. §2280(a)(1)(A) “Offenses: A person who unlawfully or intentionally seizes or exercises control over a ship by force or threat thereof or any other form of intimidation shall be fined under this title, imprisoned not more than 20 years, or both; and if the death of any person results from conduct prohibited by this paragraph, shall be punished by death or imprisoned for any term of years or for life.”}\]
\[\text{166 18 U.S.C. §2280(a)(1)(B) “Offenses: A person who unlawfully or intentionally performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship shall be fined under this title, imprisoned not more than 20 years, or both; and if the death of any person results from conduct prohibited by this paragraph, shall be punished by death or imprisoned for any term of years or for life.”}\]
\[\text{167 18 U.S.C. §2280(a)(1).}\]
\[\text{168 Shi, 525 F.3d at 720.}\]
be committed by one ship against another. This is important in the Shi case because Shi’s actions were committed only on board his boat against his crew members, and never involved a second vessel. In fact, the Maritime Safety Convention never uses the word “piracy,” but rather discusses unlawful and intentional offenses that damage or destroy a ship, or injures or kills a person on board a ship.\(^\text{170}\)

While the use of the Maritime Safety Convention over UNCLOS is beneficial to the US because of the specific circumstances of the case, the issue of jurisdiction still arises. Like in Smith, the Court first determines there is a constitutional basis in this case. Discussing the Offense Clause of the Constitution, granting Congress power to define and punish piracies committed on the high seas, \(^\text{171}\) the judge determined since the high seas are outside US territory, the Offense Clause grants Congress authority beyond US borders. \(^\text{172}\) In addition, the judge found constitutional basis in the Necessary and Proper Clause, granting Congress to make all laws. \(^\text{173}\) The Judge determined that section 2280 falls under the Offense Clause because it expressly

\(^\text{170}\) Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, opened for signature Mar. 10, 1988, art. 3(1), 1678 U.N.T.S. 221, 27 I.L.M. 668. The language of article 3 is “(1) Any person commits an offence if that person unlawfully and intentionally: (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or (b) performs an act of violence against a person on board a ship of that act is likely to endanger the safe navigation of that ship; or (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safer navigation of that ship; or (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safer navigation of a ship; or (f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or (g) injures of kills any person, in connection with the commission or attempted commission of any of the offenses set forth in subparagraphs (a) to (f).” This is the exact language codified at 18 U.S.C. 2280(a)(1)(a)-(g).

\(^\text{171}\) U.S. Const. art. I, §8, cl. 10, “The Congress shall have Power to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.”

\(^\text{172}\) Shi, 525 F.3d at 720.

\(^\text{173}\) U.S. Const. art. I, § 8, cl. 18, “The Congress shall have Power to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”
prohibits felony offenses committed in international waters. Quoting Smith, “‘piracy’ traditionally has been defined as ‘robbery, or forcible depredations upon the sea.’” By looking at section 2280(a)(1)(A) and (B), prohibiting the seizing of a ship by force or threat of force and “act[s] of violence against a person on board a ship,” respectively, the Court determined such acts are within Congress’s power to define piracies because of their use of force on the open seas. Because of this reasoning, Shi’s acts fall under the definition of piracy, and therefore the Constitution grants jurisdiction.

The last provision of section 2280 authorizes jurisdiction over any offender “later found” in the US. Because Shi was in international waters when the Coast Guard came on board, and he was forcibly, as opposed to voluntarily, brought into the United States, it was claimed this provision does not grant jurisdiction to US courts. However, the Court determined, based on rulings from aircraft hijacking cases, that “later found” does not require the defendant to arrive in the United States voluntarily. Thus, his detention in Honolulu brought him within US jurisdiction.

Finally, the Court gave a brief discussion of international law and universal jurisdiction to further support its finding that jurisdiction was properly granted in the case against Shi. Discussing the usual nexus requirement for jurisdiction, the court stated international law provides US Courts with a “rough guide.” In this case, the rough guide is the principle of universal jurisdiction, requiring no nexus to be required for jurisdiction “on the premise that

174 Shi, 525 F.3d at 720.
175 Id. (citing United States v. Smith, 18 U.S. 153, 161 (1820)).
176 Id. at 721.
179 Shi, 525 F.3d at 725.
180 Id. at 725.
181 Id. at 722.
offenses against all states may be punished by any state where the offender is found.”

Based on these three legal bases, the court determined there was proper jurisdiction in this case, and Shi was properly charged.

