Universal Jurisdiction over Operation of a Pirate Ship: The Legality of the Evolving Piracy Definition in Regional Prosecutions

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Universal Jurisdiction over Operation of a Pirate Ship: The Legality of the Evolving Piracy Definition in Regional Prosecutions

Cover Page Footnote
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Universal Jurisdiction Over “Operation of a Pirate Ship”: The Legality of the Evolving Piracy Definition in Regional Prosecutions

By Samuel Shnider†

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I. Introduction: “Operation of a Pirate Ship” and the Proposal of “Equipment Articles” for the Successful Prosecution of Somali Pirates

Somali maritime piracy remains an urgent issue, involving many human victims and a high cost to the international community. A January 2011 report by the U.N. Special Adviser

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on Piracy, based on information from political representatives, law enforcement, and legal experts from all affected areas, outlined a comprehensive initiative on three fronts: economic, security, and judicial/correctional. The report presented twenty-five proposals corresponding to these three areas.\(^2\)

The judicial proposals addressed issues of legislative reform and cooperation in effective prosecutions and emphasized the need to prosecute those who intend to commit piracy.\(^3\) The Special Adviser also addressed the issue of piracy prosecutions:

Article 103 of the United Nations Convention on the Law of the Sea, concerning the definition of a pirate ship, includes the intention to commit an act of piracy. However, the constituent elements of that offense are not clearly defined. Unless the perpetrators are caught in the act, many "acts" of piracy are not prosecuted. National judicial systems must therefore also criminalize intention.\(^4\)

In order to facilitate prosecution, the assembly of a case should begin with a set of evidence, such as the presence of equipment on board, a global positioning system, weapons, a large quantity of fuel, the composition of the crew composition, aerial observation of behavior and the type of ship for the zone in question.\(^5\)

Professor Eugene Kontorovich directly addresses the question of prosecuting those who intend to commit acts of piracy by suggesting that regional states adopt "equipment articles" which create a presumption of criminal intent when certain listed equipment is uncovered aboard ship.\(^6\) Kontorovich also gives a

the report, see Venetia Archer & Robert Young Pelton, Can We Ever Assess the True Cost of Piracy?, SOMALIA REPORT (Feb. 21, 2012), http://www.somaliareport.com/index.php/post/2867 (suggesting that the report inflates many costs (and ignores others), that it fails to distinguish between the costs of piracy, profits from private counter-piracy operations and insurance, and that it does not assess the costs to effectively end piracy).


\(^3\) See id. ¶¶ 46-52, 59-60, 73-76, 95-100 & 104-08.

\(^4\) Id. ¶ 59.

\(^5\) Id. ¶ 60.

\(^6\) Eugene Kontorovich, Equipment Articles for the Prosecution of Maritime Piracy, ONE EARTH FUTURE (May 17, 2010), http://www.oneearthfuture.org/images/imagefiles/equipment%20articles%20for%20the%20prosecution%20of%20marit
brief history of "equipment articles," which originated in the
mixed commissions established by Great Britain to suppress the
slave trade in the mid-nineteenth century. 7 The articles allowed
for a right-of-search on ships with specified equipment, made it
simpler to condemn the vessel, and eventually had a significant
effect on the slave trade. 8

These statutory presumptions, however, were not used in
criminal cases. 9 Suggested criminal law analogues include
intentional possession of nonconventional weapons at sea 10 and
drug possession on board vessels, 11 both of which have withstood
challenges in the courts. 12 However, as neither weapons
trafficking nor drug trafficking are international crimes, nor are
they subject to universal jurisdiction according to most opinions,
they do not present the same issues as piracy. 13 Kontorovich
therefore proposes a version of the crime of piracy punishable
based on mere presence or possession—quite different than the
"intent to commit act of piracy," suggested by Special Adviser
Jack Lang. 14

Kontorovich also notes that there is no new crime of

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7 Id. at 2-4.
8 Id. at 3-4.
9 Id. at 7-8 (noting that equipment articles were never used to establish mens rea,
and that in the context of piracy they would need to establish intent; to solve this
problem, they should only be used to establish "that the vessel is a 'pirate ship,'"
meaning to establish status of a vessel, with the corollary circumstantial presumption of
intent of those in dominant control). The essay itself is unclear on this point, but it
appears to suggest that it is not important to establish intent for the remaining crew of a
pirate ship, merely knowledge of facts. Id.
10 Id. at 4-5 (noting that the 2005 Protocol to the Convention for the Suppression
of Unlawful Acts Against the Safety of Maritime Navigation (SUA Protocol) limits the
crime to intentional possession).
11 Id. at 5-6 (noting that the U.S. Maritime Drug Law Enforcement Act
criminalizes the possession of large amounts of narcotics on the high seas, even without
evidence that they are headed to the United States, and has recently been amended to
include navigating on certain submersible vessels presumed to be drug smuggling
vessels because of their prevalent use in quickly destroying evidence and abandoning
ship).
12 See Kontorovich, Equipment Articles, supra note 6, at 6.
13 Id.
14 See id.; Legal Issues Related to Piracy off the Coast of Somalia, supra note 2, at

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possession of equipment:

Since there is no international crime of carrying the relevant equipment (RPGs, grappling hooks) aboard private vessels on the high seas, equipment articles promulgated through national legislation may raise concerns that they criminalize beyond what the international law permits. But this concern misperceives equipment laws. They do not define a new crime. Rather, they establish the elements of proof for an existing crime—piracy. This can be seen from the fact that the proposed articles only make possession of the equipment a rebuttable presumption. A suspect can be found in possession of the equipment yet acquitted, because the possession is not the underlying crime—rather, it is piracy against the law of nations. Kontorovich thus suggests that issues of criminal jurisdiction would be resolved under his proposal because jurisdiction over the substantive offense of piracy already exists pursuant to customary international law and maritime treaties, most notably the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS).

Presumptions of intent from possession similar to the equipment articles mentioned by Kontorovich are common in U.S. law and have generally been held as constitutional. Moreover,

15 Kontorovich, Equipment Articles, supra note 6, at 6.
17 One common example is burglarious tools statutes, which imply intent to burglarize from possession of tools. See Alfred Swersky, Note, Criminal Law - Evidence-Presumption of Intent Arising from Possession of Burglarious Tools, 6 WM. & MARY L. REV. 227, 229 (1965) (concluding that burglar's tools statutes have been held constitutional as long as they "are not conclusive" but may be overcome by defendant; there is (a) a "rational connection" between the fact proved and the presumption; and (b) no excessive burden or hardship to defendant). In a few rare cases, courts have found statutory presumptions of intent from possession unconstitutional on their face. The Supreme Court of Illinois, for example, struck down a municipal ordinance that created an express presumption with no requirement of intent, and made it unlawful for a defendant "to have in his possession any nippers of the description known as burglar's nippers, pick lock, skeleton key, key to be used with a bit, jimmy, or other burglar's instrument or tool of whatsoever kind or description" unless such person could show that his possession was innocent and for a lawful purpose. City of Chicago v. Mulkey, 257 N.E.2d 1, 2-3 (Ill. 1970). For a discussion of the court's conclusion, see Symposium, Illinois Supreme Court Review: Burglar's Tools Ordinance Unconstitutional, 65 NW. U. L. REV. 978, 980-83 (1970) (suggesting the court may have gone further than necessary, that other cases have simply read a requirement of intent into the statute even where
burden-shifting provisions in general do not present constitutional problems\textsuperscript{18} or international human rights problems;\textsuperscript{19} although, the

there is an express presumption, and that burglarious tools statutes are unconstitutional only where applied without evidence of intent). In practice, presumptions of intent may require the same "character and quantum of evidence" as proof of intent itself, except that the purpose of such evidence is different, i.e. it is aimed at proving the nature of the tools rather than intent. See Note, Criminal Law: Proof of Intent Under Burglary Tool Statutes: Benton v. United States, 282 F.2d 341 (D.C. Cir. 1956), 1957 WASH. U. L.Q. 276 (1957). Presumptions of intent from possession of dangerous tools or weapons were adopted in the Model Penal Code. See MODEL PENAL CODE (U.L.A.) §§ 5.06-5.07 (2001).

\textsuperscript{18} See Patterson v. New York, 432 U.S. 197, 216 (1977) (discussing Mullaney v. Wilbur, 421 U.S. 684 (1975), and holding that shifting the burden of proof for elements of the offense violates due process, but shifting proof of affirmative defense to defendant does not, where the facts that are elements of the offense must still be proven by prosecutor). The Court itself notes the slippery slope of this proposition:

This view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes. But there are obviously constitutional limits beyond which the States may not go in this regard. "[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime."

\textit{Id.} at 210 (internal citation omitted). \textit{See, e.g.,} Brian G. Slocum, \textit{Virtual Child Pornography: Does It Mean The End Of The Child Pornography Exception To The First Amendment?}, 14 ALB. L.J. SCI. & TECH. 637, 667-73 & nn.142 & 144 (2004) (noting that the Supreme Court has not articulated a comprehensive constitutional regime as to which facts constitute elements of crimes).

\textsuperscript{19} See Salabiaku v. France, 141-A Eur. Ct. H. R. (ser. A.) ¶ 19 (1988) ("Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not permit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. . . . It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defense."). For a dissenting view, see George P. Fletcher, \textit{Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases}, 77 YALE L.J. 880, 884 & n.16 (1968) (citing to Benton v. United States, 282 F.2d 341 (D.C. Cir. 1956), and comparing to Judgment of Oct. 3, 1958, 1959 Neue Juridische Wochenschrift 1932 (Landgericht, Heidelberg), as part of a more general trend in these jurisdictions to hold that statutes presuming intent are violations of the presumption of innocence). Professor Fletcher questions why similar presumptions in the cases of weapons, obscene materials and narcotics do not give rise to "judicial anxieties" and suggests two explanations: first, that in the latter cases possession itself manifests "sinister implications," and second, that there is a risk to "all who come into contact with them." \textit{GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW} § 3.4 (2000). See Douglas N. Husak, \textit{Reasonable Risk Creation and Overinclusive Legislation}, 1 BUFF. CRIM. L. REV. 599, 616-21 (1997) (discussing the section). The "common experience" of risk from certain criminal tools is probably at the basis of the Model Penal Code distinction between offensive weapons, which are prohibited entirely in § 5.07, and tools which have lawful use, but for which a
statute of the International Criminal Court (ICC) is particularly strict in this regard. The problem with equipment articles for piracy is related to the specific context of absolute universal jurisdiction—with no nexus to the state trying the offense. Because the pirate is not on notice of any country’s specific laws, a wide-ranging interpretation of UNCLOS, which in effect creates a new crime, would be contrary to the principle of legality. This Article is primarily concerned with examining this potential problem and its ramifications, as well as examining trends in current piracy prosecutions, rather than in proposing concrete solutions.

During the years of the recent Somali piracy phenomenon, the Security Council has chosen to build its enforcement regime around UNCLOS. Express reservations in each Security Council

presumption of intent is still appropriate, discussed in § 5.06. See Commonwealth v. Stewart, 495 A.2d 584, 594 (Pa. Super. Ct. 1985) (“[I]t is useful to distinguish between those weapons which are offensive in themselves, meaning that the universal experience within our society has been that these weapons are used only in furtherance of crime, and those that can be used offensively, in the hands of one inclined to do so, but also have recognized uses of a socially acceptable nature. . . . It is clear that section 908 was ‘intended to establish a prohibition very nearly absolute aimed at the implements or weapons themselves, whether enumerated or falling within the general definition, which are offensive by nature.’”) (internal citations omitted) (emphasis in original).

See William A. Schabas, Article 66, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT OBSERVERS NOTES, ARTICLE BY ARTICLE 833, 839 (Otto Triffterer ed., 2d ed. 1999) (noting that while “[t]he presumption of innocence may be breached where an accused person is required to produce evidence to counter the charge,” most jurisdictions allow some derogation from the principle by legal provisions and inferences, and “[t]he least offensive of such provisions are so-called factual presumptions, where proof of one fact is deemed, by the court, to constitute proof of another, incriminating fact . . . . [T]his approach is defended by judges as nothing more than a common sense rule, a logical deduction from the facts”).

See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 74-76 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans and Buergenthal) (arguing that there is no established practice of pure universal jurisdiction—akin to that applied to piracy—without links to the state, and virtually all national legislation envisages some territorial link, although there may be a trend of allowing jurisdiction for certain heinous crimes on bases other than territoriality).

See UNCLOS, supra note 16, pmbl. (explaining that UNCLOS establishes “a legal order for the seas and oceans”).

resolution relating to piracy emphasize that authorized enforcement measures apply only with respect to the situation in Somalia and do not alter existing law or define piracy more broadly as a threat to peace.24

Regional agreements have also focused on incorporating the provisions of UNCLOS into domestic law.25 In 2008, the Secretariat of the International Maritime Organization (IMO) sent a circular letter to all IMO member states requesting an update on their national legislation on piracy.26 In November 2010, responses from 41 states were reviewed by the Legal Committee of the IMO and submitted for inclusion in the UN Database.27 The IMO concluded that national legislation is not harmonized with regard to piracy, which could have an adverse effect on prosecutions.28 However, as of the writing of this article, regional


27 See IMO, Legal Committee (LEG), 97th Sess: 5-9 October 2009 (Oct. 9, 2009), http://www.imo.org/OurWork/MeetingSummaries/Legal/Pages/LEG-96th-Session.aspx (reviewing national legislation and "noting that, in most cases, piracy is not addressed as an independent, separate offence"); IMO, Legal Committee (LEG), - 97th Sess: 15-19 November 2010 (Nov. 19, 2010), http://www.imo.org/OurWork/MeetingSummaries/Legal/Pages/LEG-97th-Session.aspx (reviewing responses from 41 states, and concluding that inconsistencies "might have an adverse effect on the process of prosecution").

28 Id.; see also IMO, Legal Committee, Piracy: Review of National Legislation, ¶ 5-6, IMO Doc. LEG 97/9 (Sept. 10, 2010) (listing "general conclusions from the secretariat’s review of the material provided" in response to the circular letter).
states are increasingly implementing the definition of piracy in UNCLOS into their penal codes, and more frequently will prosecute the bulk of universal jurisdiction piracy cases. Nonetheless, UNCLOS itself is ambiguous in its provisions relating to attempt and accessory crimes, and these provisions have not yet been fully interpreted in the context of criminal trials.

This article argues that prosecution of alleged pirates who cruise with equipment creates problems of legality in regional piracy prosecutions because it is, in effect, punishing an act that has not been established as piracy. This is true even if the piracy definition in UNCLOS Article 101 is adopted by regional states as the basis of their criminal statutes of piracy, and if the definition is accepted as customary international law, because the definition's implications as a criminal norm are in early stages of development.

The article proceeds as follows: the first part addresses the theoretical basis of universal jurisdiction over piracy and the history of the UNCLOS definition of piracy, with an emphasis on UNCLOS Article 101(b), “operation of a pirate ship.” The second part addresses the problem of legality for defendants where an international treaty, which may be read as a state agreement to prosecute certain offenses, is re-characterized as a binding criminal statute. This re-characterization is present when UNCLOS Article 101, which is not a criminal law, is incorporated into state penal codes. The legality issue would arise if the treaty text of UNCLOS were broader than the established criminal norm. The third section of the article analyzes prosecutions in

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29 See U.N. Secretary-General, Report of the Secretary-General on Specialized Anti-piracy Courts in Somalia and other States in the region, ¶ 41, U.N. Doc. S/2012/50 (Jan. 20, 2012) (hereinafter SG Report Jan. 2012) (noting revision of Seychelles Penal Code § 65 as of March 2010 to conform with UNCLOS, undertaken with assistance of the UNODC); id. ¶ 58 (noting revision of Kenyan Merchant Shipping Act § 371 to conform with UNCLOS, undertaken with assistance of UNODC); id. ¶ 81 (noting adoption of the Piracy and Maritime Violence Act as of January 2011 by Mauritius which reflects the definition of piracy in UNCLOS); id. ¶ 98 (noting amendment of Republic of Tanzania Penal Code as of May 2010 to reflect UNCLOS definition); id. ¶ 124 (concluding that a great deal of work is under way to ensure successful prosecutions of pirates in regional states).

30 See UNCLOS, supra note 16, art. 101. Such a distinction is based on an assumption that state law and state practice define a customary law interpretation of UNCLOS, which is more limited than the full range of acts that might fall under its
Kenya and Seychelles for trends relating to the operation of a pirate ship. Finally, this article concludes by discussing the current regime of piracy prosecutions and the possible future enactment of equipment articles.

II. Universal Jurisdiction Over Piracy and its Limits

Presumably, maritime piracy in international law should be discussed within the context of international crime. Piracy is often studied as part of a process of the development and application of international criminal law, for which the most foundational questions are jurisdiction and elements of liability. However, one of the most influential modern writers to analyze the topic, Alfred Rubin, concludes that the use of the term "piracy" in historical sources involves a more complex interplay between a criminal law concept and a political label used to justify naval attacks. This justification by necessity allowed attacking and killing "pirates" who had not yet committed any crimes, but were merely identified by their ships. Since it is now accepted that piracy is defined by UNCLOS Article 101, and states have criminal laws that punish piracy, this debate is somewhat academic. Nevertheless, it is important to note as a guiding principle when addressing the provision of UNCLOS Article 101(b), "operation of a pirate ship," which may have traces of political use of the term "pirate" in a criminal law definition.

In general, criminal jurisdiction is the competence of a state or other international body under international law to arrest, prosecute, and punish wrongdoers for crime. It is widely agreed that, under international law and the principle of non-intervention, there are several limitations on a state's jurisdiction. These limitations prohibit a state from: (a) prescribing laws, or making provisions. See id. This allows defendants to rely on the narrower interpretation, which is the only interpretation that is genuinely accessible and foreseeable. See id. To demonstrate this narrower interpretation, the Article delves into state practice and law and shows that there appears to be a general agreement not to prosecute unless a violent attack has begun.

See id. at 343-44.
See id. at 36.
See UNCLOS, supra note 16, art. 101.
Id.
them applicable to persons and their interests; (b) adjudicating claims, or subjecting persons to the process of its courts; and (c) enforcing, introducing, or compelling compliance with its laws.\(^3\)

Most traditionally, states apply their criminal law to crimes committed on the territory of the state or against its flagged ships and aircraft.\(^3\) States may also apply their criminal laws extraterritorially if the crimes are committed by state nationals abroad.\(^3\) Somewhat more controversially, a state may punish an individual for a crime where the victim was a national (the "passive personality" principle), or if the crime injures the interests of a state (the "protective principle").\(^3\) All of these theories of jurisdiction are based on territoriality and the sovereign authority of a state, but certain universal crimes are punishable without regard to sovereignty because the universality principle transcends sovereignty.\(^4\)

"Universal jurisdiction to prevent and suppress piracy has been widely recognized in customary international law as the international crime *par excellence* to which universality applies."\(^4\) However, universal criminal jurisdiction over piracy is justified only over conduct "which constitutes piracy by international law."\(^4\) Since every jurisdiction may have municipal definitions of

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\(^3\) *Id.* at 440, arts. 5-6; *Restate ment (Third) of Foreign Relations Law of the United States* § 402.

\(^3\) *Harvard Draft on Jurisdiction*, supra note 37, at 440, arts. 7-8 (explaining the protective principle); *id.* at 445 (noting controversial aspects of the passive personality principle); *Restate ment (Third) of Foreign Relations Law of the United States* § 402 (noting protective principle); *id.* § 403 (omitting the passive personality principle in favor of a reasonableness analysis).


\(^3\) *Id.* at 110-11; *Geib & Petrign*, supra note 23, at 143 & n.588 (noting cases which state that universal jurisdiction over piracy has consolidated into an international law norm).

\(^3\) S.S. *Lotus (Fr. v. Turk.),* 1927 P.C.I.J. (ser. A) No. 10, ¶ 248 (Sept. 7); *Harvard Draft on Jurisdiction*, supra note 37, art. 9; see *Geib & Petrign*, supra note 23, at 144-45 (noting examples of municipal law definition in Kenya, a hub of piracy prosecution, which do not conform with the UNCLOS definition); see also Eugene Kontorovich, *The
the crime of piracy that extend beyond the definition of piracy under international law, a state’s competence to apply its municipal definition must be limited to traditional bases of jurisdiction. Thus, for example, if a nation broadly defines piracy as robbery at sea with no "high seas" limitation, it may only punish such attacks where its nationals or ships are involved.

Several theoretical arguments have been proposed to explain universal jurisdiction over the crime of piracy. The status of pirates as hostis humani generis, or enemies of all humankind, allowing them to be punished in the courts of any nation, has been noted frequently as justification for universal jurisdiction in national courts for a variety of international crimes. Universal jurisdiction over serious human rights violations, such as war crimes, crimes against humanity, and genocide, is often based on natural law concept of universal wrongs that offend the conscience of mankind, expanding upon the notion that pirates, bandits, and assassins should likewise be punishable by any state because of the gravity of their crime. Piracy, however, does not stand out in most modern penal codes as a particularly heinous offense. More

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43 See Harvard Draft on Jurisdiction, supra note 37, at 566.

44 See id. at 566, 588.


46 Kontorovich, Piracy Analogy, supra note 45, at 185-86 (listing cases that created this development); ILA Report, supra note 46 at 3 (summarizing Cowles for the proposition that such crimes “were to be regarded as offences against the conscience of the civilized world,” although Cowles himself based the argument more on consent); see M. Cherif Bassiouni, International Crimes: Jus Cogens and Obligatio Erga Omnes, 59 LAW & CONTEMP. PROBS. 63, 69-70 (1996) [hereinafter Bassiouni, International Crimes] (noting that characterization of a crime as jus cogens often depends on whether a crime threatens world peace or security, or whether it shocks the conscience of humankind; piracy does neither, “although it may have at one time”).
pragmatic and positivist thinkers have viewed state jurisdiction over piracy as an arrangement that allowed privateering but forbade unauthorized raids or as an arms limitation agreement between states. Actions contemplated against pirates as enemies of all humankind have thus been viewed as direct executive action, not criminal prosecution.

A. The Universal Condemnation of the Crime of Piracy

The notion that piracy is a crime that is “regarded as the most heinous by the international community,” and therefore punishable by any court where the pirate may be found, has become widely accepted as the basis of an analogy between piracy and other gross human rights offenses. That assertion, however, may not be supported by historical sources. Pirates have been described as hostis humani generis, an expression which may date back to Cicero, but was first used by Lord Coke in 1797 to describe piracy as a form of treason. Blackstone later used the expression to describe piracy as a crime “against the universal law of society”
but did not describe the substance of the crime as heinous; rather, his argument is similar to de-nationalization, discussed below.\textsuperscript{53}  

After the Second World War, the Allied war tribunals used the universality principle extensively to justify their jurisdiction over war crimes—making use of the comparison to piracy, though emphasizing the gap in jurisdiction more than the heinousness of the crimes.\textsuperscript{54}

The comparison between piracy and crimes against humanity based on the rationale of heinousness was further developed by the Supreme Court of Israel in the \textit{Eichmann} Appeal to answer both the questions of universal jurisdiction and individual criminal responsibility:

[T]hese crimes constitute acts which damage vital international interests; they impair the foundations and security of the international community; they violate universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilized nations. The underlying principle in international law regarding such crimes is that the individual who has committed any of them and who, when doing so, may be presumed to have fully comprehended the heinous nature of his act, must account for his conduct.\textsuperscript{55}

The International Criminal Tribunal for the Former Yugoslavia (ICTY) further developed this analogy,\textsuperscript{56} and it has since become a

\textsuperscript{53} See \textit{id.} at 992.

