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Crime upon the Sea: Reshaping American Jurisprudence on International Piracy

Ta'Ronce Stowes

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CRIME UPON THE SEA: RESHAPING AMERICAN JURISPRUDENCE ON INTERNATIONAL PIRACY

Ta'Ronce Stowes

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I. INTRODUCTION

Ironically, piracy needs no introduction. Piratical episodes have burdened maritime fleets throughout the world since the reign of the seventeenth-century Vikings.¹ Beginning in the late-eighteenth-cen-

1. *Piracy at Sea*, N.Y. TIMES, Feb. 24, 2011, http://topics.nytimes.com/top/reference/timestopics/subjects/p/piracy_at_sea/index.html?scp=1&sq=somali%20piracy&st=cse [hereinafter *At Sea*].

tury, Congress enacted a series of laws that created criminal remedies against general piracy *as defined by the law of nations*.² One of the first Supreme Court decisions to interpret American piracy laws was the 1820 case of *United States v. Smith*, in which the Court held that robbery at sea constituted piracy.³ Nearly 200 years have passed since the United States courts made a thorough reexamination of our laws that govern the prosecution of maritime crimes,⁴ and that is where the issue at hand lies. This note demonstrates that the crime of general piracy implicates an expansive body of rules. The law of nations has naturally broadened in scope regarding the current definition of piracy. Throughout the duration of this note, it is important to bear in mind that United States Code on general piracy is inseparable from the law of nations at all points in time.⁵

Recent events are forcing federal district court judges to determine how to properly adjudicate the uproar of modern-day piracy.⁶ Within the past twenty years, piratical encounters, specifically those spawning around the Horn of Africa, have caught global attention.⁷ After the fall of the Somali government in 1991, seagoing vessels sailing near the Gulf of Aden found themselves at the mercy of sea plunderers.⁸ By early 2011, the Obama Administration authorized defense tactics to fend off perpetrators against American vessels, and in 2006, Congress enacted 18 U.S.C. § 1651 to criminalize pirates as defined under the law of nations.⁹

Recent cases from the Eastern District of Virginia, in attempting to interpret the scope and extent of section 1651 pursuant to the law of nations, created a conundrum upon which the overarching issue of this note is based. In *United States v. Said*, Judge Jackson main-

2. *United States v. Hasan*, 747 F. Supp. 2d 599, 612-14 (E.D. Va. 2010) (outlining the Act of Apr. 30, 1790, § 8, 1 Stat. 112 and Act of March 3, 1819, ch. 77, 3 Stat. 510).

3. *United States v. Smith*, 18 U.S. 153, 163 (1820).

4. *See id.*; *see also Hasan*, 747 F. Supp. 2d 599.

5. *See* 18 U.S.C. § 1651 (2011) (explaining the “crime of piracy as defined by the law of nations”).

6. *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (holding that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today).

7. Q&A: *What do you do with a captured pirate?*, BBC NEWS, Jan. 25, 2011, www.bbc.co.uk/news/world-africa-11813168 [hereinafter Q&A].

8. *Id.*

9. 18 U.S.C. § 1651 (2006); Peter Grier, *Somali pirates: Do Shootings of Four Americans Point to Armed Escalation?*, CHRISTIAN SCI. MONITOR, Feb 22, 2011, www.csmonitor.com/USA/2011/0222/Somali-pirates-Do-shootings-of-four-Americans-point-to-armed-escalation [hereinafter *Escalation*].

tained the “robbery at sea” requirement articulated in *Smith*¹⁰ – the court found that section 1651 was inapplicable where defendants assaulted a United States vessel without physically taking property from the ship.¹¹ In contrast, merely two months later, the same court in *United States v. Hasan*, under a different bench, recognized that the offense of general piracy connotes a non-comprehensive scope of acts.¹² In the presiding Judge Davis’s opinion – with respect to the recent threats against American vessels off the Horn of Africa¹³ – federal courts must review piracy cases with broad deference to the widespread nature of contemporary piracy.¹⁴

This note explores the latter reasoning to demonstrate why the *Said* decision, which was based upon *Smith*’s obsolete guidance, fails to advance an accurate definition of general piracy. Section II traces the origin of United States authority to define and punish piracy and illustrates the reach of that authority vis-à-vis international customary law. The third section outlines the evolution of the Supreme Court’s precedent regarding the definition of piracy and analysis of the law of nations. This timeline includes legislative enactments, Supreme Court case law, and persuasive foreign authority and literature that further support the movement towards broadening the construction of contemporary piracy laws. Finally, section IV reviews the *Said* court’s decision, in light of the most-current law of nations on general piracy, to highlight the errors in the court’s reasoning.

II. BACKGROUND

A. *Origin of Piracy*

For centuries, the international community has perceived pirates as *hostis humani generis*: enemies of all mankind.¹⁵ Historically, pirates are considered robbers at sea.¹⁶ They attack seagoing vessels

10. *United States v. Said*, 757 F. Supp. 2d 554, 567 (2010).