Looking at the rulings in these two starkly different cases that dealt with two separate issues concerning piracy, one is easily able to see the US’s position against piracy. The two cases also discuss different US laws and apply those laws to punish crimes of piracy as granted by the Constitution. This is important because the courts in New York faced their first piracy case in years. In addition, more US courts are likely to see the issue of piracy before it on a more frequent basis if Americans continue to be attacked. District Court in Virginia is another court facing a Somali pirates. It is likely these two cases, Smith and Shi, and their use of international customary law, treaty law, and domestic law, could be used as precedence to convict those charged with piracies on the high seas, even if they have no nexus to the United States.

c. United States v. Muse

With the recent uprising of piracy attacks, a few states have decided to prosecute the offenders in their own domestic courts. Abduwali Abdukhadi Muse was accused of piracy and kidnapping of an American sea captain on the Maersk Alabama in April, and has become the face of modern-day piracy since he was brought to the United States for prosecution following the hijacking. A well publicized rescue by the U.S. Navy of Captain Richard Phillips lead to the killing by snipers of three pirates holding Captain Phillips on a lifeboat and the capture of Muse. Charged with five counts, the most serious was section 1651, the descendent law

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182 Id. at 722.
185 Piracy, as many hold the image out in their head to be, from its golden days in the 1700 and 1800s came to an end during the Barbary Wars. During this time, many piratical attacks occurred on the northern coast of African, distinctly close to where the attacks on Somalia currently take place. Due to
This law imposes a mandatory life sentence on those convicted. When he was first arrested and arraigned in federal district court for the Southern District of New York, it was assumed that this piracy case would differ from others, particularly the 2002 case mentioned previously, because there is a nexus for jurisdiction; here, it was an America sea captain flying under an American flag when the band of pirates Muse belonged to committed the acts charged. However, as was noted shortly after the incident, because of the laws of universal jurisdiction and piracy on the high seas as a crime that falls under that principle, the case could have gone to any country. But, rather than handing him over to an African nation that has more experience in prosecuting piracy matters, by bringing Muse to the US and prosecuting him in federal district court, the US government is trying to send a message.

While initially this was assumed it had the potential to be a landmark case because it was the first case dealing with the 21st-century embodiment of a 19th-century image, the case quickly fizzled out. At first, this case, particularly a trial, was seen as an opportunity to expose the economic dangers of piracy. As Edward O’Callaghan, a partner at the law firm of Nixon Peabody in New York, was quoted as saying, “In the case of Muse, a trial will put a spotlight on piracy’s danger to the global economy. The true nature of the threat is best exposed through the

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187 Muse was charged with hijacking, hostage-taking, kidnapping, conspiracy, and piracy.
187 *Weiser, supra* note 184, at A1.
188 *Id.* at A1.
189 *Hurtado, supra* note 185.
adversarial system of a criminal trial.” However, the defense and prosecution eventually worked out a plea deal for Muse, and in May 2010, he plead guilty. Under the plea deal, Muse pleaded guilty to two charges of felony hijacking of maritime vessels, two felony counts of kidnapping, and two felony counts of hostage-taking. However, the charge of piracy, and its accompanying mandatory life sentence was dropped, and Muse’s lawyers and the government agreed to a range of twenty-seven to thirty-three years, nine months, as a reasonable sentence. Thus, with the dropping of the piracy charge and its accompanied mandatory life sentence, and Muse pleading guilty, the expectation of high-profile piracy trial, the first since the Civil War, were officially snuffed out.

As sentencing approached, Muse’s lawyers argued that he should get the lower end of the range, only 27 years, because of his youth and poverty. As regarding his youth, his lawyers maintained that they determined he was 16 at the time of the crime, making him still only 18 at the time of sentencing. His age was a point of contention throughout his processing, but a court early determined he was at least 18 when he was arrested. In addition, they argue his poverty was so severe that he had nothing to lose, making the temptation of piracy overwhelming. However, prosecutors argued Muse was ruthless and sadistic, often holding his AK-47 to hostages’ heads and pulling the trigger, laughing when the hammer clicked but the gun did not

190 Id.
193 Hurtado, supra note 185.
fire. Ultimately, Judge Preska, on February 16, 2011, sentenced him to the maximum that was stipulated—thirty-three years, nine months—citing the need for deterrence.