\textsuperscript{54} See, \textit{e.g.}, United Nations War Crimes Comm'n., 1 \textit{Law Reports of Trials of War Criminals} 42, 53, 103 (1947), \textit{available at} http://www.loc.gov/frd/Military_Law/pdf/Law-Reports_Vol-1.pdf ("[T]he general doctrine recently expounded and called 'universality of jurisdiction over war crimes,' which has the support of the United Nations War Crimes Commission and according to which every independent State has, under International Law, jurisdiction to punish not only pirates but also war criminals in its custody, regardless of the nationality of the victim or of the place where the offence was committed, particularly where, for some reason, the criminal would otherwise go unpunished."). The analogy to war crimes is much closer to piracy, because brigands also reject the authority of all states, and conduct acts of war outside the jurisdiction of any state. See Cowles, supra note 45, at 181-207 (reviewing historical sources and eloquently removing distinctions between piracy and war crimes). At about this time, Lauterpacht—cited in the \textit{Eichmann} Appeal below—expressed the notion that universal jurisdiction should be exercised over all heinous offenses, similar to piracy, \textit{de lege ferenda}. H. Lauterpacht, \textit{Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens}, 9 \textit{Cambridge L.J.} 330, 348 n.61 (1947).

\textsuperscript{55} See Att'y Gen. of Israel v. Eichmann, 36 I.L.R. 277, 289-294 [1962] (Isr.).

\textsuperscript{56} See Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for
common argument in the writings of many scholars and jurists as a theoretical foundation for universal jurisdiction in national courts over grave human rights crimes that offend the conscience of all humankind.\textsuperscript{57}

Some have argued that this explanation is problematic as the basis for universal jurisdiction over piracy and certainly should not be extended to other offenses.\textsuperscript{58} Piracy is not a particularly heinous crime—it is comparable to robbery or kidnapping on land—and certainly does not shock "the conscience of the civilized world" in the same sense as genocide, war crimes, or crimes against humanity.\textsuperscript{59} Furthermore, privateers, engaged in

\begin{itemize}
  \item Interlocutory Appeal on Jurisdiction, ¶ 57 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (arguing that court’s jurisdiction was justified as delegated jurisdiction from the Security Council, which transcends sovereignty in a way similar to universal jurisdiction, “in view of the nature of the offences alleged against Appellant, offences which, if proven, do not affect the interests of one State alone but shock the conscience of mankind”); Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Trial Judgment, ¶ 147 (Int’l Crim. Trib. for the Former Yugoslavia, Dec. 10, 1998) (citing Filartiga v. Peña-Irala for the proposition that “the torturer has become, like the pirate and the slave trader before him, hostis humani generis, an enemy of all mankind”); id. ¶ 156 (citing Eichman for the proposition that the universal abhorrence of the crime justifies universal jurisdiction).
  \item \textsuperscript{57} See generally Kontorovich, Piracy Analogy, supra note 45 (discussing the analogy as a basis for universal jurisdiction over piracy).
  \item \textsuperscript{58} See African Union, Report of the Commission on the Use of the Principle of Universal Jurisdiction by Some Non-African States as Recommended by the Conference of Ministers of Justice/Attorneys General ¶ 11, AU Doc. EX.CL/411(XIII) (June 24-28, 2008) (“It is common to find general and expansive assertions including a wider range of international crimes, than is actually the case.”); id. ¶ 40 (concluding that moral reprehensibility does not equate to universal jurisdiction). See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 74-76 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans and Buergenthal) (arguing that there is no established practice of pure universal jurisdiction – akin to that applied to piracy – without links to the state, and virtually all national legislation envisages some territorial link, although there may be a trend allowing jurisdiction for certain heinous crimes on bases other than territoriality). While these Judges find that the practice has not become established, they admit that it is not unlawful either and apply the heinousness analogy to piracy. Id. at 81-83 (arguing that such category should be strictly limited only to the most heinous crimes of piracy, war crimes, crimes against humanity, and possibly genocide).
  \item \textsuperscript{59} ILA Report, supra note 45, at 3; Kontorovich, Piracy Analogy, supra note 45, at 223-26. Even those who argue for a strong enforcement of \textit{jus cogens} crimes would admit that piracy “neither threatens peace and security nor shocks the conscience of humanity, though it may have at one time.” Bassiouni, International Crimes, supra note 46, at 70.
\end{itemize}
exactly the same acts as pirates, were recognized as legitimate when they committed raids on ships and land with the authority of a letter of marque from a monarch. Since the *actus reus* of privateering is the same as piracy, it is difficult to understand why piracy is heinous. Others would argue that many acts that are lawful in times of war are heinous in times of peace and, similarly, privateering could be a lawful act of warfare, while piracy remains a heinous crime. Moreover, the decision to outlaw privateering as early as the Declaration of Paris of April 16, 1856 is strong precedent for a universal repulsion of acts of piracy.

The comparison of piracy to other heinous crimes has led to the conceptualization of piracy as an international *jus cogens* crime for which universal jurisdiction should exist as part of a general enforcement of the international order. Advocates of this

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60 Kontorovich, *Piracy Analogy*, supra note 45, at 210-23.
62 Id. at 146.
63 See Lawrence Azubuike, *International Law Regime Against Piracy*, 15 ANN. SURV. INT’L & COMP. L. 43, 46 (2009) ("The Declaration would seem to be the decisive turning point in the ambivalence of states towards piracy, and to affirm a universal prohibition."). The outlawing of privateering corresponded with attempts to label unlawful enemy warfare as piracy, therefore making it not subject to the laws of war. A first such attempt was made by the drafters of the Lieber Code promulgated by President Lincoln in 1864. See RUBIN, *supra* note 31, at 293-94. The same trend led to attempts in the early 20th century to consider submarine attacks on merchant ships piracy, based on analogy between piracy and violations of the laws of war. See id. at 294-96 & n.14. See J.E.G. de Montmorency, *Piracy and the Barbary Corsairs*, 33 L. Q. REV. 133, 141-42 (1919) (describing piracy as a type of war crime, and that this “foul disease in the body politic of nations” can only be removed by “the definite formulation of an International Criminal Law, and by the specific recognition of the capacity of a sovereign state to commit a crime”).

64 See Bassiouni, *International Crimes*, supra note 46, at 107-08 (noting piracy is the source of universal criminal jurisdiction for *jus cogens* crimes, but that was not always the case); see id. at 104 (suggesting that there is an independent theory of universal jurisdiction over *jus cogens* crimes, based on heinousness and the impunity gap); see id. at 136 (suggesting that customary international law is now more settled with regard to the three crimes within the jurisdiction of the ICTY, ICTR and ICC, but “to this writer, piracy, slavery and slave-related practices, torture and apartheid should also be included in this category”).

65 See id. at 104. It is unclear if the *jus cogens* label would involve an *obligatio erga omnes* and a duty to prosecute. See *Legal Issues Related to Piracy off the Coast of Somalia*, *supra* note 2, ¶ 49 (noting that the exercise of universal jurisdiction is optional under UNCLOS, but “the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation enshrines an obligation to prosecute or extradite”).
concept see pirates as direct subjects of international law who violate its provisions by committing piracy as defined by UNCLOS.66

B. Other Explanations For Universal Jurisdiction Over Piracy

Other explanations for universal jurisdiction over piracy focus on the need to allow criminal jurisdiction where there is no state to prosecute and no traditional basis for jurisdiction is sufficient.67 These rationales developed as part of a general need to ensure the safety of commerce at sea and as part of a projection of power by Great Britain and other seafaring nations. They may be based on the statelessness of defendants since pirates and pirate ships reject connection with any state.68 Thus, pirates may be seen as denationalized by having rejected the authority of their state of nationality and the authority of all states: they “hav[e] ceased to be State citizens altogether in consequence of their having broken the laws of humanity as a whole, and become enemies of the human race.”69 Statelessness, however, is a fiction, and a flag state (the

66 See United States v. Hasan, 747 F. Supp. 2d. 599, 640 (E.D. Va. 2010) (“Furthermore, as claimed Somali nationals, Defendants were subject to UNCLOS, and thus, in a sense, already bound by the piracy provisions in UNCLOS as treaty law, separate and apart from its binding effect as customary international law.”); HANS Kelsen, General Theory of Law and State 344-45 (2d ed. 1946) (“The sanction is directed against a pirate as an individual who has violated international law. This sanction of international law is executed according to the principle of individual responsibility.”).

67 Randall, supra note 49, at 793.

68 See Goodwin, supra note 47, at 988; William Blackstone, 4 Commentaries 71 (“[A] pirate being, according to sir Edward Coke, hostis humani generis. As therefore he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: for that every community hath a right, by the rule of self-defence, to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do, any invasion of his person or personal property.”); Randall, supra note 49, at 793 (arguing that this rationale is also connected to the individual actor, and that “by engaging in piracy” both “individuals and their vessels become denationalized”).

69 Harvard Draft Convention on Piracy, 26 AM. J. INT’L L. SUPP. 739, 753 (1932) (citing James Lorimer, 2 Institutes of the Law of Nations 132 (1883)). This rationale appears to have been the basis of the Acting Senior Principal Magistrate who found that Kenya had universal jurisdiction because piracy “lies beyond the protection of any state.” See James Thuo Gathii, Kenya’s Piracy Prosecutions, 104 AM. J. INT’L L.
state to which a vessel is registered) does not lose traditional bases of jurisdiction because of intent to commit piracy or acts of piracy.\textsuperscript{70}

A more modern argument is that piracy occurs in circumstances where "it is impossible or unfair to hold any state responsible for [its] commission;" since there is no state to prosecute, universal jurisdiction must be exercised.\textsuperscript{71} Furthermore, piracy, by definition, must be committed on the high seas and, since all states have an interest in the free flow of international commerce and are potential victims of piracy, jurisdiction developed as a solution allowing any state to seize pirate ships and apply criminal jurisdiction to pirates.\textsuperscript{72}

While the heinousness arguments are closely related to the development of international criminal law, these latter arguments do not necessarily understand piracy to be an "international crime" in the sense of implying individual criminal liability or a duty of states to prosecute.\textsuperscript{73} Instead the arguments are based on an

\textsuperscript{70} UNCLOS, supra note 16, art. 104; Harvard Draft Convention on Piracy, supra note 69, at 825 ("[i]f the pirate ship had a national character before it was engaged in piracy, its participation in piracy does not withdraw it from the ordinary jurisdiction and rights of its flag state without that state's consent.").

\textsuperscript{71} See Azubuike, supra note 63, at 47 (citing WILLIAM EDWARD HALL, TREATISE ON INTERNATIONAL LAW, 214-15 (1880)). This argument is used by the Supreme Court of Seychelles, quoting In re Piracy Jure Gentium, but is bolstered by the notion of \textit{jus cogens} crimes. See infra notes 391-398 and accompanying text.

\textsuperscript{72} See United States v. Yousef, 327 F.3d 56, 104 (3d Cir. 2002) (explaining that universal jurisdiction over piracy exists "because of the threat that piracy poses to orderly transport and commerce between nations, and because the crime occurs statelessly on the high seas"); Harvard Draft Convention on Piracy, supra note 69, at 788 (citing Report of the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law, League of Nations Doc. C.196.M.70 1927 V, 117 (1927)) ("Piracy has as its field of operation that vast domain which is termed 'the high seas.' It constitutes a crime against the security of commerce on the high seas, where alone it can be committed.").

\textsuperscript{73} See Harvard Draft Convention on Piracy, supra note 69, at 751-54 (citing views that regard piracy as an international crime against all society, and especially the Romanian position that "piracy [is] a prototype to . . . which should be assimilated in time all crimes universally recognized as offences against society"); id. at 754-60 (contrasting these views to others which tend to find piracy as simply a special basis for
extraordinary jurisdiction which allows states to apply their municipal criminal law to a crime that could only be addressed by interstate cooperation, and that by its nature, location, and effects defines a shared interest that can be applied with minimal disruption of the world order.\footnote{Id. at 761 ("It consists in the permissibility and other legal effects of state acts on the high seas with respect to foreign ships, property, and persons, which, were it not for the special authority over piracy, would be violations of international law.").}

This basis is borne out in practice, suggesting that piracy prosecutions are an arrangement of convenience between states, rather than an enforcement of a universal morality. Universal jurisdiction over human rights crimes has been criticized for potentially disrupting world order by interfering with the sovereignty of states and leading to controversial political prosecutions.\footnote{See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 289-90 (1st ed. 2003) (noting "various reasons that militate against applying such absolute jurisdiction, at least if resorted to with regard to political or military leaders"); Henry Kissinger, The Pitfalls of Universal Jurisdiction, 80 FOREIGN AFF., no. 4, July/Aug. 2011 at 86, 88 ("But any universal system should contain procedures not only to punish the wicked but also to constrain the righteous. It must not allow legal principles to be used as weapons to settle political scores."). See also Zachary Mills, Note, Does the World Need Knights Errant to Combat Enemies of All Mankind? Universal Jurisdiction, Connecting Links, and Civil Liability, 66 WASH. \& LEE L. REV. 1315, 1350-59 (2009).}

Piracy prosecutions, however, have been less subject to these criticisms.\footnote{See United States v. Hasan, 747 F. Supp. 2d. 599, 610-612 (E.D. Va. 2010) (citing Kissinger, supra note 75, and noting "that these arguments, presented in the debate over whether universal jurisdiction should cover modern international law offenses, are inapplicable to piracy," because of its unique history and acceptance, and primarily because it does not interfere with sovereignty). See also CASSESE, supra note 75, at 291 (suggesting that universal jurisdiction over other international crimes is best applied to low-level defendants because it does not implicate sovereignty).}

Despite the relative scarcity of actual cases applying universal jurisdiction over piracy,\footnote{See Eugene Kontorovich \& Steven Art, An Empirical Examination of Universal Jurisdiction for Piracy, 104 AM. J. INT'L L. 436, 437-38 (2010) [hereinafter Kontorovich \& Art, An Empirical Examination].} the practice appears to be developing.\footnote{See Legal Issues Related to Piracy off the Coast of Somalia, supra note 2, ¶ 50 (noting that Kenya was the first regional state to exercise universal jurisdiction, by virtue of the decision of the Subordinate Court at Mombasa of Oct. 26, 2006, and on this basis, 50 pirates were sentenced in 2009 and 2010); SG Report Jan. 2012, supra note 29, ¶ 41 (noting that the Seychelles has prosecuted seven cases to date on the basis of universal jurisdiction).} Notably, applications of universal jurisdiction

\footnote{74 Id. at 761 ("It consists in the permissibility and other legal effects of state acts on the high seas with respect to foreign ships, property, and persons, which, were it not for the special authority over piracy, would be violations of international law.").

75 See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 289-90 (1st ed. 2003) (noting "various reasons that militate against applying such absolute jurisdiction, at least if resorted to with regard to political or military leaders"); Henry Kissinger, The Pitfalls of Universal Jurisdiction, 80 FOREIGN AFF., no. 4, July/Aug. 2011 at 86, 88 ("But any universal system should contain procedures not only to punish the wicked but also to constrain the righteous. It must not allow legal principles to be used as weapons to settle political scores."). See also Zachary Mills, Note, Does the World Need Knights Errant to Combat Enemies of All Mankind? Universal Jurisdiction, Connecting Links, and Civil Liability, 66 WASH. \& LEE L. REV. 1315, 1350-59 (2009).}

76 See United States v. Hasan, 747 F. Supp. 2d. 599, 610-612 (E.D. Va. 2010) (citing Kissinger, supra note 75, and noting "that these arguments, presented in the debate over whether universal jurisdiction should cover modern international law offenses, are inapplicable to piracy," because of its unique history and acceptance, and primarily because it does not interfere with sovereignty). See also CASSESE, supra note 75, at 291 (suggesting that universal jurisdiction over other international crimes is best applied to low-level defendants because it does not implicate sovereignty).


78 See Legal Issues Related to Piracy off the Coast of Somalia, supra note 2, ¶ 50 (noting that Kenya was the first regional state to exercise universal jurisdiction, by virtue of the decision of the Subordinate Court at Mombasa of Oct. 26, 2006, and on this basis, 50 pirates were sentenced in 2009 and 2010); SG Report Jan. 2012, supra note 29, ¶ 41 (noting that the Seychelles has prosecuted seven cases to date on the basis of universal jurisdiction).}
jurisdiction over pirates have been met with little resistance from states, compared to other "modern universal jurisdiction crimes."\textsuperscript{79}

Piracy is thus an important test case for a broader question in international criminal law – the extent to which international law relates to individuals. Heinousness arguments are more focused on individual crimes and the problem of impunity.\textsuperscript{80} By extension, this approach should also be focused on human rights, presumptions of innocence, and notice of the crime charged. The more practical state interest approach is instead more focused on creating a regime without loopholes so that issues of jurisdiction may not be raised on behalf of accused individuals.\textsuperscript{81} The crime of "operation of a pirate ship" is a good test case for the ramifications of these divergent historical approaches. As discussed in the next section, if UNCLOS Article 101(b) is read as a separate criminal act of piracy, it is not easily categorized as a "heinous crime," especially where intent is proven primarily by presence and association.\textsuperscript{82} Thus, UNCLOS is best explained as part of an international agreement to prosecute. Even if the primary concern of the law is practical, such prosecutions may need to be treated differently than those for core piracy offenses, especially if there is no clearly established law prohibiting cruising for piracy.

C. Historic Sources on State Practice of Universal Jurisdiction Over Piracy

There are few cases of actual universal criminal jurisdiction over piracy.\textsuperscript{83} More frequently, cases prosecute piracy under sovereignty-based jurisdiction, i.e. prosecution by a victim state.\textsuperscript{84}


\textsuperscript{80} See Att’y Gen. of Israel v. Eichmann, 36 I.L.R. 277, 289-294 [1962] (Isr.).


\textsuperscript{82} See UNCLOS, supra note 16, art. 101.


\textsuperscript{84} See, e.g., United States Department of Justice, Major Achievements in the
Piracy convictions include prosecutions for attempted piracy, crimes of service on board a vessel (Dutch law), or voluntary participation (under laws implementing UNCLOS), but the facts of the cases have almost always involved violent attacks. This article contends that attempted piracy begins with some act of violence, and that cruising for piracy is not part of the crime of piracy in state practice.

Most assertions of adjudicative jurisdiction for piracy require a strong nexus to the offense. There are very few actual criminal cases in which the court asserted universal jurisdiction over piracy where the prosecuting state had no connection to the offense either as the flag state of the victim vessel or the nationality of the perpetrators or the victims. The first was *R. v. Green*, where the High Court of Admiralty in Scotland asserted jurisdiction over Captain Thomas Green based entirely on the *locus deprehensionis*, with no connection other than the universal right of pursuit through prosecution, since "piracy" is a crime against the law of nations, and... all mankind have an interest in pursuing it. Captain Green was hanged for plundering a vessel, sinking the vessel, and tossing the crew overboard – although the crew was later found to be alive.

In *People v. Lol-lo and Saraw*, an American court sitting in the Philippines found two defendants guilty of piracy for attacking and sinking a ship and raping the women on board. The victims
were Dutch, the crime was committed in foreign territorial waters, and the American court, although it was the occupying power in Manila and presumably could have applied its law to residents of the Philippines, applied universal jurisdiction.93 Piracy, in that instance, was defined to be "robbery or forcible depredation on the high seas, without lawful authority and done animo furandi, and in the spirit and intention of universal hostility."94

The third case is *In re Piracy Jure Gentium*,95 in which the Judicial Committee of the Privy Council received a case on appeal from the British Tribunal of Hong Kong; it involved an unsuccessful attack by two Chinese junks of a Chinese cargo ship.96 The question before the Privy Council was "[w]hether an accused person may be convicted of piracy in circumstances where no robbery has occurred."97 The ultimate answer in this case was "that actual robbery is not an essential element in the crime of piracy jure gentium, and that a frustrated attempt to commit piratical robbery is equally piracy jure gentium."98

Rubin notes two other cases asserting such universal jurisdiction over piracy, totaling five since 1705.99 Kontorovich counts one case in India and two in China in the twelve years prior to 2009, and several prosecutions of Somali pirates in Kenya.100 Kontorovich also suggests that Rubin might have undercounted, because he only includes reported cases, while many early cases were summary proceedings onboard ships.101 However, summary

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93 *Lol-lo and Saraw*, 43 PHIL. REP. at 19 ("The jurisdiction of piracy unlike all other crimes has no territorial limits. As it is against all so may it be punished by all. Nor does it matter that the crime was committed within the jurisdictional 3-mile limit of a foreign state."); RUBIN, supra note 31, at 318-19.
94 RUBIN, supra note 31, at 318.
96 *Id.* at 587.
97 *Id.* at 588.
98 *Id.* at 600.
101 *Id.* at 32 n.53; Kontorovich, *Piracy Analogy*, supra note 45, at 192 n.51 ("Many more cases were unreported in the seventeenth and eighteenth centuries than today. Reporters would be particularly uncommon in remote ports. Furthermore, the reported cases obviously do not include summary proceedings at sea, where pirates could be sunk or hanged upon apprehension."); United States v. Hasan, 747 F. Supp. 2d 599, 609 &
proceedings may be more analogous to military action than precedent for criminal law or universal adjudicative jurisdiction.

The conclusion, even by judges and scholars in favor of applying an international law of piracy, is that absolute universal jurisdiction over piracy was dormant until the recent surge of Somali piracy. Although scholars have almost unanimously agreed on the existence of a right of states to prosecute pirates as an abstract proposition, an international criminal norm has rarely been applied except by states with a connection to the crime. This scarcity of universal prosecutions should weigh against enlarging the offense to cases with no victims at all. Where there are victims, even of an unsuccessful attack, the existing definition of piracy may be sufficient to put pirates on notice of conviction; but where there are none, the law of piracy remains an “abstract proposition” involving an obligation on states but not a criminal norm.

n.11 (E.D. Va. 2010).

102 See Hasan, 747 F. Supp. 2d at 603 & nn.3-4 (noting long lapse in American prosecutions of piracy); id. at 608-09 & n.11 (noting paucity of cases applying universal jurisdiction).

103 Kontorovich, Piracy Analogy, supra note 45, at 192. U.S. law defines piracy by the law of nations, and U.S. courts have recently embraced the UNCLOS definition as providing this definition. See United States v. Dire, No. 11-4310, at *41-42 (4th Cir. May 23, 2012) (affirming prior ruling by the Eastern District Court of Virginia). But these cases may be limited to attacks on U.S. ships. Acts of piracy have more clearly been held to be universal violations of international law for purposes of civil liability under the Alien Tort Statute. See Sosa v. Alvarez Machain, 542 U.S. 692, 731-32 (2004). Piracy was raised several times in oral argument in relationship to liability of Shell for assisting the Nigerian government in human rights violations. See Transcript of Oral Argument, Kiobel v. Royal Dutch Shell, (Oct. 1, 2012) (No. 10-1491), at 26-27 (Breyer, J.) ("...if Hitler isn’t a pirate, who is? And if, in fact, an equivalent torturer or dictator who wants to destroy an entire race in his own country is not the equivalent of today’s pirate, who is? And we have treaties that say there is universal jurisdiction. Other countries take it.").

104 Geib & PetrIG, supra note 23, at 140-41.

105 Hasan, 747 F. Supp. 2d at 640 (noting that section 1651 incorporates UNCLOS by reference, and pirates are on notice of UNCLOS as treaty law).