11. *Id.*

12. *Hasan*, 747 F. Supp. 2d at 629-30.

13. *At Sea*, *supra* note 1.

14. *Hasan*, 747 F. Supp. 2d at 630 (noting courts recognize the “modern international consensus definition of general piracy” which an overwhelming majority of nations have accepted).

15. *Hasan*, 747 F. Supp. 2d at 602 (citing Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 *Notre Dame L. Rev.* 139 (2004) [hereinafter *Implementing Sosa*]).

16. *Smith*, 18 U.S. at 163.

both within and beyond national boundaries, thus causing havoc to the dismay of any seagoing vessel they encounter.¹⁷

The term “piracy” denotes a practice that has recently become an epidemic that is far more convoluted than seventeenth-century Vikings and fairytale buccaneers preying on rum ships.¹⁸ Particularly, Somali piracy caught the attention of mainstream media over the past few years, though it erupted in the turn of the twentieth century. These hijackers emerged in response to a surge of illegal fishing raids that occurred soon after the Somali government collapsed in 1991.¹⁹ Somalia nationals began acting as vigilantes and raided the Somali waters to ransack commercial fishing fleets of their taxes.²⁰ In fact, fishing activities have been the historical nexus to piracy throughout the world.²¹

Today, however, Somali pirates continue to terrorize the eastern region of international waters but with a slightly different *modus operandi*.²² Somalis generally raid seagoing cargo ships between India and Africa, holding the vessels as well as the crew members as hostages for months until the demanded ransoms are settled.²³ However, the pirates have typically been reluctant to harm any captives due to their desire to obtain the ransom payment.²⁴ One of the first seizures to capture global media attention occurred in 2008 when Somalis commandeered a Ukrainian weapon freighter and ransomed it for \$3.2 million.²⁵ Empirical data indicates that through at least 120 attacks in the Gulf of Aden, pirates netted in excess of \$100 million that year.²⁶

While the first documented capture of American citizens was reported in early 2009, the beginning of 2011 marked the first American fatality occurring in the line of piracy.²⁷ This murder arose in response to a 34-year federal prison sentence against a Somali pirate.²⁸

17. *Hasan*, 747 F. Supp. 2d at 602.

18. See Edwin D. Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334, 334-35 (1925) [hereinafter *Obsolete*].

19. At Sea, *supra* note 1.

20. *Id.*

21. See, e.g., *The Paquete Habana*, 175 U.S. 677, 678-79 (1900) (blockade squadron seized and auctioned Cuban fishing vessels), and *Davison v. Seal-skins*, 7 F. Cas. 192 (C.C.D. Conn. 1835) (regarding sealskins stolen from claimants boat).

22. At Sea, *supra* note 1.

23. *Id.*

24. Grier, *supra* note 9.

25. At Sea, *supra* note 1.

26. *Id.*

27. *Id.* (In April of 2009, Somali pirates captured six ships, including the *Maersk Alabama*, an American vessel.).

28. Grier, *supra* note 9.

Thereafter, President Obama authorized the use of deadly force against pirates whenever American citizens or vessels were deemed to be in imminent danger.²⁹ The United Nations Convention on the Law of the Sea (“UNCLOS”) also granted nations at large the authority to seize and prosecute suspected pirates, insofar as individual municipal laws permit such.³⁰ In light of the foregoing events, however, foreign nations have been hesitant to actively pursue and prosecute persons identified as pirates.³¹ Furthermore, factors, such as the lengthy time it takes to prosecute such persons, and the lack of resources necessary to execute their prosecutions, have discouraged various nations from exercising their adjudicative authority.³² Yet, the United States has charged itself to vindicate the law of nations to battle global piracy.³³

B. Constitutional Authority to “Define and Punish” Piracy

In the eighteenth century, the Articles of Confederation were drafted to afford Congress the power to appoint courts for the adjudication of “Piracies and Felonies committed upon the seas.”³⁴ During the Constitutional Convention of 1787, the drafters expounded upon the “Piracies and Felonies” phrase.³⁵ What became known as the Define and Punish Clause provided in pertinent part that “Congress shall have Power . . . [t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”³⁶ The Offense Clause, particularly, authorized Congress to apply federal legislation outside the confines of United States borders, given that “high seas” by definition means territory beyond national boundaries.³⁷ Today the Define and Punish Clause continues to afford Congress the

29. *Id.*

30. Q&A, *supra* note 7.

31. *Id.*

32. *Id.*

33. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715-16 (2004).

34. Eugene Kontorovich, *The “Define and Punish” Clause and the Limits of Universal Jurisdiction*, 103 Nw. U. L. REV. 149, 150, 161 (2009) [hereinafter *Define and Punish*].

35. *Id.* at 162.

36. *Id.*; U.S. CONST. art. I, § 8, CL. 10.