VII. Somali Pirates

While many envision pirates as the swashbucklers from the colonial times, pirates are still very much in existence. Since the 1980s, the number of pirate attacks around the world has increased every year. While technology has changed the way pirates conduct their business, now using speedboats, guns, and machetes, the reasons people resort to piracy as well as the difficulties in policing piracy remain the same. In the modern age, there are two types of pirates that are seen. The first are small-time, unorganized pirates that typically keep their activities within territorial and port waters. The second type is more like international maritime crime syndicates that typically seek to steal entire vessels, rather than just the cash and other goods on board. Modern pirates tend to attack cargo ships in narrow straits where they need to slow down to navigate the waters. This type of modern-day piracy is evident in the situation in the waters off Somalia, which has significantly increased in recent years and has gained the attention of the international community.

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195 Weiser, supra note 192.
198 Garmon, supra note 82, at 265.
199 Modern Piracy, supra note 197.
200 Garmon, supra note 82, at 267.
201 Id. at 266.
202 Modern Piracy, supra note 197.
Somalia has a 3025 kilometer coastline, and pirates operate from small coastal fishing villages.\(^{203}\) Somalia has not had a government capable of asserting authority since 1991\(^{204}\) when rival clans, without establishing a replacement regime, brought down Major General Muhammad Siad Barre, who had been in control of Somalia’s authoritarian government for 22 years, resulting in a failed state.\(^{205}\) Understanding how Somalia has become a failed state and what has occurred within its borders politically since is necessary in order to understand why piracy has thrived, as well as to attempt predictions for the future of both the country itself and Somali piracy.\(^{206}\) After the fall of Somalia’s dictator in 1991, many foreign countries began to take advantage of the sea off Somalia’s coast and the lack of a coast guard.\(^{207}\) Somali fishermen began arming themselves and began a legitimate fight against exploitation, but turned to piracy when its lucrative potential was discovered.\(^{208}\) Now, many pirates are not even fishermen, but


\(^{205}\) Patrick Lennox, *Contemporary Piracy of the Horn of Africa*, 5, Canadian Defence & Foreign Affairs Institute, Dec. 2008, available at http://www.bosasomedia.com/images/right_side_ads/Contemporary%20Piracy%20off%20the%20Horn%20of%20Africa.pdf. The only potential ruling regimes since Barre’s downfall in 1991 include the Transitional Federal Government (TFG), which was formed in exile under UN-backing and never had any real control over the country, and the Coalition of Islamic Courts (CIC) (also known as the Union of Islamic Courts), which was a collection of Islamic groups similar to the Taliban in Afghanistan. The CIC had a short reign—only six months—and controlled only the southern two-thirds of the country, but during their reign they cracked down severely on pirates, often launching attacks against the pirates at their home bases, resulting in a decrease in pirate attacks off Somalia’s coast. Lennox, *supra*, at 5-6.

\(^{206}\) Id.

\(^{207}\) VOANews.com, *supra* note 203.

\(^{208}\) Id. This “defensive” piracy was mainly the acts of the Hawiye clan, aimed at unlicensed foreign trawlers and those dumping toxic waste who exploited the absence of a functioning government in Somalia. The Hawiye clan maintained their activities until 2006 when the CIC gained control. At that time, the Darod clan took up the slack left by the Hawiye clan. *No Stopping Them*, The Economist, Feb 5th-11th 2001, at 69.
former militia from the internal part of the country. They often act on the premise they are defending Somali waters.

Somali pirates appear to take ships purely for financial gain, resolving most hijackings with a ransom payment and treating captives well. Sometimes they bring the vessel back to shore to sell the cargo. The potential wealth for a pirate is significant, especially when compared with normal standards of living in Somalia. A single seizure can net each pirate $150,000; Somalia’s per capita GDP is $600.

Looking at the Somali pirate situation in comparison to the reasons why piracy occurred in the past, the situation in Somalia is clearly a reflux in the “piracy cycle.” As seen in Somalia, piracy is conducted by small groups resorting to piracy out of desperation of poverty. Since their initial success, boats have gotten larger, weapons have gotten more destructive (pirates have been known to use rocket attacks in the Gulf of Aden), the pirates have expanded their territorial threat, and organizations have emerged to coordinate their activities (there are at least four organized groups in Somalia), these changes making predation increasingly effective. In some of the coastal towns, they are independent powers separate from the failed government of