106 Cf. Kontorovich, Piracy Analogy, supra note 45, at 192 (providing that universal jurisdiction over piracy “was more a matter of theory than of practice” and that “very few criminal prosecutions for piracy can be found that depended on the universal principle”).
III. The Modern Definition of the Crime of Piracy: UNCLOS Article 101

UNCLOS, including both its definition of piracy and the regime of cooperation for its suppression,\(^\text{107}\) has been widely accepted as authoritative customary international law\(^\text{108}\) and thus binding on all states.\(^\text{109}\) However, while UNCLOS provides a definition of piracy, it does not criminalize the offense, prohibit individual conduct, or provide for the punishment for the offense.\(^\text{110}\) This is distinct from the Genocide Convention, for example, which defines genocide in Article 2, but then specifically declares that “the following actions shall be punishable” in Article 3, and requires states to criminalize.\(^\text{111}\) Moreover, the crimes within the jurisdiction of the ICC are all accepted as international crimes entailing individual criminal liability, but piracy is not among them.\(^\text{112}\) Some have argued that Article 101 should, therefore, be interpreted as a jurisdictional basis for the enforcement acts listed in the convention, but that it is not a criminal norm and cannot serve directly as the basis of prosecutions.\(^\text{113}\) According to those scholars, the definition of the

\(^{107}\) Geib & Petrign, supra note 23, at 140; Azubuike, supra note 63, at 49 (citing authors); Michael Bahar, Attaining Optimal Deterrence at Sea, 40 Vand. J. Trans. L. 1, 10 & n.28 (2007).


\(^{109}\) Azubuike, supra note 63, at 49 (citing authors); Bahar, supra note 107, at 10 & n.28.

\(^{110}\) Geib & Petrign, supra note 23, at 140.

\(^{111}\) Id.

\(^{112}\) Id.

\(^{113}\) Id. at 141 (noting that since the drafters of the Harvard Convention clearly did not intend to define an international crime of piracy, it is unlikely that the drafters of the 1958 Law of the Sea Convention or UNCLOS intended such a major shift). For a recent alternative view arguing that UNCLOS defines an international crime which could potentially be included within the ICC’s jurisdiction, see Yvonne M. Dutton, Bringing Pirates to Justice: A Case for Including Piracy Within the Jurisdiction of the International Criminal Court, 11 Chi. J. Int’l L. 197, 203-04 (2010) [hereinafter Dutton, Bringing Pirates to Justice] (noting that because UNCLOS defines the crime of piracy and makes it subject to universal jurisdiction, it could become the basis of international prosecutions); see also Roger L. Phillips, Direct Application of the International Law of Piracy in Municipal Systems, Communis Hostis Omnium (Mar. 22, 2012), http://piracy-law.com/2012/03/22/direct-application-of-the-international-law-of-piracy-in-municipal-
systems/. This alternative view is likely also the official position of the IMO and the UNODC, which speak of the "crime of piracy" as defined in UNCLOS, but are generally careful to note that UNCLOS merely allows for national law to adopt its provisions and define them as punishable crimes. See IMO, Circular Letter Concerning Information and Guidance on Elements of International Law Relating to Piracy, Annex, Uniform and Consistent Application of the Provisions of International Conventions Relating to Piracy, ¶21, IMO Circular Letter No. 3180, LEG 98/8 (May 17, 2011) [hereinafter Circular Letter], (comparing UNCLOS to the SUA and noting that “Article 105 of UNCLOS is less prescriptive than SUA in that it empowers, but does not oblige, States to provide for piracy to constitute a criminal offence under the national legislation and to establish appropriate penalties”). When the option of an International Piracy Tribunal under Chapter VII was discussed, the Secretary General merely reiterated that “[t]he crime of piracy is well established under the United Nations Convention on the Law of the Sea and customary international law and should not present a difficulty of definition.” Defining piracy itself as a threat to the peace, the theoretical establishment of such a tribunal might change the status of the UNCLOS definition as an international crime. See U.N. Secretary-General, Report of the Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea off the Coast of Somalia, Including, in Particular, Options for Creating Special Domestic Chambers Possibly with International Components, a Regional Tribunal or an International Tribunal and Corresponding Imprisonment Arrangements, Taking into Account the Work of the Contact Group on Piracy off the Coast of Somalia, the Existing Practice in Establishing International and Mixed Tribunals, and the Time and Resources Necessary to Achieve and Sustain Substantive Results, ¶99, U.N. Doc. S/2010/394 (July 26, 2010).

114 GEL B & PETRIG, supra note 23, at 141-42.

115 See RUBIN, supra note 31, at 328 (noting that the language of the 1956 draft, current Article 110, allows nations to “decide on the penalties to be imposed,” implies that the crime is defined by the convention itself, and “[p]resumably, the failure of a state to conform its municipal law definition of piracy to that proposed by the Commission . . . would be considered itself as a violation by the state of its obligations under general international law”).

116 Id.
depredation, committed for private ends by the crew or 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 subparagraphs (a) or (b).

The definition in Paragraph (a) is controversial for several of its qualifying elements, which have been criticized as overly narrow for an effective enforcement regime. The elements of the core offense of piracy have their source in the Harvard Draft, a research effort organized in 1932, which was not a codification of state practice, but rather de lege ferenda, as advisable limitations on jurisdiction.

In terms of the disputed language, the “private ends” requirement has been disputed because it is based on a historic rationale; it could, however, exclude all types of political acts. This dispute may have little relevance to Somali pirates, who are largely apolitical. The “two ship requirement,” in the words “against another ship,” could exclude all forms of mutiny and hijacking, but does not exclude attacks carried from another

117 UNCLOS, supra note 16, art. 101.
118 See Bahar, supra note 107, at 17 (discussing the application of the international definition of offense to Somali pirates, and noting problems caused by three basic gaps in the UNCLOS definition).
119 RUBIN, supra note 31, at 321 (noting how J.P. François, the drafter of the definition, viewed these limitations as “essential elements,” even though they were taken from the Harvard Draft); id. at 314-17 (noting basic weaknesses in the Harvard Draft).
120 Bahar, supra note 107, at 26-37 (arguing for the “minority view” that private ends should only exclude governmental warships, not private actors, even if they are terrorists acting for political ends).
121 GEISS & PETRIG, supra note 23, at 61-62 (noting, however, that there may be an increasing tendency to use terrorist purposes as a defense to piracy charges).
122 Bahar, supra note 107, at 38-39 (arguing that the definition was only meant “to exclude criminal acts by one passenger or crewmember against another” but not acts of mutiny or hijacking).
vessel, even a small skiff, and thus does not present too many problems in the context of Somali piracy. The "high seas" requirement, on the other hand, is probably most problematic in the Somali context, since it would exclude jurisdiction over any acts committed within the territorial waters of Somalia or any other state.

However, little discussion has focused on the second and third paragraphs of the definition. One reading of the definitional article is that it defines a "core offense" with various "fringe connections" of complicity: aiding and abetting in the form of voluntary participation, being an accessory to the crime as a facilitator, and inciting to commit the crime. Another interpretation views cruising in a piratical vessel with intent to commit piracy as a separate crime. While the first interpretation allows for the prosecution of a large group of persons who ultimately intend violent acts of piracy, the second may open the door for conviction of a group of people who are simply present on a vessel in close proximity to pirate "leaders" and lack any intent at all. The distinction between the two interpretations is directly related to equipment articles for piracy convictions.

IV. The Problem with Universal Jurisdiction Over Piracy: The Principle of Legality

Some argue that universal jurisdiction over piracy should be denied for violating "the general acknowledgment today that all crimes must be so defined by statute before they can be punished,

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124 Id.; Bahar, supra note 107, at 25-26 (noting jurisdictional problem in territorial waters).
125 See infra notes 205-218 and accompanying text.
126 See Circular Letter, supra note 113, at Annex ¶ 7 (interpreting UNCLOS Articles 101(b) and (c) as criminalizing "acts preparatory to a full attack," including "organizing, instigating, aiding and abetting, facilitating and counselling").
127 See id. (noting that "criminalization of . . . acts [such as organizing, instigating, aiding and abetting, facilitating and counseling] is vital to combating any kind of organized crime, as not all of the criminals will be directly involved in carrying out the act itself").
128 Cf. infra note 488 (providing that "circumstances indicating an intent to commit piracy" may be one factor that would complete the offense).
nullum crimen sine lege; nulla poena sine lege."  

The principle of nullum crimen has become accepted as part of customary international law and has been adopted by 162 of 192 of U.N. Member States. Most notably, it exists in the bills of rights of Kenya, Seychelles, the United Republic of Tanzania, and Mauritius, all of which have been recruited to prosecute piracy. Each of these countries has adopted language similar to the Universal Declaration of Human Rights in 1948, which was reaffirmed in the International Covenant on Civil and Political Rights (ICCPR): "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."

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129 Rubin, supra note 31, at 343.

130 See Kenneth S. Gallant, The Principle of Legality in International and Comparative Criminal Law 3 (2009) (quoting Theodor Meron). Gallant explores the development of the principle of legality from its origins, through the Nuremberg and Tokyo tribunals, into modern treaty law and international customary law. The problem is different in the context of national prosecutions as opposed to international tribunals. See id. at 397. It is still doubtful whether defendants could raise a legality issue in national proceedings. See id. at 397-98. Nonetheless, defendants might raise the issue pursuant to treaty regimes (for example, in the African Commission on Human and Peoples Rights), and the problems relating to equipment articles for piracy also may limit the policy of the United Nations and its agencies, since the principle is binding on international organizations promulgating a legal regime. See generally id. at 306-310 (describing the Secretary General’s reports as opinio juris).

131 See id. at 243-51.

132 Constitution, art. 77(4) (2010) (Kenya) (using language similar to the International Covenant on Civil and Political Rights (ICCPR)).

133 Const. of the Republic of Seychelles, ch. 1, art. 19(4) (1993) (using language similar to the ICCPR, but adding "[e]xcept for the offence of genocide or an offence against humanity.").

134 Tanzania Const., art. 13(6)(c) (1977) (using language similar to ICCPR).

135 Mauritius Const., ch. II, art. 10(4) (1968) (using language similar to ICCPR).


137 International Covenant on Civil and Political Rights art. 15, Dec. 16, 1966, 999 U.N.T.S. 171. The principle of legality has developed differently in civil and common law countries. Civil law codes generally require a stricter form of the doctrine and a written law making the conduct a crime. Further, the law must be clear and specific in its terms. Retroactive crimes and most forms of analogy are excluded. See Cassese,
The problem of legality in piracy convictions arises from difficulty defining the applicable law. Rubin, who raised the *nullum crimen sine lege* issue in his authoritative book on the law of piracy, questioned the existence of an international law crime of piracy and a public international law definition of piracy.\textsuperscript{138}

Today, his claim seems inaccurate. The UNCLOS definition of piracy has been widely accepted as customary international law, uniformly accepted by the U.N. and its organs and agencies,\textsuperscript{139} and adopted as the official definition in several instruments among regionally affected states, including: the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP),\textsuperscript{140} the Djibouti Code of Conduct,\textsuperscript{141} and numerous Memoranda of Understanding.\textsuperscript{142} The UNCLOS definition has also been imported nearly verbatim into the penal codes of several countries.\textsuperscript{143} Moreover, Kenya and Seychelles have both conducted several prosecutions based on universal jurisdiction, applying UNCLOS language in domestic law; other

\textsuperscript{138} Rubin, supra note 31, at 343-44. In his opinion, there was probably never an agreed international law of piracy, and there were very few examples in which universal jurisdiction had been used. *Id.* In those few cases, universal jurisdiction was most likely based on a projection of British naval power, and not a true international consensus.

\textsuperscript{139} See infra notes 241-243 and accompanying text.

\textsuperscript{140} See Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) art. 1, ¶ 2, Nov. 11, 2004, 44 I.L.M. 829, available at http://www.recaap.org/Portals/0/docs/About ReCAAP ISC/ReCAAP Agreement.pdf (applying UNCLOS definition of piracy).


\textsuperscript{142} See, e.g., GEIB & PETRIG, supra note 23, at 276 (adopting the definition of piracy "as defined in Article 101 of UNCLOS" into the EU – Kenya Transfer Agreement).

\textsuperscript{143} See infra notes 313-319 and accompanying text.
regional states will soon join with trials of their own.\textsuperscript{144} Regardless of its origins, today there is a true international law of piracy sufficient to address the problem of legality.

However, criminal piracy trials still present unique legality problems because they involve modern applications of absolute universal jurisdiction with no nexus to the prosecuting state. The \textit{nullum crimen} principle requires that, in universal jurisdiction prosecutions, international law must provide the notice of the crime, and make it accessible and foreseeable to defendants.\textsuperscript{145} Additionally, there must be “some criminal law that binds the person at the time of the act.”\textsuperscript{146} But \textit{nullum crimen} is not only a problem of non-existent law, it is also a right of defendants to a clear law, accessible and foreseeable as a source of prosecutions.\textsuperscript{147}

Notice of an applicable law involves “qualitative requirements, notably those of accessibility and foreseeability.”\textsuperscript{148} UNCLOS, as

\textsuperscript{144} See supra note 78 and accompanying text.

\textsuperscript{145} See Ward N. Ferdinandusse, Direct Application of International Law in National Courts 236-48 (2006) (noting problems of accessibility and foreseeability with regard to national prosecutions of core international crimes—war crimes, crimes against humanity, and genocide).

\textsuperscript{146} See Gallant, supra note 130, at 371. UNCLOS is not a binding criminal law. See supra notes 110-116 and accompanying text. This is perhaps the primary reason why the IMO and UNODC insist that UNCLOS define a “crime of piracy” even though it is clear that there must be national implementation—to reiterate that individual criminal liability arises on the international level even before the defendant is brought to the prosecuting state. Arguably, however, a vague criminal norm of piracy \textit{jure gentium} would be sufficient. See M. Cherif Bassiouni, I International Criminal Law: Sources, Subjects, and Contents 98 (2008) [hereinafter Bassiouni, International Criminal Law] (“ICL Conventions frequently fail to satisfy the requirements of positivist legal systems, but not those of the more flexible ones. But, this difference is not relevant when ICL is applied through the indirect enforcement system, because in that approach national legal systems incorporate the ICL norm into their domestic criminal law, and thereby satisfy their respective requirements of ‘legality’ . . . The problem, however, arises with respect to the direct enforcement system, where ICL norms are applied by an international criminal tribunal.”).

\textsuperscript{147} See Gallant, supra note 130, at 11-12 (providing some rules that make up the “principle of legality of crimes and punishments” and are associated with the \textit{nullum crimen} principle).

\textsuperscript{148} C.R. v. United Kingdom, 335 Eur. Ct. H.R. (ser. A) ¶ 33 (1995). The European Court of Human Rights was applying the principle under the European Convention, and concluded that a retroactive abolition of the defense of marital rape was “foreseeable.” \textit{Id.} ¶¶ 34-38; Gallant, supra note 130, at 219-22 (agreeing with Ferdinandusse that the
a codification of customary law, would appear to meet these requirements. UNCLOS is broadly accessible to individuals, particularly in light of the publicity surrounding the piracy phenomenon. The Convention also provides notice of applicable law and foreseeability of punishment because of its widespread use as a definition of piracy and its consistent promulgation through the IMO and other U.N. agencies. In addition, while UNCLOS itself does not proscribe the offense or provide punishment for acts of piracy, it allows states to do so. Many prosecuting states use its provisions nearly verbatim.

The legality problems of UNCLOS, however, center on the vagueness of UNCLOS itself, which is not yet resolved by sufficient case law or clarification in national legislation. A court may not, according to stricter provisions of legality of the ICCPR, create a new crime with a new actus reus or a new mens rea, although it may reasonably interpret existing provisions. If


149 See FERDINANDUSSE, supra note 145, at 236-37 (noting that traditionally accessibility is the duty of states, though a number of courts have found it to be satisfied where there is a treaty in force, and that such issues are diminished with “the advent of the information age”). It is difficult to imagine that the UNCLOS definition is not immediately accessible with its extensive repetition of on piracy-related websites. Thus the law does not present problems of accessibility, even though pirates are not heads of state, or even state actors, and not necessarily aware of treaties. See 22 TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 462 (International Military Tribunal ed., 1948), available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-XXII.pdf (arguing that planners of war of aggression “must have known of the treaties signed by Germany”).

150 Id.; see also infra notes 240-242 and accompanying text.

151 FERDINANDUSSE, supra note 145, at 294-295 (noting four main problems of foreseeability: the lack of a classic prohibition in available sources, the plurality of divergent sources, vagueness, and the interplay between national and international rules). The nature of UNCLOS and the Somali piracy problem may solve the first two issues, because UNCLOS is the only treaty applicable in cases of universal jurisdiction and is applied consistently.

152 See supra note 29 and accompanying text.

153 See RUBIN, supra note 31, at 344 (providing that the definition of “piracy” is confusing, that precedents regarding “piracy” are weak, and that the “only legal definitions of ‘piracy’ exist in municipal law . . . that do not represent any universal ‘law’ . . . [and that] rest on national policies”).

UNCLOS is only being interpreted by domestic courts in their penal codes incorporating its provisions, then there is probably no problem of legality. On the other hand, if consistent state practice is to punish only violent acts of piracy, or even attempts at such violent acts, a regional state which decided to enact equipment articles and punish cruising for piracy would in effect be creating a new crime. Such a crime, although based on UNCLOS Article 101, would have a new actus reus and mens rea, and would neither be accessible nor foreseeable to defendants.

Prosecutions based on this new law would be contrary to the nullum crimen principle.

A. Accessibility and Foreseeability in Practice: Ambiguities in UNCLOS 101(b) Operation of a Pirate Ship Affecting the Scope of the Clause and its Application

As discussed above, the “fringe offenses” in the UNCLOS definition can have at least two reasonable interpretations. The first is to interpret Article 101(a), acts of depredation, as a core crime, and Articles 101(b) and 101(c), voluntary participation in operation of a ship and facilitation, as forms of accomplice liability. Under the first interpretation, this would include all aiders and abettors who intend the ultimate crime be committed,

H.R. ¶¶ 33-35 (1996)) (arguing for the proposition that foreseeability allows for the interpretation of the existing ingredients of a crime, but not for the creation of a new actus reus or mens rea, which is not reasonably foreseeable to defendant); see also Mohamed Shahabudeen, Does the Principle of Legality Stand in the Way of Progressive Development of the Law? 2 J. INT’L CRIM. JUST. 1007, 1017 (2004) (analyzing case law from the ECtHR and the ICTY, and concluding that the principle of nullum crimen does not bar development of the law through clarification, “provided that the resultant development is consistent with the essence of the offense and could reasonably be foreseen”).

155 See CASSESE, supra note 75, at 45-46.

156 Cf. id. (providing that a development of law that is inconsistent with the “essence of the offence” and that could not “reasonably be foreseen” would essentially create a new actus reus or mens rea, and that such creation is not allowed).

157 See id., at 45-46 (arguing that a new actus reus or mens rea would not be foreseeable to the defendant).

158 See Shahabudeen, supra note 154, at 1017 (noting that nullum crimen principle would be consistent with the development of the law “provided that [it] . . . could reasonably be foreseen”).

159 See supra note 126 and accompanying text.
and accessories who intend to assist, but not those who simply are cruising for potential crimes.¹⁶⁰ The second interpretation views 101(b) as a distinct form of offense—cruising for piracy—that encompasses all foreseeable violent offenses that might result.¹⁶¹ This would make cruising a crime of its own and all accessories to that crime would be equally punishable.¹⁶²

The first interpretation is assisted by Section (c), facilitation, which refers to “any act of inciting or of intentionally facilitating an act described in subparagraphs (a) or (b).”¹⁶³ Section (c) is thus seen as a secondary crime to Sections (a) and (b). If this is so, then Section (b) should be piracy in its own right, supporting the second interpretation. Moreover, the opening of Article 101 suggests that it lists several forms of piracy.¹⁶⁴ The crime of cruising is, thus, likely to be part of piracy under the plain interpretation of UNCLOS.

In a hypothetical scenario, if an international tribunal were applying UNCLOS as the basis of a customary law crime, it would be possible to argue that, although the law of piracy in UNCLOS is customary law and binding upon states, the international criminal law norm binding individuals is substantially narrower.¹⁶⁵ It would be unfair to subject individuals to punishment for offenses that have not become a part of the punishable criminal law norm of piracy, such as cruising for piracy.¹⁶⁶ This conclusion, when applied to criminal prosecution in national courts, is relevant in the sense that it affects the rights of defendants under the legality principle, and it may also be relevant if the extent of universal jurisdiction should be limited to the

¹⁶⁰ See id.
¹⁶¹ See supra note 127 and accompanying text.
¹⁶² Id.
¹⁶³ UNCLOS, supra note 16, art. 101(c).
¹⁶⁴ Id. art. 101 (providing a definition of piracy by listing several possible acts).
¹⁶⁶ Cf. Shahabudeen, supra note 154, at 1013 (noting that nullum crimen principle is a “principle of justice” that requires the developed law “retain the essence of the original crime”).
definition of the offense under international law.\footnote{See supra notes 32-33 and accompanying text; see also Alexander Zahar \& Göran Sluiter, International Criminal Law: A Critical Introduction 494-96 (2008) (citing Hof's-Gravenhage 23 Dec. 2005, LJN 2005, AU8685 ¶ 6.3 (Prosecutor/Frans van Anrata) (Neth.), translated in http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=AX6406 (“Exceeding the liability limits of international criminal law, when a case is brought to trial under national law, could cancel the international basis for universal jurisdiction, while the latter can only be applied to practices that are indictable as criminal offenses under international law.”)). The Dutch court concludes that if Dutch law allowed for complicity in genocide with a lower level of intent than that required by international law, the Dutch court could not apply Dutch law without losing its universal jurisdiction. Hof's Gravenhage, ¶ 6.5.1.}

For core human rights crimes, “in recent practice, arguments about a lack of foreseeability have systematically been dismissed, predominantly on the basis of the manifest illegality . . . .”\footnote{FERDINANDUSSE, supra note 145, at 241 (and cases cited there).} Thus, for example, “[i]t is undeniable that acts such as murder, torture, rape and inhuman treatment are criminal according to ‘general principles of law’ recognised by all legal systems.”\footnote{FERDINANDUSSE, supra note 145, at 241.}

Similarly, slavery has been found to be a “natural crime.”\footnote{Prosecutor v. Delalić (Celebici Case), Case No. IT-96-21-T, Trial Judgment, ¶ 313 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).}

Some forms of piracy that fall under UNCLOS Article 101 may not be manifestly illegal. This is especially true if cruising is a distinct form of piracy. Since setting foot on board a ship with pirate equipment is not clearly illegal,\footnote{FERDINANDUSSE, supra note 145, at 241.} it is unforeseeable to

\begin{quote}
\begin{verbatim}
Let's say I'm a young Somali man. I've been offered a job by a family friend who lives on an island off the coast and asked to bring some of my friends. The job is [to] help him build a house. The construction materials are on site, but I've been asked to bring some ladders. I don't have much money so I buy these cheap hooked ladders down by the dock. I'm renting a large boat to ferry us to the island, but I am bringing a skiff so we can get anything else we might need from the mainland like food and water. I find six friends who want work. I load my ladders into the larger boat and my six friends. The captain of the boat who has agreed to ferry me and friends has also agreed to tow the skiff. Two of my friends have brought AK-47 rifles that they carry for self-defense and the captain has two more AK-47s and some ammunition on the ship. We set out to sea and are confronted by a British warship with a helicopter.
\end{verbatim}
\end{quote}

E-mail from Matthew Williams, Law Clerk to Judge Duncan Gaswaga, to author (July 24, 2012, 5:59 PM) (on file with author).
declare it punishable under UNCLOS Article 101(b) and to make cruising itself piracy, even where the intent of those in control is to attack should an opportunity present itself.\textsuperscript{172} Such prosecutions must be avoided to “prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission.”\textsuperscript{173}

Other arguments that have been used to deny that foreseeability defenses do not apply to pirates. Pirate crewmembers do not hold positions of authority\textsuperscript{174} and cannot be expected to obtain legal advice before action.\textsuperscript{175}

The next section will examine how the simple meaning of the Convention is applied to reasonable uncertainty regarding the offenses included in piracy, particularly the offense of cruising; how state domestic laws of piracy are inconsistent in punishing a preparatory offense; and how there are, as yet, few if any prosecutions of the preparatory offense of cruising for piracy. With regard to Articles 101(b) and (c), UNCLOS leaves unclear the range of punishable conduct, which can only be clarified by the developing practice of states.\textsuperscript{176} These uncertainties relate to the elements of the offense, the mens rea required, the location of the offenses and the types of acts prohibited.

1. Intent or Knowledge?

The core definition of piracy in Article 101(a) does not address the subjective element of the acts using classic words of intent such as willfully, or knowingly.\textsuperscript{177} The first direct references to intent are in Article 101(b), which requires “knowledge of facts making [the ship] a pirate ship,” and Article 101(c), which requires “intentionally facilitating.”\textsuperscript{178} Read simply, the

\textsuperscript{172} Id.
\textsuperscript{173} Celebici Case, Case No. IT-96-21-T, ¶ 313.
\textsuperscript{174} See Rome Statute of the International Criminal Court art. 28(a)(i), July 1, 2002, 2187 U.N.T.S. 90 (setting a “should have known” standard for military commanders).
\textsuperscript{176} See supra note 153-154 and accompanying text.
\textsuperscript{177} See Cassese, supra note 75, at 92-93 (interpreting several conventions’ requirements of intent).
\textsuperscript{178} UNCLOS, supra note 16, art. 101.
knowledge requirement of Article 101(b) involves awareness of the circumstances forming part of the definition of “pirate ship.” The definition of “pirate ship” is in Article 103:

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

Thus the awareness must include knowledge of the intent of the chief perpetrators. If Article 101(b) is read together with Article 103, the intent required is only that of the persons in dominant control. The persons committing a voluntary act of participation must only have awareness of that intent. The difficulty with this interpretation is that, if the persons in dominant control of the ship intend to use it for piracy but have not yet acted so as to make that intent clear, there is no way to identify a ship as a pirate ship. The facts may be existence of equipment on board, which is proof of such an intent, or may indicate that voluntary participation only occurs after an attack has begun or ended.

An additional problem is that operation of a pirate ship is effectively a crime without intent. Participation in the operation of a ship does not directly involve the intent to commit piracy; rather, it merely indicates knowledge and awareness of the facts relating to the ship. Acts of assistance during attempted violent acts, on

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179 Cassese, supra note 75, at 62.
180 UNCLOS, supra note 16, art. 103 (emphasis added).
181 See Cassese, supra note 75, at 60-64 (providing that intent is required for most international crimes and that the “accomplice need not share the mens rea of the principal”).
182 See Cassese, supra note 75, at 63-64.
183 See Geib & Petrig, supra note 23, at 65.
184 See infra note 482 (discussing how this problem relates to involuntary induction of minors aboard ships); infra note 488 and accompanying text; supra note 6.
185 This problem was carefully avoided in the most recent Seychelles case by attributing a common purpose of intent to commit piracy. See Jama, Judgment, ¶ 56, Crim. Side No. 53 of 2011 (Jul. 25, 2012) (Seychelles) (on file with author) (convicting the accused individuals for operation of a pirate ship, but emphasizing that all aboard must have had intent to commit piracy, because no one alleged they were present involuntarily, and there was significant circumstantial evidence). However, it should
the other hand, necessarily involve some intent to aid and abet.\textsuperscript{186}

2. Pirate Ship

A second ambiguity with regard to Article 101(b) is its use of the word “pirate ship.” Article 103 is circular because it defines “pirate ship” as a ship intended to commit any of the acts of Article 101, which includes the voluntary operation of a pirate ship, if “acts” is interpreted to include Article 101(b).\textsuperscript{187} Thus, some suggest limiting the Article 103 language, “one of the acts referred to in Article 101,” to the acts committed in Article 101(a), such as a violent attack.\textsuperscript{188} However, this interpretation is not in the text, and some criminal codes implementing the provision specifically include voluntary participation in the operation of a facilitating ship or an inciting ship, widening the scope of Article 103 to all acts of Article 101.\textsuperscript{189}

A reading that narrows Article 103 to ships intended for illegal acts of violence would also give piracy two different meanings in the Convention: piracy resulting from a violent attack (Article 101(a) only), and other “nonviolent” forms of piracy, including crew and facilitators.\textsuperscript{190} This distinction might mean that the right of visit in Article 110\textsuperscript{191} and the right of arrest in Article 105\textsuperscript{192} are only applicable to violent piracy. It might also mean that Article 101(b) only applies to crew who assist a violent attack, but not arguably be sufficient for conviction if the common purpose is operation of a ship.

\textsuperscript{186} Id.
\textsuperscript{187} GEIB & PETRIG, supra note 23, at 64.
\textsuperscript{188} Id. at 65. This is also the language used in the Harvard Draft Convention on Piracy, supra note 69, at 742-43 (“A ship is a pirate ship when it is devoted by the persons in dominant control to the purpose of committing an act described in the first sentence of paragraph 1 of Article 3.”).
\textsuperscript{189} See infra notes 313-318 and accompanying text.
\textsuperscript{190} See GEIB & PETRIG, supra note 23, at 65.
\textsuperscript{191} UNCLOS, supra note 16, art. 110 (noting that a ship may board another ship if there is “reasonable ground for suspecting that: (a) the ship is engaged in piracy”).
\textsuperscript{192} Id. art. 105 (“[E]very State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates.”). Furthermore, Article 105 allows arrests of everyone on board a pirate ship, and seizure of all property on board “a ship . . . taken by piracy and under the control of pirates.” Id. Since the acts of attempt and facilitation do not result in the taking of a ship, “piracy” is most likely again used only in the limited sense of 101(a) acts of attack. See GEIB & PETRIG, supra note 23, at 66.
those who assist cruising.

3. No High Seas Requirement

Paragraphs 101(b) and (c) are not limited to the high seas, and do not need to be committed on board a ship. Potentially, these crimes could be committed on land or in territorial waters. If so, it is unclear if they would be subject to universal jurisdiction under UNCLOS. By the terms of UNCLOS Article 105, jurisdiction to try the offenders would only exist if they were captured on the high seas:

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 or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

The second sentence of Article 105 is generally interpreted to provide for universal jurisdiction over piracy. It has also provided some support for the principle of limited universal jurisdiction, which would allow only the seizing country’s court to judge pirates. At any rate, such universal jurisdiction exists only

193 Geib & Petrigni, supra note 23, at 64-65.
194 See id.
195 See Azubuike, supra note 63, at 53 (providing that “[u]nder UNCLOS, pirates could be pursued from the high seas, but the right of hot pursuit ended once they entered the territorial waters of any State”).
196 UNCLOS, supra note 16, art. 105.
197 Id.; Geib & Petrigni, supra note 23, at 66 (noting that all persons on board may be arrested regardless of whether they have been involved in piracy); Azubuike, supra note 63, at 54 (noting that universal jurisdiction is a fairly undisputed aspect of piracy, and it is retained by Article 105); Bassiouni, Universal Jurisdiction, supra note 40, at 111 (2001) (“This article clearly establishes universal jurisdiction [over piracy.”); see also Circular Letter, supra note 113, Annex, IMO Doc. 98/8/1 ¶ 7 (citing Article 105 as basis for universal jurisdiction over piracy). For a recent application of the provision in state practice, see Rb. Rotterdam 17 juni 2010, NJ 2010, LJN: BM8116, 230, translated in http://www.unicri.it/maritime_piracy/docs/Netherlands_2010_Crim_No_10_6000_12_0 Judgment.pdf [hereinafter Samanyolu Judgment].
198 See Ryan P. Kelley, Note, UNCLOS, but No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy, 95 Minn. L. Rev. 2285, 2297 (2011) (noting support in drafting convention notes that “this provision gives any state the right to seize
for persons found on board a pirate ship or a seized vessel on the high seas. If so, most acts falling under Article 101(c) as facilitation or incitement would not be subject to universal jurisdiction.

**B. The Preparatory Drafts of UNCLOS – Some Clarification Relating To UNCLOS 101(b)**

In 1924, the Assembly of the League of Nations began the first modern effort to codify the crime of piracy by requesting that the Committee of Experts for the Progressive Codification of International Law address the subject. A first report, prepared by M. Matsuda of Japan, and M. Wang Chung-hui of China, was submitted on January 26, 1926 and circulated to governments three days later for their comments. The report explicitly defined piracy as a crime of cruising, where piracy consisted of "sailing the seas for private ends without authorization from the Government of any State with the object of committing depredations upon property or acts of violence against persons."

Article 101(b), in its current form, has its source in the *Harvard Draft*, a separate research effort that developed in response to the League of Nations effort. The principle

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199 UNCLOS, supra note 16, art. 101(a).

200 See Jon Bellish, *A High Seas Requirement for Piracy Facilitators Under UNCLOS?*, COMMUNIS HOSTIS OMNIUM, Aug. 18, 2012, http://piracy-law.com/2012/08/18/a-high-seas-requirement-for-pirate-facilitators-under-unclos/ (discussing whether the high seas requirement should limit prosecution of piracy under Article 101(c) of UNCLOS). See also Jon Bellish, *A Second Avenue to Assert Universal Jurisdiction Over Negotiators*, COMMUNIS HOSTIS OMNIUM, Aug. 25, 2012, (arguing that an ex ante agreement to negotiate with pirates who have successfully hijacked a vessel, even if concluded from land, may also be sufficient for the high seas requirement). This last argument has no application to convictions for operation of a pirate ship.

201 See RUBIN, supra note 31, at 305-08 (describing process of creating the report, and citing to its chief articles).

202 Id.


204 See RUBIN, supra note 31, at 308-13 (describing origins of the Draft and theory behind its preparation).
language of the provision on "operation of a pirate ship" did not change much between the development of the Harvard Draft and the 1982 UNCLOS 101(b).\textsuperscript{205} J.P.A. François, the Special Rapporteur appointed by the International Law Commission, incorporated six articles dealing with piracy into his 1954 draft Regime of the High Seas; his definition of piracy was simply a French translation of the Harvard Draft.\textsuperscript{206} On the first day of discussions, the definition inspired much debate among members of the Commission relating to whether piracy should include acts committed for political ends or sponsored by a state,\textsuperscript{207} acts committed with a desire for gain (known as \textit{animus furandi}),\textsuperscript{208} acts committed in territorial waters or on land,\textsuperscript{209} or acts committed only between multiple vessels (the "two-ship requirement").\textsuperscript{210} There was, however, little to no debate as to whether acts of participation in the operation of a ship should be included among "acts which were liable to prosecution by the authorities of any State, even if the interests of that State were not at stake."\textsuperscript{211}

On the second day of discussion, François proposed dropping


\textsuperscript{207} Seventh Session, supra note 206, at 37-39 (disusing whether Chinese warships committed piracy against Poland); id. at 43-44, 55-57 (discussing a suggestion by Sergei M. Krylov of the U.S.S.R. to include state piracy, based on an interpretation of the Nyon Agreement prohibiting unauthorized submarine warfare); see also RUBIN, supra note 31, at 320.

\textsuperscript{208} Seventh Session, supra note 206, at 39-40 (statement of M. François, Special Rapporteur).

\textsuperscript{209} Id. at 41, 43 (statement of M. Georges Scelle (France)); see id. at 52-53.

\textsuperscript{210} Id. at 41-42; see id. at 53.

\textsuperscript{211} See id. at 39.
the second and third sections from the definition “since they dealt with details of international penal law,” and the purpose of his report was only to lay down the main principles of a regime of the high seas. A similar proposal, omitting acts of operation of a pirate ship and facilitation, was proposed by Douglas L. Edmonds of the United States. A.E.F. Sandström of Sweden suggested expanding the definition of piracy to include mutiny on board a ship with intent to use that ship for piracy. In discussing what types of acts committed by crew or passengers aboard a vessel “transformed it into a pirate,” Scelle of France observed that “it was not vessels but persons who became pirates.” Sir Gerald Fitzmaurice of the United Kingdom noted that “it was only after an act of piracy had been committed that the vessel became a pirate,” and on that basis disapproved of Sandström’s draft “since the purpose of seizure of a ship by crew or passengers could not be known until their subsequent action provided evidence.” The difficulty with this position is it would also seem to exclude acts of voluntary participation in the operation of a pirate ship before any violent acts have been committed. Thus, it is possible Sir Fitzmaurice read the draft report to refer to participation in the operation of a pirate ship before any violent acts have been committed. While no vote was recorded, it appears that Fitzmaurice’s view was adopted.

213 See id.
214 Id.
216 Id. at 53.
217 Id. at 53-54.
218 See RUBIN, supra note 31, at 322-23 & n.134 (noting that a previous case held the opposite—that piracy was any seizure of a ship for a felonious purpose—but not requiring proof that the ship was taken for purposes of depredations at sea); Att’y Gen. of H.K. v. Kwok-a-Sing, (1873) 5 L.R.P.C. 179, 199-200 (P.C.) (appeal taken from H.K.) (demonstrating that it would be strange to argue one could be liable for operating a pirate ship that had not been seized but not for seizing a ship by mutiny). This places greater importance on intent for future acts than actual acts and emphasizes again that piracy is not about the severity of the crime, but about crimes that fall within a technical jurisdictional definition. Another alternative is that Sir Fitzmaurice was referring to a proposal that did not include the second and third parts of the definition.
The *Harvard Draft* authorizes prosecution where there is "lawful custody;" the Geneva Convention on the Law of the Sea suggests the definition of piracy is the actual law to be applied.\(^\text{219}\) This suggestion is consistent with the theory of the *Harvard Draft*, which viewed the international law of piracy as simply defining jurisdiction, but not as a substantive crime:

Properly speaking, then, piracy is not a legal crime or offense under the law of nations. In this respect it differs from the municipal law piracy which is a crime by the law of a certain state. International law piracy is only a special ground of state jurisdiction—of jurisdiction in every state. This jurisdiction may or may not be exercised by a certain state. It may be used in part only. How far it is used depends on the municipal law of the state, not on the law of nations. The law of nations on the matter is permissive only. It justifies state action within limits and fixes those limits. It goes no further.\(^\text{220}\)

The implications of this theory are evident in the clauses on "operation of a [pirate] ship," and facilitation, which—according to comments on the Draft—were added simply for "convenience."\(^\text{221}\) These clauses serve two purposes: first, they provide a more complete enforcement regime to prevent attacks (including raids planned from the high seas but directed towards the coast), and second, they serve as "a ground of jurisdiction to prosecute when the evidence of a certain person's participation in particular outrages is not sufficient."\(^\text{222}\) There is no analysis of the substantive criminal law of accessories.\(^\text{223}\)

Cruising for piracy is included within piracy jurisdiction based on two academic sources, both of which mention it more as suggestion than law: "[i]t is doubtful whether persons cruising in

\(^{219}\) *Compare Harvard Draft Convention on Piracy, supra* note 69, arts. 6, 11 (defining lawful custody and authorizing prosecution under state law), *with* High Seas Convention 1958, *supra* note 205, art. 19, at 84 ("On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed.").

\(^{220}\) *See* *Harvard Draft Convention on Piracy, supra* note 69, at 759-60.

\(^{221}\) *See id.* at 820-22.

\(^{222}\) *See id.* at 820.

\(^{223}\) *See generally id.* (lacking any analysis of accessories under this criminal law).
armed vessels with intent to commit piracies, are pirates or not.\textsuperscript{224}

The writer further notes that his hypothesis

is founded on the absence of any express authority for the affirmative of the proposition, and on the absurdity of the negative. If a Queen's ship were to fall in with an armed vessel belonging to no state, and obviously cruising for piratical purposes, would the commanding officer hesitate to seize that vessel because it had not actually taken a prize? It seems equally difficult to suppose that the vessel would be permitted to escape, or that it could lawfully be arrested if the crew were not pirates.\textsuperscript{225}

He then cites piracy acts of the seventeenth and eighteenth centuries, which suggest pirates are "a known class of persons . . . and that a man may be a pirate though he has never actually robbed."\textsuperscript{226} The argument is weak because the piracy acts cited tend to apply the legal consequences of piracy to treason, suggesting that the connotation of pirates as a class of persons was used to denote illegal political activity rather than robbery at sea.\textsuperscript{227} The suggestion that cruising for piracy is a piratical act is consistent with British naval practices used to deal with rebels in the nineteenth century.\textsuperscript{228}

\textsuperscript{224} JAMES FITZJAMES STEPHEN, A DIGEST OF THE CRIMINAL LAW (CRIMES AND PUNISHMENTS) 75 (4th ed. 1887).

\textsuperscript{225} Id. at 74 n.1. Note also the suggestion of one writer that a crew of mere pleasure-seekers who reject the authority of all states and sail under no flag could also be arrested as pirates. Harvard Draft Convention on Piracy, supra note 69, at 776.

\textsuperscript{226} STEPHEN, supra note 224, at 74 n.1. See also Piracy Act, 1721, 8 Geo., c. 24, § 1 (Eng.), available at http://www.legislation.act.gov.au/a/db_1804/19870112-2295/pdf/db_1804.pdf (making it an offense to trade or barter with pirates, and "deem[ing]" a person a pirate without robbery); Piracy Act, 1698, 11 Will., c.7, §§ 8-9 (Eng.), available at http://www.legislation.act.gov.au/a/db_1805/19870112-2296/pdf/db_1805.pdf (deeming a master of a ship to be a pirate if he "betray[s] [the admiral's] trust").

\textsuperscript{227} See RUBIN, THE LAW OF PRIACY, supra note 31, at 210 ("In view of the use of the word 'piracy' in England to bring about the legal results of treason in the 1690's, and the continuance of the statute of 1700 . . . it is not surprising that the word 'piracy' was felt to have broader legal meanings than the strictly historical one in English law relating to robbery within the jurisdiction of the Admiral."); id. at 101 & n.123 (noting various laws of "petty treason").

\textsuperscript{228} See id. at 213 (describing Robinson's application of the criminal law concept of "piracy" to allow military action against ethnic Greek insurgents); id. at 223-24 (describing a "pirate-hunting" expedition by James Low, a British official, in 1826, aimed at ousting Kedah Udin who had allegedly been involved in depredations at sea.
Furthermore, the Harvard Draft makes clear that cruising for piracy only allows for jurisdiction over a pirate ship when “it is being devoted to piratical purposes.” Abandonment of the piratical purpose before any attack will grant immunity from seizure, but if the ship has already been used for an act of piracy, it cannot lose its character as long as it remains in dominant control of the persons who committed those acts. This same rule should apply under UNCLOS if the provision criminalizes accessories, since it is consistent with general international law on criminal attempt as well. Thus, pirates who are captured on the high seas, but surrender without any conflict, could often raise an abandonment defense.

In sum, several conclusions can be made from the preparatory drafts, which do not fully resolve the issues of ambiguity raised above. First, François appears to have understood that Sections 2 and 3 of the definition were modes of liability, and not separate crimes. This interpretation is also supported by the

near Penang); id. at 226-29 (describing how Norris eventually acquits Mohamed Saad, the deposed Sultan of Kedah, from a charge of piracy because he is deemed to be acting for public ends, but that marauders cruising for private ends can be attacked at sea, shifting the focus out of the courts); id. at 235 (“Even an independent state may, in my opinion, be guilty of piratical acts. What were the Barbary pirates of olden times? What many of the African tribes at this moment? It is, I believe, notorious, that tribes now inhabiting the African coast of the Mediterranean will send out their boats and capture any ships becalmed upon their coasts. Are they not pirates, because, perhaps, their whole livelihood may not depend on piratical acts? I am well aware that it has been said that a state cannot be piratical; but I am not disposed to assent to such dictum as a universal proposition.” (quoting The Magellan Pirates, 1 Spink Eccl. & Adm. (Eng.) 81, 83-84 (1853))).

230 Id. at 822-24.
231 See Kai Ambos, Individual Criminal Responsibility, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 475, 488-90 (Otto Triffterer ed., 1999) (discussing the ambiguity between attempt and commission but clarifying that once a crime is committed, there is no undoing of it).
232 See Harvard Draft Convention on Piracy, supra note 69, at 823 (“If the pirate ship has made no piratical attack, its piratical character will be dissipated by a definite abandonment of piratical purposes.”).
Netherlands, which suggested getting rid of the term “pirate ship” altogether, clarifying the distinction between pirate ship for purposes of seizure and accomplice liability.\textsuperscript{234} On the other hand, the fact that these suggestions were not accepted may support the view that voluntary operation of a ship, or cruising for piracy, is a separate crime.

The International Law Commission, in its comments on the final draft, noted that “[a]cts committed on board a vessel by the crew or passengers and directed against the vessel itself, or against the persons or property on the vessel cannot be regarded as acts of piracy.”\textsuperscript{235} This interpretation was said to “tall[y] with the opinion of most writers,”\textsuperscript{236} and although the Dutch government reached a different interpretation, it did generally agree with the conclusion.\textsuperscript{237} However, the strict interpretation of the two-ship requirement overlaps with attempted piracy to some degree—if mutineers can be defended from a piracy charge because they have not yet committed piracy, then operation of a ship with intent, before any violent acts, should also not be criminal.

\textbf{V. State Practice and \textit{Opinio Juris} Relating to UNCLOS}

\textbf{101(b) – Operating a Pirate Ship}

The definitions of piracy in UNCLOS are widely accepted as the customary international law definition of piracy, and thus are binding on all states.\textsuperscript{238} However, as mentioned above, it is both less clear and more controversial whether these norms create individual criminal responsibility and whether the nature of piracy obligations qualify as a \textit{jus cogens} norm. Since customary law is created both by state practice and \textit{opinio juris} regarding that


\textsuperscript{236} Id.

\textsuperscript{237} See Netherlands, supra note 234, at 64 (“The Netherlands Government are, however, of the opinion that the view of the Commission is correct.”).

\textsuperscript{238} See supra notes 107-109 and accompanying text.
practice, it is useful to examine state practice in prosecuting pirates and state laws defining piracy. Based on this examination, an argument can be made that the customary law norm creating criminal liability for individuals is substantially narrower than the broadest interpretation of UNCLOS. This argument is based on the fact that actual prosecutions, and many state laws, appear to confine liability or limit universal jurisdiction to situations where there is an actual violent attack.

Today, efforts to prosecute Somali pirates have shown some measure of success, and there are currently close to 1100 Somali pirates undergoing prosecution. These efforts have gone hand-in-hand with attempts to review national legislation and revise domestic penal codes to match the UNCLOS definition. All U.N. bodies, particularly the International Maritime Organization (IMO), a specialized agency of the United Nations with responsibility for the safety and security of ships, officially espouse the full definition of piracy as listed in Article 101, including operation of a ship and facilitation. In addition, the General Assembly and the IMO have been acting to review national legislation and have requested that states adopt the UNCLOS definition into the national criminal code definitions of piracy.