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209 VOANews.com, supra note 203.
210 Id.
211 Joe Vacarello, U.N. Passes Piracy Pursuit Powers, CNN.com, Jun. 3, 2008, http://www.cnn.com/2008/WORLD/africa/06/02/somalia.piracy/index.html. The average hijacking lasts for 60-80 days, but that is increasing. The longest captives have been held was ten months, while the Taiwanese hostage ship, the Win Far 161, was utilized as a mother ship for the pirates. No Stopping Them, supra note 208, at 70.
212 Kontorovich, supra note 204.
213 VOANews.com, supra note 203. The average ransom paid rose from $1.5 million in 2009 to $3.5 million at the beginning of 2010. The record was $9.5 million for a South Korean tanker after the pirates initially demanded $20 million. No Stopping Them, supra note 208, at 70.
215 Vacarello, supra note 211.
Somalia, bringing money and wealth in.\textsuperscript{216} They are already seen by the townspeople as “a mercenary navy, paid by plunder.” They are perhaps on the cusp of the last part of the cycle, where success will legitimize their power or failure will lead to the disintegration of the pirates. Perhaps the final outcome rests on not the strength of the pirates, but on the strength of the international response that has been gradually increasing with the increase in attacks.

In 2008, 111 pirate attacks took place in the Gulf of Aden, a nearly 200 percent increase from 2007.\textsuperscript{217} The figures have only been increasing. In 2010, more hostages were taken at sea than any other year on record, with 1,181 total hostages take, and eight killed. Four-hundred forty-five (445) ships were attacked, and 53 ships were hijacked in 2010, and Somalia was responsible for 92\% of those seizures, accounting for 49 vessels hijacked and 1,016 crew members taken hostage.\textsuperscript{218} They have netted hundreds of millions of dollars in ransom and have disrupted global trade.\textsuperscript{219} For shipping companies using that route, they have faced increasing insurance rates, seeing a fifteen percent rise from 2008.\textsuperscript{220} The Somali pirates typically attack cargo ships exiting the Suez Canal and entering the shallow waters of the Gulf of Aden.\textsuperscript{221} Not only are these cargo ships moving slowly to navigate, but they are also typically unarmed.\textsuperscript{222}

\begin{footnotesize}
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\item[217] Kontorovich, \textit{supra} note 204. As of April 14, 2011, worldwide 156 attacks with 19 total hijackings have been reported in 2011. 107 of those attacks and 17 hijackings, with 309 captives taken, were reported for Somalia alone. Seven deaths have been reported for 2011. In total, Somali pirates currently hold 26 vessels and 532 hostages. \textit{Piracy News & Figures}, ICC International Maritime Bureau, \textit{available at} http://www.icc-ccs.org/piracy-reporting-centre/piracynewsfigures (last visited April 18, 2011).
\item[218] \textit{Hostage Taking at Sea Rises to Record Levels, Says IMB}, ICC International Maritime Bureau, Jan. 17, 2011, \textit{available at} http://www.icc-ccs.org/news/429-hostage-taking-at-sea-rises-to-record-levels-says-imb. While these figures are the worst on record, it is note-worthy that attacks in the Gulf of Aden have decreased significantly from 2009 to 2010, going from 117 to 53, with the reduction attributed to the naval coalitions that have now been regularly patrolling the area.
\item[219] VOANews.com, \textit{supra} note 203.
\item[220] Kimani, \textit{supra} note 216.
\item[221] Kontorovich, \textit{supra} note 204.
\item[222] \textit{Id.} While there have been some calls to arms, this has mostly been ruled out because it risks civilian crews will become embroiled in firefights with the pirates. Instead, the naval forces and shipping industry has worked together to develop “best management practices” that detail how ships should
\end{enumerate}
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addition, the Gulf of Aden, one of the world’s most important and busiest shipping lanes, is approximately three-quarters the size of the United States, making it extremely difficult to patrol. With the growing success of piracy off the coast of Somalia, pirates are now becoming more brazen, entering territory they never have before and venturing further out to sea than before.

The threat of piracy also jeopardizes the delivery of aid to Somalia, which continues to face a deteriorating humanitarian situation. Because of the increase in attacks, higher shipping costs and fewer cargo ships have resulted in restricted humanitarian aid. Ships willing to bring food aid into the country have been cut in half, and World Food Program ships have not been immune from pirate attacks. These numbers are extremely detrimental to the population of Somalia, where eighty percent of food assistance from the UN moves by sea. For a country that has experienced many years of drought, floods, wars, and instability, coupled with inflation and ever rising violence, this threat to the food supply many people rely on to survive is literally life-threatening.

prepare their vessels when travelling through the Gulf of Aden. These practices include maintaining a high cruising speed (no ship travelling over 18 knots has ever been successfully boarded by pirates), evasive maneuvers, erecting physical barriers and using hoses and foam cannons when pirates are close. These tactics seem to be working, with three-quarters of attacks ending in failures, whereas in 2008 pirates were successful 50% of the time. No Stopping Them, supra note 208, at 71.