The Office of Legal Affairs of the UN, the IMO, and the United Nations Office of Drugs and Crime (UNODC) have


240 See infra Table 2.

241 See id.


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"prepared guidance documents on the elements of national legislation . . . [and] the implementation of" the international law regime of piracy. 244 In addition, the current Security Council resolutions on piracy all affirm that "international law, as reflected in UNCLOS" set out the "legal framework applicable to combating piracy." 245

Several regional agreements have also been concluded, emphasizing the need to review national legislation and to implement crimes that match the UNCLOS definition. 246 The Djibouti Code of Conduct, adopted on January 29, 2009, expressly incorporated the UNCLOS definition of piracy, with Sections (b) and (c), and required regional states to review their "national legislation with a view towards ensuring that there are national laws in place to criminalize piracy . . . ." 247 That definition is now implemented by eighteen regional signatories. 248 The more recent Security Council resolutions also embody this obligation. 249

A. A Review of Non-Conforming Legislation

As of January 2011, a number of states had undertaken the legislative process of adapting their law to combat piracy, most notably Belgium, France, Japan, Maldives, Seychelles, Spain, and


245 See sources cited supra note 24.

246 See supra notes 140-141 and accompanying text.

247 See Djibouti Code of Conduct, supra note 141, art. 1 (defining “piracy”); id. art. 11 (requiring states to move toward adopting UNCLOS statutes).


the United Republic of Tanzania.\textsuperscript{250} A recent survey of domestic laws criminalizing piracy by Professor Yvonne Dutton suggests that there is still quite a bit of divergence from UNCLOS definitions of piracy in national legislations.\textsuperscript{251} Dutton outlines several relationships of national piracy crimes to the definition in UNCLOS: some jurisdictions have incorporated the UNCLOS provisions in their substantive definitions of the crime of piracy, with a greater or lesser degree of divergence.\textsuperscript{252} Some only reference their treaty obligations in combating piracy, but do not incorporate the substantive provision.\textsuperscript{253} Other states have simply left the definition to the law of nations.\textsuperscript{254} Several other states define piracy without reference to UNCLOS—some predate the Convention, while others suggest reinterpretation of its provisions.\textsuperscript{255} Dutton concludes there is still some difference of opinion as to the core offense of piracy, and the extent to which it should be subject to universal jurisdiction.\textsuperscript{256}

For an analysis of national piracy laws whether they have incorporated universal jurisdiction (UJ), see Table 1 at page ##.

2. **UNCLOS Article 101(b) Omitted: Liberia, Somaliland**

Nations adopting the UNCLOS definition of piracy use language identical or similar to Article 101 to create a domestic crime that is punishable as piracy. Thus, the UNCLOS treaty regime of cooperation on the high seas is almost identical to a municipal criminal norm, and piracy is the same for purposes of enforcement and criminal jurisdiction.\textsuperscript{257} This appears to be the preferred approach of UNODC and the IMO and is gradually being adopted by regional states of the Gulf of Aden.\textsuperscript{258}

\begin{itemize}
\item \textsuperscript{250} Legal Issues Related to Piracy off the Coast of Somalia, supra note 2, ¶ 47.
\item \textsuperscript{252} See id. at 1141.
\item \textsuperscript{253} See id.
\item \textsuperscript{254} See id.
\item \textsuperscript{255} See id.
\item \textsuperscript{256} See id. at 1152.
\item \textsuperscript{257} See supra note 113 and accompanying text.
\item \textsuperscript{258} See Mohammed Al Qadhi, Yemen Tries Suspected Pirates, THE NATIONAL,
According to these states, all of Article 101, including operation of a pirate ship, falls under the international crime of piracy, allowing for universal jurisdiction over operation of a pirate ship and facilitation when committed by any person anywhere. Thus, the laws of the United Kingdom, South Africa, and Seychelles incorporate UNCLOS Articles 101 through 103. Malta also defines piracy similarly to UNCLOS, but appears to require some nexus to the offense. Kenya and Tanzania have recently amended their laws to follow UNCLOS but omit “high seas” from the definition, suggesting that piracy may be committed in territorial waters. The revision of the laws of these states, and

(Sept. 30, 2009) http://www.thenational.ae/news/world/middle-east/yemen-tries-suspected-pirates (explaining that Yemen does not have a piracy law, but considers it to be a form of banditry and has also tried it as terrorism).

See Law on Combating Piracy, Law No. 52/2012 (Piracy Law), 2012 (Somaliland); Dutton, Impunity Gap, supra note 251, at 1141 & tbl. 2.

The U.K. law incorporates Articles 101 to 103 of UNCLOS, thus preserving the circular reference to pirate ship (potentially including facilitating ships), and the ambiguity regarding mens rea of participants in the operation of a pirate ship (i.e. knowledge versus intent). The Seychelles law also preserves the circularity of the definition of pirate ship (§ 65(5) referring to all acts in (4)), and hence the ambiguity of mens rea, but clarifies that it refers to all acts and addresses attempt, incitement, and facilitation in § 65(3) separately from the core definition of piracy and pirate ships. Core piracy is subject to absolute universal jurisdiction and presumably facilitation, incitement, and attempt are as well. See infra notes 398, 441, and 463 and accompanying text. The South African law omits the term pirate ship, thus avoiding both problems. Compare UNCLOS, supra note 14, arts. 101-03, with Merchant Shipping and Maritime Security Act, 1994, c. 28, § 26, sch. 5 (Eng.), available at http://www.legislation.gov.uk/ukpga/1997/28/pdfs/ukpga_19970028_en.pdf and Defense Act 42 of 2002 § 24 (S. Afr.) and Penal Code (Amendment), (2010) § 65 (Seychelles), available at http://ddata.over-blog.com/xxxyyyy/0/50/29/09/Docs-Textes/CodePenalSeychellesAmend-Sey100311.pdf to see how similar these laws are.

See CRIMINAL CODE, 2009, §§ 328N-328O (Malta) (assigning jurisdiction only over acts committed on Maltese ships, against Maltese ships, or by Maltese nationals).

those of Seychelles, has been undertaken as part of the effort to combat piracy in Somalia and to facilitate prosecutions, with significant promises of financial assistance from the European Union.263

However, Liberia and Somaliland, which incorporated the UNCLOS provisions, specifically reject the inclusion of “operation of a pirate ship” within the definition of the crime.264 Liberia omits both Article 101(b)—operation of a ship, and Article 101(c)—facilitation, suggesting the narrower interpretation of UNCLOS above.265 The Somaliland law provides for a crime of “[a]ny act of willful participation in an act directed knowingly as a pirate’s attack against a private ship or private aircraft.”266 The notes on the Act make clear that this language diverges from UNCLOS and indicate that the offense of “going equipped” to a crime is not punishable under Somaliland law; there is no criminal provision covering the separate offense of 101(b).267

1. **UNCLOS 101(b) as a Separate, Lesser Offense**

A number of jurisdictions define an offense parallel to 101(b) but specifically provide for a lesser punishment, suggesting that the offense, while punishable, should be treated with less severity. Australia creates two offenses: an act of piracy including only the definition of UNCLOS 101(a), punishable by life in prison; and operation of a pirate ship, punishable by fifteen years imprisonment.268 Japanese law, which defines piracy without

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265 See Dutton, *Impunity Gap*, supra note 251, at 1146 & n.167; Penal Law, 1956, § 15.31 (Liber.).

266 Law on Combating Piracy, Law No. 52/2012 (Somaliland), art. 2 (footnote omitted).

267 See id. at 2 & n.2.

UNCLOS but mirrors its provisions, provides a punishment for preparatory acts such as breaking into a ship or operating a pirate ship that is potentially equivalent to those for violent “acts of piracy.”\(^{269}\) Japanese law also distinguishes between “operating and approaching in close proximity of” another ship or simply “preparing weapons and operating a ship” for the purposes of piracy.\(^{270}\)

As discussed above, it is unclear whether the language of Article 101(b) defines a mode of liability similar to aiding and abetting or whether it is a separate preparatory offense.\(^{271}\) Two distinctions might be the degree of punishment and the attempted “operation of a pirate ship.” Some commentators have written that Article 101(b) is designed to be a catchall including any acts of attempt and conspiracy with intent to commit piracy.\(^{272}\) However, there is no obvious reason to define attempt in relation to a vessel or to use language which narrows the definition of attempt because an attempt can be “assimilated to piracy” under Article 101(a).\(^{273}\) If UNCLOS Article 101(b) defines such attempt, it would appear to exclude other lesser forms of attempt. This problem was addressed by the Special Adviser on piracy, who suggested that domestic legislations expand on UNCLOS provisions on attempt; Seychelles followed this suggestion in its amendment.\(^{274}\)

If Article 101(b) is a separate crime, UNCLOS is silent on the issue of attempt, leaving it to the definitions of domestic law.\(^{275}\)

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\(^{269}\) See infra note 508, and accompanying text.

\(^{270}\) See id.

\(^{271}\) See supra note 127 and accompanying text.

\(^{272}\) See Legal Issues Related to Piracy off the Coast of Somalia, supra note 2, ¶ 59; Dutton, Impunity Gap, supra note 251, at 1158 (noting that the Lang Report suggests that nations define attempt more broadly than UNCLOS, but that a number of states have not done so).


\(^{274}\) See infra notes 508 and 516.

\(^{275}\) See Bassiouni, International Criminal Law, supra note 146 and accompanying text (implying that domestic law must fill in the gaps where international lawmakers remain silent).
This second interpretation may be more in line with the Japanese implementation of UNCLOS, which includes operation of a pirate ship as piracy, while clarifying that there is no attempted operation of a pirate ship, and Australian law, which has two separate offenses: one for “acts of piracy” and one for “voluntary participation in the operation of” a pirate ship (both allow for universal jurisdiction).\textsuperscript{276} Belgian law also uses the UNCLOS language to include operation of a pirate ship as piracy itself and expressly punishes attempt and preparation for operation of a pirate ship.\textsuperscript{277} Other jurisdictions, which incorporate UNCLOS verbatim, are less clear regarding attempted operation of a pirate ship, but they all agree that universal jurisdiction is proper over all crew.\textsuperscript{278}


Other jurisdictions have retained laws defining piracy by reference to the “law of nations.” These include the United States,\textsuperscript{279} Canada,\textsuperscript{280} New Zealand,\textsuperscript{281} and Singapore.\textsuperscript{282} Both Israel\textsuperscript{283} and the Bahamas punish piracy and crimes “akin to piracy” but do not define the offense, nor refer specifically to the

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\textsuperscript{276} See \textit{infra} note 268 and accompanying text, \textit{infra} note 508 and accompanying table.

\textsuperscript{277} See \textit{Loi relative à la lutte contre la piraterie maritime [Piracy Act] of Dec. 30, 2009, MONITEUR BELGE [M.B] [Official Gazette of Belgium], Jan. 14, 2010, art. 3(b) and (c).

\textsuperscript{278} See \textit{supra} note 260 and accompanying text; \textit{infra} notes 502, 510 and accompanying table.


\textsuperscript{280} Criminal Code, R.S.C., 1985, c. C-46, art. 74, § 1 (Can.), \textit{available at} http://laws-lois.justice.gc.ca/PDF/C-46.pdf (“Every one commits piracy who does any act that, by the law of nations, is piracy.


\textsuperscript{282} Admiralty Offences (Colonial) Act, 1849, c. VIA, § 130B, cl. 1 (Sing.) (“A person commits piracy who does any act that, by the law of nations, is piracy.”).

law of nations.\textsuperscript{284} The Bahamian Penal Code also provides that persons committing piracy "shall be liable to be tried and punished according to the law of England for the time being in force."\textsuperscript{285} Similar provisions existed in The Republic of Tanzania\textsuperscript{286} and Seychelles\textsuperscript{287} before recent revisions to the law; the older Seychelles law was applied in the first two universal jurisdiction cases to punish piracy \textit{jure gentium}.\textsuperscript{288} In Seychelles, the court determined that the "Law of England" that was "in force at the time" for purposes of punishing piracy in Seychelles was the Law of England in force at the time of the signing of the Seychelles law, not at the time of the acts of piracy, and the court punished piracy \textit{jure gentium}.\textsuperscript{289} Many of these codes were based on the Queensland Code, also known as the Griffith Model Penal Code, adopted in many former British Colonies,\textsuperscript{290} but it is unclear if the law contemplated the exercise of universal jurisdiction over piracy.\textsuperscript{291}


\textsuperscript{286} \textit{Penal Code}, 1945, Cap. 16, § 66 (Tanz.), available at http://www.unhcr.org/refworld/docid/3ae6b5de0.html (last amended 1963) ("Any person who is guilty of piracy or any crime connected with or relating or akin to piracy shall be liable to be tried and punished according to the law of England for the time being in force.").

\textsuperscript{287} \textit{Penal Code}, c. VIII, § 65 (Seychelles), available at http://www.unhcr.org/refworld/docid/4d67afc82.html ("Any person who is guilty of piracy or any crime connected with or relating or akin to piracy shall be liable to be tried and punished according to the law of England for the time being in force.").

\textsuperscript{288} See Republic v. Mohamed Ahmed Dahir & Ten Others ("Topaz"), Judgment, ¶¶ 34-36, Crim. Side No. 51 of 2009, (July 26, 2010) (Seychelles) (explaining how the Supreme Court of Seychelles has jurisdiction in the case over defendants).

\textsuperscript{289} See \textit{id.} ¶ 48 ("According to established principles and case law, the phrase ‘for the time being in force’ would refer to the law in force up to the 29th June, 1976 when Seychelles attained independence from Britain.").

\textsuperscript{290} See, e.g., Gathii, \textit{Prosecutions}, supra note 69, at 425 ("The Nigerian and Kenyan Penal Codes were descended from the Queensland Criminal Code.").

\textsuperscript{291} See \textit{id.} at 426-28 (noting that Justice Griffith himself did not envision piracy prosecutions in the colonies, but that Kenya has interpreted its statutes in line with an early series of commonwealth cases that construed their statutes as embodying universal jurisdiction).
Laws that rely on "the law of nations" or international law to define the offense present problems of _nullum crimen sine lege_, since a defendant may not be on notice of the crimes for which he is punished. This may be a broader problem in domestic jurisdictions following a stricter textual requirement of notice. Even in jurisdictions that require only notice of the substance of the crime, lack of notice is a barrier for prosecution of crimes that may fall outside the core definition of piracy. Thus, Judge Jackson of the District Court of Eastern Virginia found that a prosecution for attempted piracy would violate due process as an unconstitutional judicial expansion of criminal law because, under U.S. precedent, piracy required the successful seizure of a ship or acts of robbery, and the defendant was not on notice that he could be hauled into court for unsuccessful piracy, since the alleged wrongful actions did not necessarily fall under "piracy as defined by the law of nations." Several commentators have criticized the decision for not accepting a settled definition of piracy that includes attempt.

Judge Davis, writing in the same court two months later, found that UNCLOS was settled customary law of piracy, and therefore satisfied due process, because the law clearly put defendants on

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292 See Dutton, Impunity Gap, supra note 251, at 1152.

293 See id. at 1152 ("More broadly, corollary legislative and interpretive principles require that criminal statutes be drafted with some specificity, be strictly construed, and that any ambiguities be resolved in favor of the accused. The purpose of these principles is to ensure the legality of criminal law so that individuals are on notice of proscribed conduct and are protected against arbitrary and oppressive state action.").


notice that their conduct was unlawful, and any conduct falling
within the definition was punishable as a crime. Judge Davis
established at length that "the crime of piracy," as defined by
UNCLOS, is customary law, and proceeded to read the provisions
of Article 101 as though they were written into the U.S. criminal
statute. This interpretation was affirmed on appeal. However,
the UNCLOS definition in Article 101 is not binding criminal
law. For UNCLOS to genuinely put defendants on notice that
their conduct is criminally punishable, there must be a generally
accepted interpretation of its defined crimes and a custom that all
conduct falling within its broad scope is actually punishable in
national courts. Especially for "fringe offenses" such as
operation of a pirate ship, which is generally not prosecuted on its
own, defendants may not be on notice of liability.

The Kenyan High Court of Mombasa's 2010 decision in
Mohamud M. Hashi v. Republic also demonstrates how the
nullum crimen principle may require courts to distinguish between
UNCLOS Article 101 and piracy convictions under the law of
nations. The prior Kenyan law, repealed in 2009, read, "any person, who, in territorial waters or on the high seas, commits any

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296 United States v. Hasan, 747 F. Supp. 2d 599, 640-42 (E.D. Va. 2010) ("Defendants were fairly warned of the potential criminal liability they faced for their conduct.").

297 Id. at 640-641. Judge Davis also notes that the word "illegal" in UNCLOS Article 101, as in "any illegal acts of violence or detention," is synonymous with violence, and thus a harmless redundancy. Id. at 640 n.33. He seems to suggest that it may serve as a reminder that all acts of violence are unlawful, and defendants are on notice of such unlawfulness; unless, they make a claim of legal rights, thus satisfying due process. Id. This is similar to the argument that prosecution is foreseeable for all malum in se crimes, thus satisfying the nullum crimen principle, but this argument may not hold for UNCLOS Article 101(b). See supra notes 145 and 165 and accompanying text.

298 United States v. Dire, No. 11-4310, at *41-42 (4th Cir. May 23, 2012) (affirming the Eastern District Court of Virginia).

299 See generally Ambos, supra note 231 for insight into why the principle of notice in criminal law can be problematic.

300 Id.

301 See id. at 491 (articulating one argument for why crimes without an definite beginning point create serious issues for defendants).


303 See id. at *18, *25-29.
act of piracy *jure gentium* is guilty of the offence of piracy." The High Court held that the repeal, which was absolute and had no transitional provision, created a gap in legislation since the prior law was now non-existent and could not be used for convictions, while the new law, which incorporated UNCLOS, could only be applied to cases after its enactment. Therefore, pending cases under the old law would have to be dismissed. The court also held that piracy *jure gentium* was distinct from the statutory definition mirroring UNCLOS Article 101, and thus, the new law was a substantive change. The High Court decision implied that international criminal law distinguishes between piracy *jure gentium* and UNCLOS piracy; conduct made criminal under the new law following UNCLOS may not necessarily have been criminal under the prior provision because the applying court was obligated to find and determine its ingredients through other interpretive sources[,] e.g. [d]ictionaries, texts and precedent.

This decision was recently overturned by the Kenyan Court of Appeal, which held that the new law simply updated piracy *jure gentium* to match UNCLOS.

3. **Jurisdictions Referencing Treaty Provisions with No Definition of the Offense**

Jurisdictions that reference UNCLOS but do not specifically incorporate its provisions into domestic law may also face problems when prosecuting crimes of piracy due to a lack of clarity and formalism. The IMO recently raised this problem regarding French law, which cites UNCLOS but does not include its substantive provision, noting that "this generic approach may

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304 See id. at *18.
305 Id. at *25-29.
306 Id. at *25-29.
307 Id. at *26-27.
310 See Dutton, Impunity Gap, supra note 251, at 1154-55 (providing examples from Senegal and France in which national courts rejected direct application of international crimes that had not been specifically implemented into domestic law).
present obstacles for adequate prosecution and punishment in countries where criminal law requires as a condition for enforcement that all elements of the offence are described in detail in the legislation.\textsuperscript{311}

4. Jurisdictions Defining the Offense without Reference to UNCLOS

Among jurisdictions that do not refer to UNCLOS as the basis of their definition, the crime of operation of a pirate ship may not allow for universal jurisdiction. For example, by including the crime of mutiny, the Philippines Revised Penal Code appears to punish piracy more broadly than the UNCLOS definition; however, it does not mention operation of a pirate ship or facilitation as criminal conduct.\textsuperscript{312}

The Netherlands, which has laws on piracy significantly predating UNCLOS, defines the offense of piracy as “a person who enters into service or is serving as a master of a vessel, knowing that it is intended for or using it for the commission of acts of violence against other vessels on the high seas . . .”; the crime for a crewmember is similar, but the punishment is a maximum of nine years imprisonment instead of twelve.\textsuperscript{313} A person who commits such an offense “is guilty of piracy.”\textsuperscript{314} Separate offenses exist for equipping a pirate vessel and indirectly or directly facilitating the hiring of a pirate vessel.\textsuperscript{315} The Netherlands’ Penal Code allows for absolute universal jurisdiction


\textsuperscript{314} Id.

\textsuperscript{315} Id. §§ 383-84.
for piracy.\textsuperscript{316} Indonesian law, possibly influenced by the Dutch code, includes as a crime in open-seas piracy the acts of “the person who enters into service or serves as a shipper on a vessel, knowing that it is destined to be used or is used to commit acts of violence in the open sea.”\textsuperscript{317} The Indonesian Penal Code provides for universal jurisdiction over piracy.\textsuperscript{318} The Indonesian and Dutch definitions of piracy mirror the crime of voluntary operation of a pirate ship in UNCLOS Article 101(b).

\textbf{B. Current State Practice In Exercising Universal Jurisdiction Over Inchoate Crimes of Piracy}

This section briefly surveys prosecutions of Somali pirates since 2006, and then addresses the regional piracy prosecutions in Kenya and Seychelles, which are important because of jurisprudence on universal jurisdiction, attempted piracy convictions and cruising for piracy convictions under UNCLOS Article 101(b).

A recent report by the Secretary General shows that as of October 25, 2011 over 1,000 suspected pirates had been prosecuted or were awaiting prosecution in 20 States . . . . The prosecutions are a result of increased apprehension of suspected pirates with improved gathering and preservation of evidence, enhanced information-sharing, strengthened legislative frameworks in some States, and increased political willingness

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\textsuperscript{318} See Aziz \& Yusran, supra note 317, at 17 (noting that under Article 4(4), the Indonesian Penal Code provisions on piracy apply to any person, including foreigners outside Indonesia).
\end{flushright}
to undertake prosecutions.\textsuperscript{319}

For a summary of how twenty different countries have addressed or intend to address pending prosecutions of pirates, see Table 2, at page ##.

1. Non-Regional States

Non-regional states usually prosecute pirates only when national interests are involved; therefore, pirates caught without connection to an attack are generally not prosecuted.\textsuperscript{320} The unwillingness of states to pursue criminal prosecutions has led to the release of almost ninety percent of the suspected pirates caught by coalition warships.\textsuperscript{321}

A survey of non-regional prosecutions of piracy shows that most cases involve attacks on ships or nationals of the prosecuting state. In November 2011, France tried six men for attacking a private yacht, the Carre d’As, and holding a couple ransom for $2 million; five pirates received sentences between four to eight years, and one was acquitted.\textsuperscript{322} Another case, decided in June 2012, involved the attack of the French luxury yacht Le Ponant, and resulted in four convictions between four to ten years, and two acquittals.\textsuperscript{323} Two other pending cases also involve attacks on French private vessels and French victims.\textsuperscript{324} The German trial of ten pirates accused of seizing the MV Taipan, a German registered

\textsuperscript{319} SG Report Oct. 2011, \textit{supra} note 244, ¶ 58.

\textsuperscript{320} \textit{Geib & Petrig}, \textit{supra} note 23, at 30-31.

\textsuperscript{321} See \textit{Legal Issues Related to Piracy off the Coast of Somalia}, \textit{supra} note 2, ¶¶14, 41, 43-44, 59.


ship, has just been concluded in Hamburg after 105 days of trial and two years;\textsuperscript{325} the adults were sentenced to six or seven years each, and the juveniles under 21 years of age at the time were sentenced to two years with time served.\textsuperscript{326} Both the French and the German trials involved successful attacks, and apparently do not rely on universal jurisdiction.

Belgium also recently prosecuted its first pirate, who was convicted and sentenced to ten years in June 2011 for an attack on a Belgian vessel in 2009.\textsuperscript{327} The pirate was captured during an attempted attack in November 2010 of a Sierra Leonean vessel, but was identified by the crew of the previous vessel who was held hostage for sixty-eight days until a 2 million euro ransom was paid; his fingerprints were also found on the Belgian vessel.\textsuperscript{328}

The Spanish case involved the kidnapping of thirty-six Spanish nationals for forty-seven days where the two captured pirates attempted to flee the scene; both received high sentences.\textsuperscript{329} Five more violent attackers on a Spanish warship may face trial in Spain soon.\textsuperscript{330}

\textsuperscript{325} See Ready to Prosecute? Suspected Pirates on Trial in Hamburg, RECLAIM THE SEAS BLOG (Feb. 24, 2012, 9:57 PM), http://reclaim-the-seas.blogspot.com/2012/02/ready-to-prosecute-suspected-pirates-on.html. Three minor defendants were eventually released from pretrial custody because no one was harmed in the attack, and no direct violence was used. For insight into the human rights aspects of the case, see Beate Lakotta, German Justice Through the Eyes of a Somali Pirate, SPIEGEL ONLINE INTERNATIONAL, July 4, 2011, http://www.spiegel.de/international/world/torture-execution-german-justice-through-the-eyes-of-a-somali-pirate-a-755340-4.html.


Italy has recently ordered the prosecution of nine pirates captured by the Italian navy after hijacking an Italian flagged cargo ship, the Montecristo, while the crew locked themselves in the hold for twenty-four hours until they were rescued by U.S. and British troops. The suspected pirates face up to twenty-year sentences if convicted.

All of the U.S. cases concluded to date involved attacks on U.S. ships. The Netherlands has also prosecuted pirates where the victims bore a relationship to the Netherlands, although technically applying universal jurisdiction.

While neither the Netherlands nor the United States appear willing to prosecute pirates with no connection to the forum, the Dutch cases may have significance for prosecutions under UNCLOS Article 101(b), because of the nature of Dutch law, which punishes a crime similar to cruising with intent to commit piracy. The U.S. cases are significant for future prosecutions under UNCLOS that extend its provisions beyond current practice because they delve deeply into the question of the evolving nature of the definition of piracy.

Some regional countries also have effectively pursued non-regional policies and have prosecuted mainly where there is a nexus to the prosecuting state. Although it accepted some international transfers in 2009, Yemen has since chiefly prosecuted pirates who have attacked Yemeni ships and

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333 See Major Achievements in the Courtroom, supra note 84.


335 See DUTCH PENAL CODE, supra note 313, art. 381; Rb. Rotterdam, 17 June 2010, LJM: BM8116, at *10-11, available at http://www.unicri.it/maritime_piracy/docs/Netherlands_2010_Crim_No_10_6000_12_09%20Judgment.pdf (discussing charge of “entering into service” as a pirate, which may sometimes occur on land).

336 See United States v. Dire, 680 F.3d 446, 458, 469 (4th Cir. 2012) (affirming the district court’s application of UNCLOS while recognizing that international law is constantly “expanding”).
crewmembers. It sentenced six pirates to death and six additional pirates to ten-year sentences in May 2010, as well as ordering compensatory damages to the owner of the ship, and restitution to the families of two Yemeni crewmembers killed in the attack. Prosecutions in United Arab Emirates and Oman have also involved national interests.

While it is unlikely to find non-regional prosecutions for merely operating a ship, a number of prosecutions have involved unsuccessful attacks and attempted piracy. Two recent high profile cases in the United States and the Netherlands have involved attempted piracy. The U.S. District Court for the Eastern District of Virginia used a narrow domestic definition of piracy under the law of nations, holding that attempt was excluded and therefore the suspect must be acquitted. The Rotterdam district court of the Netherlands, on the other hand, held that the pirates who were intercepted by the Danish navy while attempting to attack the Samanyolu could be prosecuted. It held that “the wide definition in Dutch law focuses on the act of violence towards other ships to constitute ‘piracy,’ [and is] much more in line with the UNCLOS definition, whether the act is successful in robbing the other vessel or not.”

2. Regional States

On the other hand, regional prosecutions can be potentially instructive on prosecutions under Article 101(b) (or domestic parallels), since regionally affected states increasingly have committed to accepting pirates for prosecution where no nationals are victims. Although only three such transfers occurred in 2011, the UNDP and UNODC predict that with the combined

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338 Id.

339 See infra notes 527-529 and accompanying table.


341 Mansuma, supra note 334, at 151.


efforts of Somalia, Kenya, Seychelles, the United Republic of Tanzania and Mauritius, along with international assistance, it would be possible in two years to prosecute 125 cases, or about 1250 pirates, a year. A large number of prosecutions involve arrests by regional authorities that lead directly to prosecution, without transfer. As these regional hubs for the prosecution develop, it is likely that there will be prosecutions even where there are no known victims and the pirates are merely operating a ship with intent to commit piracy.

3. Kenya Piracy Prosecutions

Kenya was the original forum for universal jurisdiction over Somali pirates, with its first case in 2006. Republic v. Hassan M. Ahmed and Nine Others involved the hijacking of the Safina al-Bisarat, an Indian registered dhow roughly 300 miles off the coast of Somalia on January 20, 2006. The arresting ship belonged to the U.S. Navy, and none of the victims were Kenyan. The case was heard in the Chief Magistrate’s Court of Mombasa, an ordinary criminal court of first instance. The Defense argued that the court had no jurisdiction to try the accused

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345 SG Report Jan. 2012, supra note 29, ¶ 55 (noting that only three cases of eight in Seychelles involved transfers, and the rest were arrests by the Seychelles Coast Guard). It should be noted that almost all prosecutions currently occurring in Somaliland and Puntland involve arrests by the Somali authorities themselves. See Legal Issues Related to Piracy off the Coast of Somalia, supra note 2, ¶ 101-106. Since these trials do not yet conform to international standards, no transfer agreements have been concluded. SG Report Jan. 2012, supra note 29, ¶ 24, 34.
349 Id.
350 See id. (explaining that “American Navy officers” intercepted “Indian crew members”).
351 See Gathii, Jurisdiction, supra note 346, at 367-74.
for piracy because piracy is an offense defined by UNCLOS, and Kenya lacked implementing criminal law. The court dismissed the arguments and held that jurisdiction was proper because UNCLOS does not supersede the penal code, but merely “amplifies” it. It then convicted and sentenced each of the accused to seven years imprisonment. In Hassan M. Ahmed v. Republic, the High Court at Mombasa affirmed the magistrate’s decision on appeal, asserting that Kenyan courts had jurisdiction under the penal code, establishing a basis that allowed for the conviction of fifty pirates in 2009 and 2010.

The High Court further suggested that Kenya could directly apply the provisions of UNCLOS as international customary law and punish piracy as a crime with no implementing statute:

Even if the Penal Code had been silent on the offence of piracy, I am of the view that the Learned Principal Magistrate would have been guided by the United Nations Convention on the Law of the Sea which defines piracy in Articles 101 as consisting of any of the following acts: - (a) any illegal acts of violence or detention . . . the Learned Principal Magistrate was bound to apply the provisions of the Convention should there have been deficiencies in our Penal Code and Criminal Procedure Code. I would go further and hold that even if the Convention had not been ratified and domesticated, the Learned Principal Magistrate was bound to apply international norms and Instruments since Kenya is a member of the civilized world and is not expected to act in contradiction to expectations of member states of the United Nations.

Professor James Gathii, a Kenyan scholar, finds this dictum to

\[\text{\textsuperscript{352}\textsuperscript{352}}\text{Section 69 of the Kenyan Penal Code, which punished piracy }\textit{jure gentium}, both in territorial waters and the high seas, was not in accordance with international law. See Gathii, Prosecutions, supra note 69, at 422-23 (describing arguments made during the proceedings).\]

\[\text{\textsuperscript{353}\textsuperscript{353}}\text{See id.}\]

\[\text{\textsuperscript{354}\textsuperscript{354}}\text{Id. at 423 & n.51 (citing Republic v. Hassan Mohamud Ahmed, (2008) L.R.K. Crim. No. 434 of 2006 (High Court at Mombasa) (Kenya)).}\]


\[\text{\textsuperscript{356}\textsuperscript{356}}\text{Legal Issues Related to Piracy off the Coast of Somalia, supra note 2, ¶ 50 & n.33.}\]

be contrary to Kenyan treaty practice, which generally requires an implementing law, and contrary to more general state practice on universal jurisdiction and piracy in particular. Gathii notes that the history of Kenya’s code further suggests that the original provision punishing piracy by the law of nations was not intended to allow for universal jurisdiction over piracy.

On September 1, 2009, the older criminal law of piracy was repealed, and the Merchant Shipping Act was amended to fully implement the UNCLOS provisions on piracy and the SUA Protocol on armed robbery of ships. The repeal and re-enactment caused uncertainty as to whether pending proceedings under old law must be dropped; the magistrate’s courts ignored this problem, and assumed proceedings could continue. Thus, in 2009 and 2010 about fifty pirates were sentenced under the older piracy law of the Kenyan Penal Code, which criminalized piracy jure gentium.

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358 Gathii, Jurisdiction, supra note 346, at 378-80; Gathii, Prosecutions, supra note 69, at 424-26 (addressing prior Kenyan decisions applying ratified but undomesticated treaties, and noting that Kenya has generally been dualist).

359 Gathii, Prosecutions, supra note 69, at 426-28 (surveying the history of the Kenyan code and arguing that by specifically including “territorial waters” it does not support an intent to allow universal jurisdiction over piracy).


In September 2010, nine accused pirates, charged under the old law, brought a new appeal on jurisdiction.\textsuperscript{363} In \textit{Matter of M. Mohamed Hashi}, the High Court of Mombasa held that under the older law, Kenyan lower criminal courts do not have jurisdiction over pirates captured outside of territorial waters.\textsuperscript{364} The court noted that the general part of the Penal Code in Section 5 gives Kenyan criminal courts territorial jurisdiction only, but Section 69, which punishes piracy by the law of nations, includes the "high seas."\textsuperscript{365} The High Court held that the general part took precedence over a specific provision "until Parliament corrects its clear error," and jurisdiction was only proper for piracy in territorial waters.\textsuperscript{366} The court further noted that the Merchant Shipping Act crime of piracy could not stand in place of the original crime charged since piracy under UNCLOS has a different scope than piracy \textit{jure gentium} and applying the law retroactively would be ex post facto law.\textsuperscript{367} The court therefore held that the proceedings were void ab initio; the defect in jurisdiction could not be remedied by amending the charge, and the nine accused pirates were released.\textsuperscript{368}

The \textit{Hashi} decision was clearly relevant to proceedings begun under the older law, but it did not directly address the question of universal jurisdiction for lower criminal courts under the new law.\textsuperscript{369} Since the new law was clearly designed to implement

\textsuperscript{363} In re Mohamud M. Hashi & Eight Others, (2010) L.K.R. (H.C.K.) (Kenya), available at kenyalaw.org/Downloads_FreeCases/78571.pdf. The name of defendant is cited interchangeably as Hashi, Dhodi and Dashi; Hashi will be used in this article.

\textsuperscript{364} \textit{Id.} at *24-26.


\textsuperscript{366} In re Hashi, L.K.R. (Kenya), at *26-27. The Court further conducted an analysis of other jurisdictional grants in Kenyan law, based primarily on Wambua, \textit{supra} note 361, concluding that under the old law it was arguable that jurisdiction should be confined to the High Court as part of admiralty jurisdiction. In re Hashi, at *33-34.

\textsuperscript{367} In re Hashi, at *37-44 (citing Wambua, \textit{supra} note 361, at 17-18).

\textsuperscript{368} \textit{Id.} at *17-18.

\textsuperscript{369} See Legal Issues Related to Piracy off the Coast of Somalia, \textit{supra} note 2, ¶ 50.
UNCLOS and Kenya’s obligations under the Djibouti Code of Conduct, there was a strong argument that the new law created universal jurisdiction in the criminal courts of first instance. However, the arguments articulated in Hashi could potentially limit jurisdiction to admiralty proceedings in the High Court only. In May 2011, another judge of the High Court held that the “manifest and functional position” was clearly that there was jurisdiction in Kenya’s criminal courts, and any denial of that position was “essentially abstract.”

The issue was finally resolved by a decision of the Kenyan Court of Appeal in Nairobi, which held that the new law simply reestablished piracy jure gentium, which has now effectively become UNCLOS Article 101. The Court further held that the crime of piracy was not subject to the general territorial limitations in Section 5 of the Kenyan Penal Code, as piracy belonged to a different class of international crimes for which universal jurisdiction was proper.

Kenyan proceedings were also originally hindered by strict rules requiring all non-documentary evidence to be proven by oral evidence, and photographic evidence to be tendered by an officer of the Attorney General who produced the photograph. More recently, problems of presentation of evidence have been resolved through use of video link testimony.

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370 Id. (describing how the “subordinate court,” a court of first instance in Kenya, exercised universal jurisdiction).
371 See Gathii, Jurisdiction, supra note 346, at 370, 390-91.
374 Id. at *49–50 (resolving the question raised at *41–42).
375 See Gathii, Prosecutions, supra note 69, at 431 (noting delays in trials because of non-attendance of witnesses); Mwangura, supra note 401; Bahar, supra note 107, at 60 (noting problems relating to Kenyan laws of evidence).
The debate over jurisdiction in Kenya was influenced by policy considerations as well, in particular the sense that Kenya’s original memoranda of understanding were “lopsided and burdensome” and that Kenya would not become “an open door for dumping pirates.” In March 2010, Kenya announced it would not accept any more pirates and gave a six-month termination notice on all its transfer agreements, claiming that nations had not met obligations of helping with funding and assistance and that its justice system was overburdened and overcrowded. In April 2010, Kenya totally refused to accept jurisdiction over pirates for a few weeks. In May 2010, it reassumed receiving and adjudicating pirates on an ad hoc basis.

4. Seychelles Piracy Prosecutions

The most complete record of first-instance regional court decisions on piracy convictions is from the Supreme Court of Seychelles. These cases have been notable for several key features:

(a) Consistent universal jurisdiction over pirates;
(b) Consistent liability for attempted piracy;
(c) Consistent use of the common enterprise doctrine (Section 23 of the Seychelles Penal Code) to solve problems of identification and accomplice liability;
(d) The development of case law relating to circumstantial

been resolved through guidance from UNODC, including use of video witness evidence).

377 See Wambua, supra note 361, at 37 (summarizing MOUs); id. at 21 & n.86 (citing statement of Minister for Foreign Affairs).
381 Id.
382 Id.
evidence and “piracy action groups”;\textsuperscript{384} 
(e) Severity of the sentences;\textsuperscript{385} and
(f) Most recently, a willingness to prosecute for cruising without violence, as a participation in the “operation of a pirate ship.”\textsuperscript{386}

Many of the current prosecutions of pirates in the Seychelles have been for cases of attempted piracy, and intent has been established by the surrounding circumstances, as well as the equipment present and the location of the ship.\textsuperscript{387} Two of the most recent cases have involved prosecutions for operation of a pirate ship.\textsuperscript{388}

\textit{a. Universal Jurisdiction over Piracy in Seychelles}

In Seychelles, universal jurisdiction over piracy on the high seas is not disputed, and the Supreme Court of Seychelles addresses the issue relatively quickly. In Republic vs. Mohamed Ahmed Dahir & Ten Others (“Topaz”),\textsuperscript{389} the court simply notes: “such universal jurisdiction is provided for in international law.”\textsuperscript{390} Republic v. Abdi Ali et al. (“Intertuna II”),\textsuperscript{391} examines the question more carefully, relying on the Privy Council’s rationale of In re Piracy Jure Gentium\textsuperscript{392} that “a person guilty of [the crime of] piracy has placed himself beyond the protection of any State.”\textsuperscript{393}

\textsuperscript{385} See McLeod, supra note 380.
\textsuperscript{387} See McLeod, supra note 380.
\textsuperscript{388} Id.
\textsuperscript{389} Topaz, Judgment, ¶ 51, Crim. Side No. 51 of 2009 (July 26, 2010) (Seychelles).
\textsuperscript{390} Id. Additional charges of terrorism rely on other forms of jurisdiction, but these are ultimately dismissed for lack of terrorist intent. Id. ¶¶ 36, 42-43. Since the Topaz was a Seychellois vessel, arguably there was no need for universal jurisdiction in this case.
\textsuperscript{392} In re Piracy Jure Gentium, (1934) A.C. 586 (U.K.).
\textsuperscript{393} Id. at ¶ 9.
In Republic v. Mohamed Aweys Sayid et al. ("Galate"), the court establishes universal jurisdiction by relying on UNCLOS, which has now been adopted as the amendments to Section 65 of the Penal Code, noting as well that the individual crime of piracy is a breach of *jus cogens*—"a conventional peremptory norm that states must uphold." This formulation appears again in Republic vs. Mohamed Ahmed Ise & Four Others ("Talenduic"): This universal jurisdiction makes it possible for the arresting State, like the Republic of Seychelles in this case, to freely prosecute suspected pirates, from anywhere in the world, and punish them if found guilty under the municipal law, since the crime of piracy *jure gentium* is considered to be a contravention of *jus cogens* (compelling law), a conventional peremptory international norm that States must uphold.

The court notes that the issue is not in dispute, further relying on Grotius's *Piracy Jure Gentium*, Halsbury's *Laws of England*, Republic v. Houssein Mohammed Osman & Ten Others ("Draco"), and on the *Lotus* case of the Permanent Court of International Justice.

The court does not differentiate between universal jurisdiction as a broad common interest of states and individual criminal responsibility for heinous crimes. Instead, it equates individual criminal responsibility with the duty of states: the "crime of piracy is a breach *jus cogens*," which implies individual criminal liability similar to war crimes. In doing so, the court follows the position

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395 *Id.*, ¶ 37.
396 *See Talenduic*, Judgment, ¶ 22, Crim. Side No. 75 of 2010 (June 30, 2011) (Seychelles).
398 The debate over whether piracy is a *jus cogens* crime is mentioned above in *supra* notes 49-65 and accompanying text. *See also* Kontorovich, *Piracy Analogy*, supra note 45, at 205 & n.129 (noting development of *jus cogens* rationale in international law). Strictly speaking, it is not the crime which is a breach of *jus cogens*; rather, *jus cogens* implies a duty upon states to punish the crime, and an invalidation of any contrary law. The end of the sentence, "that states must uphold," is more accurate. *See, e.g.*, Rafael Nieto-Navia, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, at *14-15, available at http://www.iccnow.org/documents/WritingColombiaEng.pdf.
of the UNODC that UNCLOS defines an international criminal norm and that the customary law of piracy is similar to human rights offenses.\textsuperscript{399} This analysis also solves the legality problem in absolute universal jurisdiction over pirates and paves the way for a broader application of piracy.\textsuperscript{400}

The reasoned decisions of the Supreme Court of Seychelles are also creating precedent: when the court asserts universal jurisdiction over piracy to the limits of the UNCLOS definition, it establishes state practice that UNCLOS in fact embodies a criminal norm of piracy.\textsuperscript{401} The current Seychelles definition of piracy in Section 65(4) of the penal code uses nearly the same wording as UNCLOS.\textsuperscript{402} What remains unclear is whether the court itself perceives any limits on its jurisdiction that could come from UNCLOS itself or customary law, such as extending Article 101(b) to a separate crime of cruising for piracy. In \textit{Gloria}, for example, the court discusses the defense arguments of absence of "private ends" and "two ships" in the context of proving "the essential ingredient[s] of the offence beyond a reasonable doubt [which] must automatically lead to acquittal."\textsuperscript{403} It is not an issue of jurisdiction.

The next section shows how almost all the Seychelles cases involve some form of attempt. Arguably, if UNCLOS is now the customary law crime of piracy, and it does not specifically

\begin{itemize}
\item \textbf{See Roger O'Keefe, \textit{Universal Jurisdiction}, 2 J. INT'L CRIM. JUST. 735 (2004).}
\item \textbf{Compare Penal Code (Amendment) Bill, 2010, § 65(4) (Seychelles) (amending Penal Code 1955, CAP. 73 (Seychelles)), \textit{with} UNCLOS, supra note 16.}
\item \textbf{Republic v. Ahmed ("Gloria"), Judgment, ¶¶ 19-21, Crim. Side No. 21 of 2011 (July 14, 2011) (Seychelles).}
\end{itemize}
criminalize attempt, universal jurisdiction would not apply. Violent attempts might still fall under 101(a) “acts of violence or detention,” but nonviolent attempts may only be crimes under the national code.\footnote{404} If the international crime is no longer being charged, the court might lose its universal jurisdiction.\footnote{405} In \textit{Draco}, however, the court concluded there was no basis for a charge of piracy \textit{jure gentium}, and yet the facts were sufficient for an attempt conviction under the Seychelles Penal Code.\footnote{406} This suggests that the court is continuing to assert universal jurisdiction to an entirely domestic definition of attempted piracy—possibly a form of pendent jurisdiction. On the other hand, the court could be interpreting UNCLOS to include all modes of liability where the intent is ultimately violent piracy.

\textit{b. Attempt Liability in the Seychelles Cases}

The Seychelles cases all involve some form of attempted piracy, although only three directly refer to convictions for attempt. One such case is \textit{Topaz}, in which an aircraft alerted a Seychelles Coast Guard (SCG) patrol vessel of the presence of two skiffs and a whaler, commonly used as a “mother ship.”\footnote{407} The \textit{Topaz} chased after the skiffs and came under fire, managing to subdue the skiffs and apprehend three additional men on the whaler.\footnote{408} The eight men on the skiffs were convicted for “a frustrated attempt to commit piratical robbery which, according to the cited authorities and the definition, constitutes the offence of piracy \textit{jure gentium},” and the three on the whaler were convicted for aiding and abetting piracy.\footnote{409} The court, noting that robbery is not an essential element of the crime of piracy, convicted the eight accused on the skiffs on the basis of assault—causing fear of imminent death or harm in the crew of the \textit{Topaz}—and a frustrated attempt at robbery.\footnote{410}

\begin{itemize}
\item \footnote{404} See, \textit{e.g.}, \textit{Draco}, Judgment.
\item \footnote{405} See supra notes 42-43, 167 and accompanying text.
\item \footnote{406} \textit{Draco}, Judgment, ¶ 24 (concluding there is no basis for piracy charge); \textit{id.} ¶ 30 (concluding there is a basis for attempted piracy under § 65(3)).
\item \footnote{407} \textit{Topaz}, Judgment, ¶¶ 3-7, Crim. Side No. 51 of 2009 (July 26, 2010) (Seychelles).
\item \footnote{408} \textit{id.} ¶¶ 11-13.
\item \footnote{409} \textit{id.} ¶¶ 61-62, 66-71.
\item \footnote{410} \textit{id.} ¶¶ 55-59.
\end{itemize}
The common intention of the accused to execute a "pre-
arranged plan" was vital to establishing they were all equally
guilty.\footnote{Id. ¶ 29-33, 60.} The court found there was a common intention based on
the method of the attack, the actions of the accused, the types of
weapons used, the locations of the boats, and the gadgets found on
board.\footnote{Id. ¶ 33.} Predicated on this finding, the court concluded that the
accused were engaged in acts of piracy.\footnote{Topaz, Judgment, ¶ 59.} As for the three aiders
and abettors on the mother ship, the court found they were also
involved in the "preparatory stages,"\footnote{Id. ¶ 66.} based on the kind of
equipment on board the ship and its location, as well as pre-trial
statements from the accused that it was an "umbilical cord."\footnote{Id. ¶ 68-69.} All
indications pointed to the fact that the three were intentionally
aiding the pirates.\footnote{Id.}

In 	extit{Intertuna II}, another attempted piracy \textit{jure gentium}, two
skiffs approached the 	extit{Intertuna Dos} at great speed and with AK-
47s and ladders on board.\footnote{Intertuna II, Judgment, ¶ 14-17, Crim. Side No. 14 of 2010 (Nov. 3, 2010) (Seychelles).} Although the first shots were fired by
security guards, the method of the attack and the equipment were
sufficient to establish an attempted seizure of the ship or of
assault.\footnote{Id. ¶ 37.} The additional crew on board the whaler were charged
with a common intention to participate in the attempt.\footnote{Id. ¶ 38.}

	extit{Galate} was the first case under the new law codifying the
UNCLOS Article 101 definition of piracy.\footnote{This definition was adopted in March 2010. \textit{See} Penal Code (Amendment) Bill, 2010, § 65(3) (Seychelles) (amending Penal Code 1955, CAP. 73 (Seychelles)).} The pirates were
charged with three counts of piracy for three different ships – the
	extit{Galate}, a Seychellois fishing vessel; the \textit{Al-Ahmadi}, an Iranian
vessel later captured for fuel; and the \textit{Topaz}, a coast guard vessel
that arrived on the scene to rescue the crew.\footnote{Galate, Judgment, ¶ 2-4, Crim. Side No. 19 of 2010 (Dec. 15, 2010) (Seychelles).} The Somalis
argued in their defense, as they had in earlier cases, that they were fishermen who had been drifting for three days and were merely seeking help to get back to Somalia. However, no fishing equipment was found on their vessel. "On the other hand, they had two ladders suitable for climbing onto bigger ships, outboard engines and firearms, leav[ing] no doubt that the real intention . . . was not to catch fish but to reach and board other vessels with the use of force as necessary."