223 Kimani, supra note 216.
227 Id.
228 Id.
229 Id.
230 Id.
However, even with these facts becoming more obvious and shipping in this sea lane increasingly difficult, many nations patrolling the Gulf of Aden have chosen not to prosecute pirates because of the difficulty and expense, especially compared to the ransoms being asked for.\textsuperscript{231} The dominant approach has been to avoid capture, or capture and release without charging a crime.\textsuperscript{232} Nevertheless, with the significantly increasing number of pirate attacks occurring each year, this approach seems to be changing.

\textbf{a. Actions taken by the UN}

Perhaps the strongest effort so far to curb piracy in Somalia has been taken by the UN. In 2008, the UN Security Council passed five resolutions (1816, 1838, 1844, 1846, and 1851).\textsuperscript{233} This is more than on any subject the UN has addressed that year.\textsuperscript{234} The Security Council passed these Resolutions pursuant to their powers under Chapter VII of the Charter to address issues posing a threat to international peace and security.\textsuperscript{235}

The first Resolution was passed in June.\textsuperscript{236} UN Security Council Resolution 1816 called on all Members to use “all necessary means to repress acts of piracy and armed robbery.”\textsuperscript{237} It authorizes warships to chase pirates into Somali territory waters if necessary.\textsuperscript{238} The Resolution cites as part of its reasoning the surge in attacks on ships delivering World Food Program shipments.\textsuperscript{239} Before, Somali pirates would attack in international waters and then return to Somali territorial waters where they could not be chased.\textsuperscript{240} This resolution was passed with the

\begin{footnotes}
\item[231] Kontorovich, supra note 204.
\item[232] Gettleman, supra note 183, at A8.
\item[233] Kontorovich, supra note 204
\item[234] \textit{Id.}
\item[235] \textit{Id.}
\item[237] \textit{Id.}
\item[238] \textit{Id.} at 7(a).
\item[239] \textit{Id.}
\item[240] Murquand, supra note 224.
\end{footnotes}
consent of the Somali government who are incapable of patrolling and securing its own waters.\textsuperscript{241} The Resolution was limited to only a six month period of time.\textsuperscript{242}

Resolution 1851, passed in December, extends the authority of military force to land-based operations for the purpose of suppressing acts of piracy and armed robbery for a one year period.\textsuperscript{243} This Resolution went further than any before.\textsuperscript{244} Any actions states take, however, must be authorized by Somalia’s Transitional Federal Government.\textsuperscript{245}

While these two Resolutions are the key to fighting piracy because they extend the capabilities of states beyond what has ever been authorized either by treaty law or by previous UN Resolutions, the other three are also important in the fight against piracy. Resolution 1838 asks “any nations with military capabilities in the area to ‘actively fight piracy’ on the high seas off Somalia.”\textsuperscript{246} Resolution 1844 allows the freezing of accounts and the prevention of entry into state’s territories by anyone who has “engag[ed] in or provid[ed] support for acts that threaten the peace, security or stability of Somalia,” or anyone “obstructing the delivery of humanitarian assistance to Somalia.”\textsuperscript{247} Finally, Resolution 1846 grants states and regional organizations the right to use “all necessary means” to fight piracy off the coast of Somalia.\textsuperscript{248} This Resolution is also limited to a one year period.\textsuperscript{249}