As to the Topaz (the SCG vessel), which arrived last to the scene, the defense argued there was no act of piracy; any shots fired by the pirates were only fired after the Coast Guard opened fire, were fired in self-defense, and, in any case, were unsuccessful and out of range. The court rejected these arguments, finding that self-defense was irrelevant when engaged in criminal activity, that at least two of the accused had fired, and that it did not matter whether any of the shots had actually reached the Topaz, because "a successful act of violence is not a prerequisite proof that the offence as charged has been committed." Only two pirates fired at the Topaz, but nonetheless all accused were convicted of piracy based on their "common intention to prosecute an unlawful purpose."

In Galate, although the court never used the term "attempt" to qualify the actions of the pirates, the facts of the third count, detailing the assault against the Topaz (the same ship as the earlier case), match the assault in the Topaz in which the court did find there was attempted piracy jure gentium. It thus appears that under the new law, the court does not distinguish between attempted piracy and perpetration, focusing instead on the all-

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422 Id. ¶ 27.
423 Id. ¶¶ 23, 27, 42.
424 Id. ¶ 42.
425 Id. ¶ 27.
426 Id. ¶ 43.
427 Galate, Judgment, ¶ 47.
428 Id. ¶ 15.
429 Id. ¶ 48; see McLeod, supra note 380 (noting that the Court convicted all "regardless of their lack of success").
430 Compare Galate, Judgment, ¶ 12, with Topaz, Judgment, ¶¶ 11-12, Crim. Side No. 51 of 2009, (July 26, 2010) (Seychelles).
inclusive “violence” and equating the attempted violence against the *Topaz* with the seizure of the two other ships under the UNCLOS definition, echoing the distinction between U.S. and Dutch law on this point.\(^{431}\)

In *Talenduic*, the court further developed the interpretation of “acts of violence” as including unsuccessful attacks.\(^{432}\) Here, the court found no difficulty convicting the perpetrators of attacks on two vessels even though “no one was injured and no vessel was damaged in the attempt” because (as quoted in the *Topaz*) “a frustrated attempt [to commit] a piratical robbery will constitute piracy *jure gentium*.\(^{433}\) This holding emphasizes the court’s understanding that the UNCLOS definition, in its breadth, is supported by the underlying customary law definition.\(^{434}\) The conviction was also the first in the Seychelles for “operation of a pirate ship” under the second part of the UNCLOS definition.\(^{435}\)

*Republic vs. Abdukar Ahmed & Five Others* ("*Gloria*") again involved the assault of three ships—one which was captured and the crew held hostage for several hours, and two from the SCG that participated in a rescue and were attacked but not harmed.\(^{436}\) The pirates were convicted of three counts of piracy for all three ships, and all six were held equally responsible based on a common intention to attack,\(^{437}\) with no essential distinction between the successful attack and the two unsuccessful ones.\(^{438}\) There was a distinction in sentencing, however, with twenty-four years for the original ship seized, and eighteen years each for the coast guard ships, to run concurrently.\(^{439}\) All equipment on board

\(^{431}\) *Galate*, Judgment, ¶ 47 (“Furthermore a successful act of violence is not a prerequisite proof that the offence as charged has been committed.”).

\(^{432}\) *Talenduic*, Judgment, ¶ 39, Crim. Side No. 75 of 2010 (June 30, 2011) (Seychelles).

\(^{433}\) *Id.*

\(^{434}\) The Kenyan High Court of Mombasa adopted a different approach, which was only recently rejected by the Court of Appeal of Nairobi. *See supra* notes 304-309 & 366-374, and accompanying text.

\(^{435}\) *Talenduic*, Judgment, ¶ 40.

\(^{436}\) *Gloria*, Judgment, ¶¶ 1, 5-10, Crim. Side No. 21 of 2011 (July 14, 2011) (Seychelles).

\(^{437}\) *Id.* ¶ 18.

\(^{438}\) *Id.* ¶¶ 25-26.

\(^{439}\) *Gloria*, Sentence, ¶ 6. A similar distinction was made in the *Galate* case, with a
was also seized pursuant to Section 65(7) of the penal code, which is worded nearly exactly the same as UNCLOS Article 105.\textsuperscript{440}

Perhaps the most fascinating instance of a case distinguishing an attempt from a frustrated attack is \textit{Draco},\textsuperscript{441} in which the pirates were thwarted in their attack before managing to fire any shots.\textsuperscript{442} The security guard of the \textit{Draco} fired 171 rounds into the air and water, successfully repulsing the pirate skiff for three or four hours before a European Union Naval Force helicopter arrived on the scene.\textsuperscript{443} The helicopter found two pirate skiffs and a whaler, and continued hovering overhead for about eight hours, photographing the scene and firing warning shots, until it was finally joined by its dispatching warship, the \textit{Canarias}.\textsuperscript{444} By the time the pirates were apprehended, they had discarded all weapons.\textsuperscript{445} Based on these facts, the court did not convict for piracy because there had been no act of “violence, depredation or detention;”\textsuperscript{446} nonetheless, the court held that there was sufficient evidence of intent to qualify as attempt under the penal code.\textsuperscript{447} The pirates were also convicted of operating the ship.\textsuperscript{448} The sentence was ten years for the operation of the ship and six years for the attempt, the two terms to run concurrently.\textsuperscript{449}

In sum, the Seychelles cases address two types of attempt. The first is attempted piracy \textit{jure gentium}, or any act of violence or depredation, regardless of success. The second type is attempted piracy under the Seychelles Penal Code, which is engaging in overt acts with the intent to commit piracy, even though there is not yet any violence.\textsuperscript{450} This latter form of attempt

\begin{itemize}
\item \textsuperscript{440} See \textit{id.} \textsuperscript{¶} 8.
\item \textsuperscript{442} \textit{Id.} \textsuperscript{¶¶} 4-6.
\item \textsuperscript{443} \textit{Id.} \textsuperscript{¶} 7.
\item \textsuperscript{444} \textit{Id.} \textsuperscript{¶¶} 8-10.
\item \textsuperscript{445} \textit{Id.} \textsuperscript{¶¶} 10-11.
\item \textsuperscript{446} \textit{Id.} \textsuperscript{¶¶} 23-24.
\item \textsuperscript{447} \textit{Draco}, Judgment, \textsuperscript{¶} 28.
\item \textsuperscript{448} \textit{Id.} \textsuperscript{¶} 31.
\item \textsuperscript{449} \textit{Id.} \textsuperscript{¶} 8.
\item \textsuperscript{450} Penal Code (Amendment) Bill, 2010, \textsuperscript{§} 65(3) (Seychelles) (amending Penal
is also punishable, although the sentence is less than for the former.\textsuperscript{451} The court appears to exercise universal jurisdiction over attempted piracy as defined by Sections 65(3) and 377 of the Seychelles Penal Code, which have no parallel in UNCLOS.\textsuperscript{452}

c. Common Intention and Piracy Action Groups

In \textit{Talenduic}, the court was faced with the problem of identifying the accused: none of the individuals who were arrested could be positively identified by any of the witnesses.\textsuperscript{453} Nevertheless, the court convicted the entire group based on circumstantial evidence connecting it to the attack.\textsuperscript{454} To support this decision, the court employed a new innovative terminology: because there was a “Piracy Action Group” (“PAG”) identified by witnesses and associated with an attack, there was sufficient evidence to convict each of the PAG’s members, even though no individual pirates could be identified.\textsuperscript{455} The court relied on the location and position of the PAG, the time since the attack, the lack of other PAGs in the vicinity, and the lack of hiding places, to conclude that the PAG as a whole was the same.\textsuperscript{456} The accused were convicted of a common intention or plan, since it was not clear how many had actually participated in the attack.\textsuperscript{457}

The \textit{Talenduic} case is not unique in using the common intention or plan. All charges of piracy in these cases are read in concert with Section 23 of the Penal Code, making every participant equally liable regardless of individual acts.\textsuperscript{458} Although almost all the cases use this evidence to prove common

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{452} Compare \textit{Draco}, Judgment, ¶ 30, with UNCLOS, supra note 16, art. 100-107.
\item \textsuperscript{453} \textit{Talenduic}, Judgment, ¶ 31, Crim. Side No. 75 of 2010 (June 30, 2011) (Seychelles) (“The bedrock of the defence case is that none of the witnesses could identify any of the accused persons in and or out of court nor place them at the scene.”).
\item \textsuperscript{454} See id. ¶ 37; \textit{Talenduic}, Sentence, ¶ 8.
\item \textsuperscript{455} \textit{Talenduic}, Judgment, ¶¶ 8, 28.
\item \textsuperscript{456} Id. ¶ 32.
\item \textsuperscript{457} Id. ¶ 37.
\end{itemize}
\end{footnotesize}
intent, *Talenduic* is unique because it uses PAG evidence to identify individual members of the group.\(^{459}\)

*Talenduic* and *Draco*, the two cases in which there are convictions for operation of a pirate ship, are instructive on the use of this circumstantial PAG evidence. *Talenduic* involved a vessel that had been taken over and used for acts of violence and piracy *jure gentium*; *Draco* did not.\(^{460}\) The UNCLOS provision and its parallel in Seychellois law do not require that the ship actually be used for piracy; rather, these provisions only require that those in control intend for it to be used for such a purpose.\(^{461}\) Thus, the *Draco* court inferred from circumstantial evidence of the attempt and the violence on the surveillance helicopter that “[c]learly, the accused were waiting to chance on other passing vessels and their participation in the operation of the ‘pirate ships’ as well as the whole venture was voluntary rather than involuntary, and for private ends.”\(^{462}\) Thus, all the circumstantial evidence concerning the use of the ship shows the intent of the crew, which in turn defines the intent of the ship.

d. Convictions for “Operation of a Pirate Ship” with No Evidence of Violent Attack

The most obvious cumulative precedent of the Seychelles cases is the heavily fact-based identification and usage of the PAG as a tool for circumstantial evidence.\(^{463}\) Thus, perhaps almost

\(^{459}\) See, e.g., *Draco*, Judgment, ¶ 19, 291 (using PAG evidence to show common intent).

\(^{460}\) Compare *Draco*, Judgment, ¶ 11, with *Talenduic*, Judgment, ¶ 6.

\(^{461}\) UNCLOS, *supra* note 16, art. 103; Penal Code (Amendment) Bill, 2010, § 65(3) (Seychelles) (amending Penal Code 1955, CAP. 73 (Seychelles)).

\(^{462}\) *Draco*, Judgment, ¶ 31.

\(^{463}\) *Jama*, Judgment, ¶ 52, Crim. Side No. 53 of 2011 (Jul. 25, 2012) (Seychelles) (on file with author)(“Judicial notice is taken of what sailors and experts in this field have stated regarding the composition or characteristics of a typical piracy action group.”). This development indicates the pragmatism of the court and closely parallels the increasing efficiency of law enforcement in the region, which is using sophisticated surveillance, photographic and video evidence, and databases of suspected vessels. See, e.g., *id.* ¶ 10-18 (describing the use of radar, photography, and video by Royal Navy and Norwegian Maritime Patrol Aircraft; the court carefully analyzed the video footage, and in fact most of the equipment that served as the basis of PAG evidence in this case was dumped prior to arrest and only observed on video). See Republic v. Dahir (“Happy Bird”), Judgment, ¶ 22-25, Crim. Side No. 7 of 2012 (July 31, 2012) (Seychelles) (on
inevitably, the court applied PAG evidence in two recent cases to prove that a *ship* was a "pirate ship," even though there was no attack, and to convict all on board for "operation of a pirate ship." 464

Although these cases progress one step closer to convicting on intent alone where legally no attack has begun, they both involve situations in which an arrest was initiated in response to a distress signal for piratical activity. In *Republic v. Mohamed Abi Jama & Six Others* ("Jama"), a PAG was spotted after an aborted attack on a British warship, the *Fort Victoria*, and a preemptive distress call from the Spanish fishing boat *Alakrantxu*. 465 The same PAG was spotted about an hour later with a whaler and one skiff. 466 The helicopter and a Norwegian Maritime Patrol Aircraft managed to capture the crew of the PAG dumping ladders and other equipment overboard. 467 By the time the crew of the whaler and the skiff were apprehended, no piratical equipment was found, except for a single AK-47 bullet, but no fishing equipment was found either. 468

In *Republic v. Liban Mohamed Dahir & Twelve (12) Others* ("Happy Bird"), a PAG was spotted, recorded, and photographed before any attack; about twenty-two hours later, an attack was launched on the *Happy Bird*. 469 Almost a day after this attack, the PAG from the first surveillance photos was arrested, but the captain of the *Happy Bird* was unable to identify the ships or any persons on board. 470 Since there was no conclusive evidence

file with author) (comparing "testimony of persons having had contact with a PAG," citing prior cases, and listing identifying factors); id. ¶ 43 (convicting on the basis that the accused in this case were members of a PAG).

464 See Jama, Judgment, ¶ 40-44 (noting several factors that comprise a PAG, location, nature of ships and formation, nature of equipment and flight from law enforcement, and carefully applying them to this case); id. ¶¶ 54-57 (concluding after lengthy deliberation on circumstantial evidence, the state of the law, and foreseeability, that in this case the crew of the ships were a PAG, and therefore guilty of operation of a pirate ship).

465 Jama, Sentence, ¶ 10.

466 Id. ¶ 10-14.

467 Id. ¶¶ 15-18 (describing dumping of ladders and other equipment).

468 Id. ¶¶ 24-25 (recounting that nothing of note was found aboard skiff, except one 7.62mm round not used by coalition forces).

469 Happy Bird, Judgment, ¶¶ 8-14, Crim. Side No. 7 of 2012 (July 31, 2012) (Seychelles).

470 Id. ¶¶ 15-17 (noting some circumstantial evidence based on location and
linking the PAG to the attack, the piracy charge was dropped and only the operation of a pirate ship charge remained. While the evidence captured was pronounced insufficient to support a piracy charge, the court found it was incompatible with any explanation other than guilt for operation of a pirate ship.

In *Jama*, the court was evidently conflicted, both in establishing its own legal basis for conviction and in protecting the rights of defendants. Ultimately, the court decided that the presence of all the “necessary indicia” of a PAG excluded any possibility other than guilt. Additionally, the court analogized to the usage of equipment articles in the slave trade as support for its conclusion that the status of a ship could be based on circumstantial evidence alone. According to the court, the purpose of such articles was “to provide the court with some measure of foreseeability.” Though the court acknowledged that no such equipment articles or possession offenses were currently in place for piracy convictions, these articles nonetheless provided the court with a strong theoretical basis for conviction on intent alone. In the case of hooked ladders—which had no lawful purpose—the court held that this argument was even

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471 Id. ¶¶ 37-38.
472 Id. ¶¶ 19-25 (noting evidence found on board skiff: 11 AK-47 variant rifles, 2 pistols, 1 Rocket Propelled Grenade Launcher, a significant amount of ammunition for all 14 weapons, ammunition carrying belts, military body webbing, 1 pineapple grenade, 1 anti-personnel grenade, 1 suspected Improvised Explosive Device (IED), 2 hooked boarding ladders, a large amount of fuel, a life jacket taken from the Fairchem Boger, a vessel known to have been captured by pirates in August 2011, 2 GPS units, an outboard motor for a skiff, cell phones, food and other personal property which, in combination with general characteristics of a PAG and lack of fishing equipment, was conclusive for the Court); id. ¶¶ 38-40, 43-44 (convicting).
473 *Jama*, Judgment, ¶ 48 (noting few results from research, and no explicit legislation); id. ¶ 49 (suggesting comparison to equipment articles and citing advisory scholarly articles); id. ¶ 50 (arguing for proper current interpretation of “operation of a pirate ship”).
474 Id. ¶¶ 53-56 (excluding any inference other than guilt, and noting that crew “had gone beyond mere preparation”).
475 Id. ¶ 49.
476 Id.
477 Id. ¶¶ 47-48 (“The Seychelles has not yet expressly or directly legislated for such eventuality in piracy matters.”).
The court also carefully avoided the problem of convicting for a crime that does not require intent.\footnote{Id. ¶ 50.}

The court did not address the possibility that the unique international status of piracy should not apply to inchoate offenses. The question not raised, and which is still in need of resolution, is whether the jurisdiction itself should be void in the case of inchoate offenses, since prosecution is not foreseeable to defendants themselves. The court skipped this question and established a new principle designed to "eliminate loopholes in the law."\footnote{Jama, Judgment, ¶ 56, Crim. Side No. 53 of 2011 (Jul. 25, 2012) (Seychelles) (on file with author); see supra note 186; infra note 484.}

Significantly, universal jurisdiction is not addressed at all in Jama; the court apparently believed this issue had been resolved in earlier cases. A possible conclusion is that the court sees jurisdiction as proper anywhere in the high seas, in all cases where a potential piracy crime could be committed. The issue for the court was only sufficiency of intent evidence within domestic criminal law: since the PAG evidence is sufficient to prove intent for criminal law purposes, it is sufficient to resolve universal jurisdiction and attendant problems of international law as well.

Undoubtedly, since the Supreme Court of Seychelles is the main hub of piracy trials,\footnote{Jama, Judgment, ¶ 58.} its judicial practice will also influence enforcement practices, leading to the arrest of PAG formations that are merely cruising. In effect, this will produce the same result as if equipment articles had been enacted by treaty or international agreement. Since UNCLOS has not previously been applied in this way, and the actus reus and mens rea of the offense are different from core piracy, the court is thus creating new law.\footnote{McLeod, supra note 380.}

\footnote{Note that one problem with this development would relate to involuntary induction of the accused into pirate crews. Currently the Seychelles Penal Code s. 23 places equal responsibility on all crew members, but this should not be sufficient to overcome the fact that some crew members should not be subject to jurisdiction at all. Both Jama and Happy Bird involved minors who were given lesser sentences. See Jama, Sentence, ¶ 6 (sentencing minor over 14 but under 18 to serve two as opposed to seven years); Happy Bird, Judgment, ¶ 16, Crim. Side No. 7 of 2012 (July 31, 2012) (Seychelles) (sentencing minors to two and a half years, as opposed to twelve years). Happy Bird additionally involved a 12 year-old, who was conditionally released, id. ¶ 553.}
The Abandonment Defense

If the PAG formation is sufficient for conviction, are there any limits on its application? The court only addresses the cases standing before it, but one reason the court may not have addressed the jurisdictional international law question is that it assumes jurisdiction is automatic for any PAG on the high seas.\(^{483}\) Thus, any PAG on the high seas is potentially exposed to conviction. This jurisdictional issue could lead to over-conviction, and raises the question of whether there should be any limits to convictions based on a future status of the ship. It is quite possible that a simple practical limitation on the liability of a PAG will be the consideration of whether there was an imminent attack and active distress calls, as suggested by the facts of the cases above.\(^{484}\) These and other practical factors such as specific locations or the outfitting of skiffs may be implied judicial limits on what is legally defined as a PAG. The court suggests that imminent attack may be crucial and that some threshold was crossed.\(^{485}\)

Another judicial option is an adoption of the “abandonment defense,” which could potentially allow for any PAG that has not yet commenced an attack to voluntarily surrender itself to law enforcement, perhaps register in a database, and leave unpunished.\(^{486}\) The abandonment defense was explicitly included in the comments of the *Harvard Draft* and was raised as

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15, and an 11 year-old who was released immediately, *id.* ¶ 6. In assessing the severity of the sentences, the court noted the severity of recruiting child soldiers, but another aspect of the problem is that minors may legitimately claim they were not voluntary participants. In this case, one of the adults testified on his own behalf that he was forcibly drugged and induced to board the ship; this testimony did not fit the facts, especially after the accused threatened to shoot the prosecutor. *Compare Happy Bird, Judgment*, ¶¶ 30-31, *with Happy Bird, Sentence*, ¶ 13. In a future case, perhaps such testimony from minors would be more credible. *See also* Sonia Messaoudi, *Child Pirates: A Key Issue for Respecting Child’s Rights and Halting Piracy*, COMMUNIS HOSTIS OMNIUM, Oct. 23, 2012, http://piracy-law.com/2012/10/23/child-pirates-a-key-issue-for-respecting-childrens-rights-and-halting-piracy/.

483 See generally supra notes 91-101 and accompanying text.

484 See *Jama, Judgment*, ¶ 56; *see also Happy Bird, Judgment*, ¶ 11.

485 See *Jama, Judgment*, ¶ 56; *see also Happy Bird, Judgment*, ¶ 11.

486 Note that in *Happy Bird*, for example, another known suspect ship the *Liquid Velvet* was being escorted back to Somalia when the distress call was heard. *See Happy Bird, Judgment*, ¶ 15.
a possibility by the International Law Commission. The normative question is: should pirates who enter the high seas with all equipment necessary for the commission of piracy be encouraged to abandon such a purpose and give themselves in? Or should remorse only be considered in mitigation? Some have suggested that, by the logic of the court, all on board are guilty of a completed offense the moment a PAG enters the high seas with intent to commit piracy, and there is no option for abandonment after that. If this assessment of the court’s jurisprudence is correct, the bright line rule should be re-examined in future years to determine whether it is in fact the best deterrent for piracy.

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487 See Harvard Draft Convention on Piracy, supra note 69, at 823 ("If the pirate ship has made no piratical attack, its piratical character will be dissipated by a definite abandonment of piratical purposes."). The Harvard Draft thus emphasizes that “when it is devoted” is the operative language in the text, and excludes ships whose piratical purpose has been abandoned. This use of “when” is also the language that the ILC adopted in the Draft Regime on the High Seas in 1955, art. 24, [1955] 2 Y.B. INT’L L. COMM’N 25 ("[W]hen it is devoted by the persons in dominant control to the purpose of committing an act. . ."). The ILC comments also suggest an adoption of the abandonment defense because the right of seizure in Article 18 is extended to vessels which have committed piracy but not those that intend piracy. Id. at 26. The Belgian government suggested using a broader wording, to include all ships with an intended piratical use. See [1956] 2 Y.B. INT’L L. COMM’N 39. This language was ultimately adopted by the Rapporteur, in a text that closely mirrors UNCLOS. Id. at 19. However, none of the state parties discussed the abandonment defense; they were only concerned with broadening the scope of “pirate ship” to include future intent. This leaves the question open.

488 I am extremely grateful to Matthew Williams, law clerk to Judge Duncan Gaswaga, Supreme Court of the Seychelles, for his correspondence with me on this issue. In his personal assessment of Seychelles law and the practice of the court, once a ship has entered the high seas with equipment (especially hooked ladders which are suited only to one purpose) and circumstances indicating an intent to commit piracy, the offense would be complete, and abandonment would be considered in mitigation, but not accepted as an affirmative defense. He also noted that “any act of voluntary participation” legally includes any act at all, suggesting the offense is complete at an early point. Furthermore, Mr. Williams noted that abandonment is unlikely to be considered “voluntary” when it occurs in the face of a warship; however some other hypothetical scenarios of voluntary abandonment might be considered. E-mail from Matthew Williams, Law Clerk to Judge Duncan Gaswaga, to author (July 24-26, 2012) (on file with author).
5. **Interim Conclusion: The Crime of “Operation of Pirate Ship” Should not Be Prosecuted where there is No Violent Attack**

Although the research on piracy prosecutions is based only on public sources, it shows several trends. First, of all the non-regional states, only the Netherlands has exercised universal jurisdiction over Somali pirates. Of regional states, Yemen has accepted some transfers based on universal jurisdiction, though the majority of transfers have been by Kenya and Seychelles. The vast majority of prosecutions are in areas of Somalia and are still under laws that do not reflect UNCLOS. If the work of the UNODC continues as planned, there will be a number of regional states with domestic crimes of piracy that implement UNCLOS provisions and prosecute universal jurisdiction cases within several years.

Seychelles, which has become a hub of piracy trials, has shown that it will prosecute pirates who intend piracy, even though they have not yet begun an attack. Similarly, the Netherlands, also a center of piracy prosecutions, has laws that criminalize service as master or crew of a pirate ship. However, prosecutors rarely pursue cases involving only evidence of intent. Other states show little or no will to prosecute where there is no victim ship. While one main reason for the infrequency of this state practice may be the simple problem of proving intent, it may also reflect the state of customary

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490 See, e.g., Dutton, *Impunity Gap,* supra note 251, at 1134 (discussing how many cases have been transferred to Kenya).

491 See id. at 1128.

492 McLeod, *supra* note 380.


494 Id.

495 *Id.*

496 See *c.f.* Kontorovich, *Piracy Analogy,* *supra* note 47, at 229 (explaining that a directly injured nation might have less incentive to prosecute when pirates commit robbery as opposed to murder).
international law and the states' accepted interpretation of UNCLOS. This could suggest that the offense of UNCLOS Article 101(b), "operation of a pirate ship," is currently not applied to include universal jurisdiction over mere conspiracy and preparatory acts as a punishable crime. Moreover, the current practice of catch-and-release is especially common with regard to pirates for whom there is no evidence of participation in an attack or violent act. This practice may be evidence of a custom of non-prosecution where pirates are apprehended simply due to operating a ship and planning for piracy.

If regional states were to start enacting equipment articles, defendants could argue against the practice based on lack of foreseeability of prosecution or on accessibility of these laws, both of these defenses raise the ultimate issue concerning problems of legality in universal jurisdiction prosecutions of piracy. The prosecution of pirates for mere cruising, while potentially supportable under UNCLOS, is not widely supported by state practice. Since it falls on the fringes of the core definition of piracy under UNCLOS, it is not sufficiently established as a customary criminal law norm applicable to individuals. For these reasons, a municipal prosecution on the basis of this provision would be contrary to nullum crimen sine lege.

On the other hand, the recent decisions of the Supreme Court of Seychelles are the functional equivalent of enacting equipment articles. They implicitly understand UNCLOS Article 101(b) as a mode of liability and represent a developing practice to broaden the modes of liability for the crime of piracy, echoed in current

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497 Seychelles is in fact a pioneer in this regard, and is addressing issues for which there is little precedent. E-mail from Judge Duncan Gaswaga, Seychelles Supreme Court, to author (Mar. 27, 2011) (on file with author).

498 See Eugene Kontorovich, International Legal Responses to Piracy off the Coast of Somalia, 13 AM. SOC'Y OF INT'L L. INSIGHTS, Feb. 6, 2009, http://www.asil.org/insights090206.cfm ("The dominant approach has been to avoid capturing pirates in the first place, or, if captured, releasing the pirates without charging them with a crime.") [hereinafter Kontorovich, International Legal Responses].


500 See, e.g., Kontorovich, Equipment Articles, supra note 6, at 1-2.

501 See Kontorovich, International Legal Responses, supra note 498.
precedent in the Netherlands and the United States on attempted piracy, as well as in some of the other state cases mentioned above. The potential consequences are far-reaching and could lead to a spate of convictions to clear the seas of pirates before they have committed piracy.

VI. Conclusions

Universal prosecutions of piracy are, in many ways, a modern development. Since 2006, the number of universal jurisdiction cases in regionally affected states in East Africa has at least doubled the number of universal jurisdiction cases in the 300 years before then. Universal jurisdiction is currently exercised primarily by regionally affected states, and the U.N. bodies dealing with the crime of piracy are agencies that deal with other transnational crimes such as drugs and money laundering, not state-sponsored human rights offenses. If piracy is in fact quite different from human rights offenses, this development would signal a new regime that is better equipped to deal with transnational crimes such as drug trafficking and money laundering in a wider jurisdictional interpretation of the "protective principle" for offenses that require broad cooperation and for which there is a broad common interest in prosecution but traditional bases of jurisdiction do not provide a sufficient nexus for any one state. Historically, this is perhaps the best role for universal jurisdiction.

The strengths of universal jurisdiction over piracy are, in some ways, also its weaknesses. Since pirates are not within the domestic jurisdiction of any state and prosecution does little to interfere with sovereignty, pirates are also not on notice of any state’s law. Since piracy is not a state-sponsored crime, it is importune to demand that pirates know treaty law, and it is also just to interpret existing international legal instruments in their favor as laymen.

These aspects of piracy may create issues of legality where pirates are prosecuted for crimes that fall under the wider definition of piracy under UNCLOS but are not established in state

502 Id.
504 See, e.g., Kontorovich, Equipment Articles, supra note 6, at 1-2.
practice, such as “operation of a pirate ship.” Lower-level pirates, as opposed to kingpins, may also be inducted into crews involuntarily or not intend violent piracy. This is especially true of minors. By default, even without any international treaty or agreement, regional states are building a prosecution regime similar to equipment articles and establishing that states such as the Seychelles are resolved to prosecute in cases of simply cruising in “pirate ships,” without any violence yet committed, according to the broader reading of UNCLOS. 505 Such a development is not only an evidentiary presumption under local statutes, but can become, in effect, a gradual change in the customary international law of piracy.

505 See, e.g., Jama, Judgment, ¶ 52, Crim. Side No. 53 of 2011 (July 25, 2012) (Seychelles); Happy Bird, Judgment, Crim. Side No. 7 of 2012 (July 31, 2012) (Seychelles) (punishing for the offense of “operation of a pirate ship.”).
Table 1: National Piracy Laws and their Incorporation of Universal Jurisdiction

<table>
<thead>
<tr>
<th>Law of Nations (some with UJ)</th>
<th>United States, New Zealand, Canada, Singapore, Malaysia, Israel, Bahamas</th>
</tr>
</thead>
<tbody>
<tr>
<td>Incorporating Treaty Commitments (with UJ)</td>
<td>Bulgaria, Poland, Finland, Oman, Czech Republic, Iran, Latvia, China, France</td>
</tr>
<tr>
<td>UNCLOS (mostly with UJ)</td>
<td>South Africa, Malta, United Kingdom, Kenya, Tanzania, Cyprus, Liberia, Mauritius, Australia, Belgium, Seychelles, Somaliland</td>
</tr>
<tr>
<td>Defining Piracy without UNCLOS, but UJ</td>
<td>Thailand, Japan, Greece, Estonia, Ukraine, Germany, Netherlands, Italy, Suriname</td>
</tr>
<tr>
<td>Defining Piracy without UJ</td>
<td>Sri Lanka, Denmark, Turkey, South Korea, Georgia, Russia, Albania, Argentina, Philippines, Ecuador</td>
</tr>
<tr>
<td>Other State Offenses</td>
<td>Austria, Norway, Brazil, United Arab Emirates, Azerbaijan, Yemen, India, Cuba, Jamaica</td>
</tr>
<tr>
<td>No Category</td>
<td>Grenada, Zambia</td>
</tr>
</tbody>
</table>

506 See Dutton, Impunity Gap, supra note 251, at 1141 (citing National Legislation on Piracy, U.N. DIVISION FOR OCEAN AFFAIRS & THE LAW OF THE SEA (last updated Oct. 26, 2011), http://www.un.org/Depts/los/piracy/piracy_national_legislation.htm [hereinafter National Legislation]). Footnotes have been added to address a number of states not included in Professor Dutton’s survey sample or whose law may have changed since the above table was prepared.

507 These states would only prosecute piracy based on the direct application of an international criminal norm—either a treaty obligation (if UNCLOS creates a criminal norm) or the customary crime of piracy—which might be narrower than the UNCLOS definition (for example excluding universal jurisdiction over acts in 101(b) and 101 (c), and possibly even attempt according to U.S. precedent). Bulgaria, Finland, Czech Republic, Latvia, and China would likely only prosecute pursuant to a treaty obligation, i.e., if it were determined that UNCLOS defines a crime. The Bulgarian Penal Code has no specific provisions on piracy, but suggests that it would apply the definition in UNCLOS Article 101 as a criminal offense based on the treaty. Letter from the Permanent Mission of the Republic of Bulg. to the U.N. to the Division for Ocean Affairs & the Law of the Sea (Feb. 16, 2010), available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/BGR_penal_code.pdf. Finland likewise has no specific provisions on piracy, but would prosecute an international offense “based on an international agreement binding on Finland,” although it is less clear if that offense would be considered to be an act defined in UNCLOS Article 101. Letter from Permanent Mission of Finland to the U.N. to the Division for Ocean Affairs & the Law of the Sea (Feb. 19, 2010), available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/FIN_crimal
Evolving Definition of Piracy


See Loi relative à la lutte contre la piraterie maritime [Piracy Act] of Dec. 30, 2009, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Jan. 14, 2010, art. 3, § 1, (reflecting the UNCLOS definition of piracy almost verbatim, but specifically including acts of preparation and attempt in paragraph (c) of the definition).

See infra note 260 and accompanying text.

See Law on Combating Piracy, Law No. 52/2012 (Piracy Law), 2012 (Somaliland).

States in this category are not always clear on their application of universal jurisdiction or their relationship to UNCLOS. Estonia has a category of jurisdiction for offenders who commit a crime and later become citizens of Estonia if there is dual
criminality or no penal authority in the place of commission. This category would include core international crimes, but it may also include other crimes like murder, robbery, or any other penal offense. Additionally, crimes are punishable if they are "punishable according to an international agreement binding on Estonia." Piracy appears to be a non-international crime in the code. See Estonian Legislation on Piracy, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/EST_legislation_piracy.pdf. Greece refers to piracy jure gentium in its general part of the penal code, but in the Greek Code on Public Maritime Law § 215, it applies a definition that seems to use the UNCLOS definition of pirate ship as a ship intended for piracy, but only including 101(a) type violent acts. Other types of complicity may be punishable under other provisions. Additionally, Greece appears to require intention to rob. See Letter from Hellenic Republic Ministry of Mercantile Marine, Aegean & Island Policy to IMO Secretariat (May 19, 2009), available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/GRC_piracy.pdf. Thailand’s law bears an unclear relationship to UNCLOS, only explicitly includes violent acts of piracy and allows for jurisdiction over “[a]ny person who commits any offense under this Act outside the kingdom [to] be punished in the kingdom”; however, this is not necessarily universal jurisdiction. Act on Prevention & Suppression of Piracy, 1991, c. 10, § 28 (Thai.). Ukraine has a definition of piracy which diverges from UNCLOS, allowing piracy to be committed on rivers, but suggests that universal jurisdiction might be proper in cases in which it is allowed under UNCLOS, or if Ukrainian citizens are harmed. See Criminal Code of Ukraine, 2001 (Ukraine). The Netherlands has a piracy law which was adopted in 1881, significantly predating UNCLOS, which allows for universal jurisdiction pursuant to section 4 of the criminal code. See Kenneth Manusama, Prosecuting Pirates in the Netherlands: The Case of the MS Samanyolu, 49 MIL. L. & L. OF WAR REV. 141, 146 (2010). Although the law significantly predates UNCLOS it was considered to satisfy the requirements under UNCLOS. See A.H.A. Soons & J.N.M. Schechinger, THE NETHERLANDS COUNTRY REPORT FOR THE CIL RESEARCH PROJECT ON INTERNATIONAL MARITIME CRIMES, 12-13 & n.34 (2011), available at http://cil.nus.edu.sg/wp/wp-content/uploads/2010/10/Country-Report-Netherlands.pdf (discussing the universal jurisdiction in the Netherlands); id. at 16-17 (discussing piracy legislation, and noting it was found to fulfill obligations under UNCLOS). The Netherlands has allowed for universal jurisdiction over pirates in several cases. See Samanyolu Judgment, supra note 197, at 2 (“Firstly, it must be noted that the legislature of the Netherlands has vested so-called universal jurisdiction for criminal proceedings in cases of piracy.”); SG March 2012 Summary, supra note 307, at 67-68 (listing and summarizing cases).

Japan has recently enacted a law that punishes piracy but does not correspond clearly to the UNCLOS definition of piracy. The definition of piracy has six subsections, which can be interpreted as an itemization of the acts in UNCLOS Article 101: four types of acts of violence or depredation, referred to as "acts of piracy"; and two types of preparation "for the purpose of committing acts of piracy." Attempt is punished only for the first four "acts of piracy." Breaking into a ship, as well as operating a ship in close proximity of a victim ship, both receive lesser punishment, and attempt of these crimes is not punished. Finally, preparing weapons and operating a ship for the purpose of piracy is a lesser offense, and punishment will further be reduced for a voluntary surrender. See Ocean Policy Research Foundation [OPRF], Law on Punishment of and Measures Against Acts of Piracy, art. 2, available at
See MICHAEL BOLANDER, THE GERMAN CRIMINAL CODE: A MODERN ENGLISH TRANSLATION § 6(3) (2008) (allowing jurisdiction over internationally protected interests, including attacks on air and maritime traffic); id. § 316c (allowing jurisdiction over attacks on air and maritime traffic). See INTERNATIONAL FOUNDATION FOR THE LAW OF THE SEA, 2009 SUMMER CONFERENCE REPORT 6, http://www.iflos.org/media/40696/conference%20report.pdf (describing a lecture by Dr. Ewald Brandt, Head of Public Prosecutor’s Office, Hamburg discussing Germany’s exercise of jurisdiction over Somali pirates); SG March 2012 Summary, supra note 507, at 32.

Suriname punishes the act of serving as captain or sailor on a pirate ship, like the Netherlands, and allows for universal jurisdiction. See Shipping and Aviation Crimes, 1971, tit. XXIX, art. 444 (Surin.), available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/SUR_national%20legislation_piracy.pdf. Italy has also emphasized that it will assert universal jurisdiction over piracy. See Maritime Code, 2002, § 1, art. 1135, at 3 (It.) (implying in the statute that there is no limit to its jurisdiction).


Argentina has legislation on piracy that does not explicitly provide for universal jurisdiction. See Letter from the Embassy of the Republic of Arg. to the U.K. of Gr.

518 The Republic of Philippines also defines piracy as a conventional crime and does not appear to assert universal jurisdiction. See *Revised Penal Code*, Act. No. 3815, arts. 122-23 (Phil.).

519 Countries in this category have other conventional offenses that cover piracy, but some of them may have jurisdiction pursuant to treaty or other international law. See, e.g., Letter from the Permanent Mission of Austria to the U.N. to the Secretary-General of the U.N., at 1 (Feb. 8, 2010), available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/AUT_criminal_code.pdf (“Most crimes relating to maritime piracy can be subsumed to crimes enumerated in the Austrian Criminal Code.”). Norway states that its Penal Code potentially extends jurisdiction for armed robbery to offenses committed by foreigners anywhere, but that practical considerations would limit such prosecutions. See *Code Civil* [C. CIV.] art. 12(4)(i), arts. 266-69 (Nor.), available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_penal_code.pdf (explaining a claim to universal jurisdiction in certain cases); Letter from Tonje Sund, Acting Deputy Director General to the IMO, at 2 (Sept. 25, 2009), available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_piracy_summary.pdf (noting that jurisdiction will be only be taken “after thorough consideration if the King (in council) so decides”). Jamaica appears to extend universal jurisdiction to terrorism offenses but does not specifically address piracy. See *Terrorism Prevention Act* 2003, art. 46 (Jam.), available at https://www.unodc.org/tldb/pdf/Jamaica_Terrorism_Prevention_2003.pdf (“For the purpose of conferring jurisdiction, any offence committed outside of Jamaica shall be deemed to have been committed in any place in Jamaica where the offender may for the time being be, if, had such offence been committed in Jamaica, the offence would be a terrorism offence.”).

520 See Al Qadhi, *supra* note 258 (explaining that Yemen does not have a piracy law, but considers it to be a form of banditry and has also tried it as terrorism); Mashhood A. Bashirin, *Effective Legal Representation in “Shari’ah” Courts as a Means of Addressing Human Rights Concerns in the Islamic Criminal Justice System of Muslim States*, 11 Y.B. ISLAMIC & MIDDLE E. L. 135, 145-47 (2004) (discussing that for countries applying Shari’ah criminal code, if maritime piracy is assimilated to brigandage or highway robbery, it would become a hudud offense and be subject to prescribed fixed and invariable punishment as provided by Islamic law, possibly raising human rights concerns).


522 These countries’ piracy legislation were not classifiable.
### Table 2: Pirates Prosecuted or Awaiting Prosecution in Twenty Countries
(sorted by region, then by the number of pirates held)

<table>
<thead>
<tr>
<th>Country</th>
<th>Held</th>
<th>Number Convicted</th>
<th>Regionally Affected State? (Signatory of DCoC)</th>
<th>UNC-LOS?</th>
<th>Universal Jurisdiction?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Somalia – “Puntland”</td>
<td>290</td>
<td>Approx. 240</td>
<td>(Nationals?)</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Somalia – “Somaliland”</td>
<td>35</td>
<td>All, including 17 transferred from Seychelles</td>
<td>(Nationals?)</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Somalia – South Central</td>
<td>18</td>
<td>Status of trial unclear</td>
<td>(Nationals?)</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Kenya</td>
<td>137</td>
<td>74, 17 acquitted, 10 completed sentence</td>
<td>Yes</td>
<td>After 2009</td>
<td>Yes</td>
</tr>
<tr>
<td>Yemen</td>
<td>123</td>
<td>123; 6 acquitted</td>
<td>Yes</td>
<td>No</td>
<td>Some</td>
</tr>
<tr>
<td>Seychelles</td>
<td>105</td>
<td>98; 2 juveniles repatriated to Puntland</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Maldives</td>
<td>41</td>
<td>Awaiting deportation in absence of a law under which to prosecute</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Oman</td>
<td>32</td>
<td>25</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Madagascar</td>
<td>12</td>
<td></td>
<td>Yes</td>
<td>?</td>
<td>?</td>
</tr>
<tr>
<td>Country</td>
<td>Held</td>
<td>Number Convicted</td>
<td>Regionally Affected State? (Signatory of DCoC)</td>
<td>UNC-LOS?</td>
<td>Universal Jurisdiction?</td>
</tr>
<tr>
<td>-------------------------</td>
<td>------</td>
<td>------------------</td>
<td>-----------------------------------------------</td>
<td>----------</td>
<td>------------------------</td>
</tr>
<tr>
<td>United Republic of Tanzania</td>
<td>12</td>
<td>6</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>United Arab Emirates</td>
<td>10</td>
<td></td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Comoros</td>
<td>6</td>
<td></td>
<td>Yes</td>
<td>?</td>
<td>?</td>
</tr>
<tr>
<td>India</td>
<td>119</td>
<td></td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Netherlands</td>
<td>29</td>
<td>19</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>United States of America</td>
<td>28</td>
<td>17</td>
<td>No</td>
<td>Yes (Law of Nations)</td>
<td>No</td>
</tr>
<tr>
<td>Italy</td>
<td>20</td>
<td></td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>France</td>
<td>18</td>
<td>8 (5 under appeal), 3 acquitted, 1 completed sentence</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Germany</td>
<td>10</td>
<td>10</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Malaysia</td>
<td>7</td>
<td></td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Republic of Korea</td>
<td>5</td>
<td>5</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Japan</td>
<td>4</td>
<td></td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Spain</td>
<td>8</td>
<td>2</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Belgium</td>
<td>2</td>
<td>1</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Total</td>
<td>1071</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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from Combined Task Force to Intertanko which states that pirates do not have to be caught in the act of an attack to be prosecuted, as a response to “incendiary piracy capture-and-release story”); Michelle Wiese Bockmann, *Pirate Operations Disrupted as Second Mothership Captured*, LLOYD'S LIST, Feb. 16, 2011, at 2 (noting pirates released because “they were not committing an act of piracy”).

This column is used to assess the level of prosecutions in regional states as opposed to non-regional states. An arbitrary definition of “regional” is used, based on the signatories of the original Djibouti Code of Conduct. See IMO, *Protection of Vital Shipping Lanes*, Annex, at 4, IMO Doc. C 102/14 (Apr. 3, 2009), available at http://www.imo.org/OurWork/Security/PIU/Pages/Signatory-States.aspx. “Nationals” is used to emphasize that prosecutions in Somalia itself could potentially be handled under traditional criminal frameworks, since the perpetrators are nationals.

This field denotes whether the prosecution was under a direct application of UNCLOS, or a national implementation that closely mirrors its provisions, using the same language.

This column is based on explicit assertions of universal jurisdiction by the court, or an assessment of the nationality of the victims and perpetrators.


Somaliland has introduced a new bill as of March 2012 which will apply an UNCLOS-based definition, and universal jurisdiction. See supra note 511.


On November 5, 2012, 15 more pirates were convicted for hijacking an Indian oil tanker, bringing the total number of convictions to 98. *See Press Release*, United States Department of State, http://www.state.gov/r/pa/prs/ps/2012/11/200232.htm.

The Omani trials involved pirates who attempted attacks while at port in Oman,

533 The Tanzanian case apparently was prosecuted on the basis of the new law, but did not involve universal jurisdiction since the pirates were captured in Tanzanian waters. See Roger L. Phillips, Tanzania — A Case Study, COMMUNIS HOSTIS OMNIOUM, Mar. 3, 2011, http://piracy-law.com/2011/03/03/tanzania—a-case-study/; supra note 262.


535 See supra note 521 (stating that the new law will provide for an UNCLOS-based definition of piracy and universal jurisdiction).


537 Although German law may allow for universal jurisdiction, Germany generally prefers not to exercise it. See sources cited supra note 541; M. Gebauer, H. Knaup & Marcel Rosenbach, First Trial of Somali Pirates Poses Headache for Germany, SPIEGEL ONLINE INTERNATIONAL, Apr. 20, 2010, http://www.spiegel.de/international/world/0,1518,689745,00.html.


539 South Korea has a law of piracy that differs from UNCLOS and is limited to nationals. See Kim & Lee SOUTH KOREA’S COUNTRY REPORT, supra note 516, at 6-7.


541 Spain’s doctrine of absolute universal jurisdiction has been a very contentious subject. As a result, a new bill was passed on November 5, 2009 limiting the jurisdiction of Spanish courts for all international crimes (including piracy) to cases in which the perpetrator is present on Spanish soil, the victims are Spanish, or there is some demonstrated relevant link to Spain, and no other state or international tribunal asserts