\textsuperscript{241} Vacarello, supra note 211.
\textsuperscript{242} \textit{Id.} at 7.
\textsuperscript{245} \textit{Id.}
\textsuperscript{249} \textit{Id.}
While 2008 saw the most Resolutions adopted by the Security Council to combat the Somali piracy situation, the UN has not restricted its resolve to that year. In addition, the Security Council adopted Resolution 1897 in November 2009, renewing both Resolutions 1846 and 1851 for an additional twelve months. In April 2010, the Security Council adopted Resolution 1918. This Resolution “not[ed] with concern… that the domestic law of a number of States lacks provisions criminalizing piracy and/or procedural provisions for effective criminal prosecution of suspected pirates” and “being concerned over cases when persons suspected of piracy are released without facing justice and determined to create conditions to ensure that pirates are held accountable.” Finally, it called on all States, particularly those in the area, to criminalize piracy and prosecute those convicted of piracy, as well as requested the Secretary-General to present within three months a report on possible options for prosecuting and imprisoning those responsible for acts of piracy.\textsuperscript{250} Finally, Security Council Resolution 1950, adopted in November 2010, while “welcoming the report of the Secretary-General, as requested by resolution 1918 (2010),” “renew[ed] its call to States and regional organizations that have the capacity to do so, to take part in the fight against piracy and armed robbery at sea off the coast of Somalia,” continued to call on States to criminalize piracy and noted its interest in the seven options for prosecuting pirates as described in the Secretary-General’s report.\textsuperscript{251} While these later Resolutions do not necessarily enable states to take unusual action, like entering the territorial waters of Somalia, that are typically not allowed in international law, they do express a continued desire to contain and criminalize the problem.


b. Increased international cooperation

In addition to UN action to fight piracy, there has been unprecedented international cooperation to combat Somali pirates. For starters, many shipping firms have now hired private security forces to protect their cargo.\(^{252}\) Also, there has been unparalleled international naval cooperation; more than 20 countries have joined the joint coalition.\(^{253}\) A coalition has been patrolling the Gulf of Aden led by the US, French, Great Britain, and Indian navies.\(^{254}\) The coalition includes the first-ever European Union naval force, and China’s first naval deployment outside the South China Sea.\(^{255}\) This naval force has seen some initial success, with the success rate for attempted hijackings falling from fifty percent to thirty percent, though attacks continue.\(^{256}\) In April 2009, donor nations pledged more than $200 million to Somalia for security on land and at sea, shortly after the captured American sea captain of the *Maersk Alabama* was rescued.\(^{257}\) Among other options the international community can try is prosecuting captured pirates in the capturing state’s courts, which is allowed under traditional customary law or trying captured pirates in third-party states, which presents jurisdictional questions.

\(^{252}\) Kontorovich, *supra* note 204.
\(^{253}\) *Id.* Three main naval task forces now operate in the area: Operation Atalanta, the EU contingent; Operation Ocean Shield, the NATO maritime group; and CTF-151, a 25-nation coalition under American command. In addition, many countries have deployed ships under national command, including China, Japan, India, Iran, Russia and Saudi Arabia. These naval forces have been able to help World Food Programme supplies to now get through with fewer attacks (it is estimated these flotillas disrupt around a fifth of the attacks); however, the naval forces have also contributed to the pirates beginning to roam further out using “mother ships.” *No Stopping Them, supra* note 208, at 70.
\(^{254}\) Kontorovich, *supra* note 204.
\(^{255}\) *Id.*
VIII. The Use of Kenyan Courts to Curb Somali Piracy

Numerous countries, including the United States, United Kingdom, and the European Union, among many others, have signed “Memorandums of Understanding” (MOUs) with Kenya to prosecute captured pirates. These agreements are usually made in exchange for money and the promise to modernize Kenya’s court system. These MOUs are not necessarily accepted by the international community. They have particularly been the target of criticism from human rights groups who claim the legal system in Kenya is corrupt and does not have relevant piracy laws.

However, Kenya provides an advantage to the world trying to deal with a seemingly unsolvable problem. Trying pirates at a court in Kenya is seen as an alternative to trying pirates in Somalia’s courts, where there is no effective central government or legal system, as well as trying pirates in the capturing state’s courts, where finding translators, witnesses, or evidence is a sometime insurmountable difficulty.

The first case of piracy tried in Kenya was in 2006, when the US turned over 10 Somali nationals captured approximately 200 miles of the coast of Somalia. They were sentenced to 7 years. In addition, Britain turned over 8 suspected pirates in 2008. This case is ongoing.

258 VOA News.com, supra note 203.
259 Gettleman, supra note 183, at A8. As an example, the EU has invested around $3 million in Kenya’s judicial system, with some of those funds going towards building a special court for piracy trials. However, In September 2010, Kenya announced it was ending the agreement with the EU, accusing it of failing to keep its side of the bargain. No Stopping Them, supra note 208, at 71.
260 VOA News.com, supra note 203.
261 Gettleman, supra note 183, at A8. Kenya is not the only foreign state trying pirates even without a nexus. Other regional countries of note include Tanzania and the Seychelles, but Kenya has experienced the largest influx of piracy trials and convictions. No Stopping Them, supra note 208, at 71.
262 Kontorovich, supra note 204
Kenya’s Constitution grants “unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law” to its High Court.\textsuperscript{266} Although this provision does not overtly grant extra-territorial jurisdiction, this does suggest it is not limited to Kenyan territory.\textsuperscript{267} In addition, “any other law” includes the law of nations.\textsuperscript{268} Kenya’s Penal Code also provides a person is guilty of piracy if that person, “in territorial waters or upon the high seas, commits any act of piracy \textit{jure gentium}.”\textsuperscript{269}

The Court being used to prosecute these suspected pirates is a domestic Kenyan court, rather than an international court or tribunal.\textsuperscript{270} This is partly why Kenya has signed the MOUs; it is advantageous to the government of Kenya to be viewed as the international tribunal for piracy.\textsuperscript{271} But the concerns of the human rights organizations are not off-base. Currently there are 79 pirates being held, though this number is disputed and may be over 100.\textsuperscript{272} In addition, there is a problem with transparency; no court decisions are publicly available, and of the MOUs, only the EU one is publicly available.\textsuperscript{273}

While the ability to dump the world’s captured pirates on the court system of Kenya seems a golden opportunity for many, the problems that have arisen may make this solution only viable in the short-term. Kenya argues it is making an essential contribution toward re-establishing maritime security in east Africa, but acknowledges the problem of piracy is likely to

\begin{footnotesize}
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\item \textsuperscript{265} \textit{Id.}
\item \textsuperscript{266} Constitution of Kenya §60(1).
\item \textsuperscript{267} Gathii, supra note 264, at 7.
\item \textsuperscript{268} \textit{Id.} at 8.
\item \textsuperscript{269} \textit{Id.} at 9.
\item \textsuperscript{270} Azim, supra note 3.
\item \textsuperscript{271} Azim, supra note 3.
\item \textsuperscript{272} Personal conversation with Professor James Gathii, Albany Law School Oct. 5, 2009 [hereinafter Conversation].
\item \textsuperscript{273} \textit{Id.}
\end{itemize}
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continue until Somalia attains political stability. They see this as an opportunity to enhance their image internationally “at a time when their government is facing criticism of corruption and political violence.” It is also argued that if the international community had cared about the struggles of Somalia during the 1990s, this problem likely would not have occurred.

Many, because of the advantages Kenya presents and the disadvantages other options pose, are hoping Kenya becomes a sort of Hague for Pirates. However, it is unclear whether Kenya’s fragile politics can support the controversy, or its troubled judicial system can deliver quality of justice. In addition, many Somali pirate lords are talking retaliation. Because the two countries border each other, Kenya has a large Somali refugee population, as well as a powerful Somali business community. The idea of an international tribunal to prosecute suspected pirates is gaining ground but until they can be implemented prosecution seems to remain the jurisdiction of Kenya. However, the Kenyan Courts, while currently the best option, are more likely to be only a short term solution, and other options need to be explored, including stabilizing the Somali government.

\[\text{VOANews.com, supra note 203.}\]
\[\text{Azim, supra note 3.}\]
\[\text{VOANews.com, supra note 203.}\]
\[\text{See generally, Murquand, supra note 224.}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Azim, supra note 3.}\]
\[\text{Azim, supra note 3. Some other options are to use the court systems of those countries that initially capture the pirates, often due to the fact that in those specific attacks the citizens of that country are the ones who were threatened. Examples of countries that have done this include the United States and South Korea. Hyung-Jin Kim, 5 Somalis Brought to South Korea on Piracy Charges, Associated Press, Jan. 30, 2011, available at http://www.msnbc.msn.com/id/41337648/ns/world_news-asiapacific/}.\]
IX. Conclusion

As exemplified from ancient times, through the Golden Age, and into today, the Somali piracy situation shows the “piracy cycle” continues to rotate even into modern days. While laws created in the Golden Age of piracy can and will be used to continue to battle this modern day piracy, it is a problem that will not resolve until the motivations for people to resort to piracy are absolved. However, resolving the lack of an effective government in Somalia that is capable of controlling the entire country is a solution that will not be solved immediately. As a result, the use of the Kenyan court system is a good (but at best) short-term solution and other options must be explored in order for the international community to eradicate global piracy up to their expectations.