37. *United States v. Shi*, 525 F.3d 709, 720 (9th Cir. 2008) (citing *United States v. Davis*, 905 F.2d 245, 248 (9th Cir. 1990)); *Cf. EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (To ensure that American laws will not unintentionally encroach into foreign jurisdictions, federal courts cannot enforce municipal laws beyond the confines of U.S. territory unless Congress expressly authorized such action.).

power to criminalize piracy in a way that corresponds with the exercise of universal jurisdiction.³⁸

Many considerable concerns arose that shaped the framers' legislative intent to afford Congress the "define and punish" power. First, the framers aimed to establish a uniform standard of conduct that would allow the national government to exercise jurisdiction over crimes that could produce tension with foreign governments.³⁹ Consequently, it was argued that Congress should not have to transfer to the states its plenary power over foreign relations.⁴⁰ Framers also presumed that foreign governments should directly coordinate with the federal government, not individual states, regarding piracy crimes that involved American citizens or instrumentalities.⁴¹

On the contrary, the legislative history that drove the reconstruction of the Define and Punish Clause indicated that framers on the Articles of Confederation were apprehensive about negative ramifications of the clause.⁴² One of the issues raised concerned whether the language simply implicated legislative powers of preexisting crimes.⁴³ It was unclear as to whether the original language of the Define and Punish Clause would tightly restrict Congress to those crimes, or gave Congress the discretion to depart from the existing meanings of the offenses.⁴⁴ Second, drafters suggested that the language also challenged the states' sovereign powers to define their own criminal laws.⁴⁵ In other words, the clause transferred legislative authority from the states to Congress to essentially create offense that already existed in state law.⁴⁶ Some debaters further highlighted perceivable implications of arrogance towards the law of nations, given that each country played a role in its development.⁴⁷ Finally, the drafters of the Articles noted particular redundancies between "Piracies" and "Felonies . . . and Offenses."⁴⁸ Despite this concern, scholars suggest that the framers carefully employed the word "piracies" to highlight substantive

38. *United States v. Hasan*, 747 F. Supp. 2d 599, 605 (E.D. Va. 2010); see also discussion *infra* Part II.C.ii (discussing universal jurisdiction).

39. Kontorovich, *supra* note 34, at 169.

40. *Id.* at 170.

41. *Id.* at 171.

42. *Id.* at 163.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 163-65.

differences from that of “Felonies” and “Offenses.”⁴⁹ Particularly, the drafters parsed the term “Pirac[y]” to mean “a subspecies of felony” that “necessarily occurs on high seas” and “against the law of nations.”⁵⁰

At least some of those debates diffused as quickly as they arose. For instance, the Continental Congress encouraged state legislatures to enact criminal laws that afforded remedies already available at common law for violations against the law of nations.⁵¹ More recently, federal courts have required claims to be based on the modern law [of nations] and to fall within the purview of specific international matters.⁵²

Of the aforementioned discussions, the most compelling and relevant debate to this note concerns the meanings of “define” and “punish.”⁵³ Facially speaking, the original piracy legislation was “artlessly drafted.”⁵⁴ However, the context of “define” and “punish” conspicuously required federal courts to reference the internationally accepted definition of piracy, as per the law of nations.⁵⁵ Ergo, the Framers most likely intended federal courts to punish piratical acts as other nations generally would.⁵⁶ As today’s scholars, lawyers, and *judges* (should) comprehend, the Define and Punish Clause affords Congress legislative authority to criminalize piracy committed on international seas, that is, general piracy.⁵⁷ But the federal courts must coincide with the customary law of nations when exercising jurisdictions over perpetrators of such offense.⁵⁸

49. *Id.* at 164, 167.

50. *Id.* at 163.

51. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 722 (2004).

52. *Id.* at 725.

53. Kontorovich, *supra* note 34, at 162.

54. Dickinson, *supra* note 18, at 342-43.

55. *Id.*

56. Kontorovich, *supra* note 34, at 168.

57. *Hasan*, 747 F. Supp. 2d at 603-12 (explaining the guiding principles by which any statute passed in accordance to the define and punish powers must be interpreted, as well as examining Framers’ understanding of piracy at time of nation’s finding).

58. *Id.* at 609-10 (“Because of th[e] need for the United States law to reflect the definition of general piracy agreed upon by the international community before universal jurisdiction could attach . . .” and “for a crime to be cognizable in the federal courts of the [states],” an act of Congress must have proscribed the offense through a “municipal law that adequately embodied the international crime of piracy.”).

C. Piracy Under Customary Law

The term "piracy" denotes two distinct classes of offenses: municipal and general piracy.⁵⁹ *Municipal* piracy entails violations of a nation's (or state's) municipal laws.⁶⁰ On the other hand, piracy committed against the law of nations is *general* piracy.⁶¹ Here, the majority of the following sections will focus on the latter category.

Prosecuting general piracy was the original purpose for creating the doctrine of universal jurisdiction.⁶² Federal courts have generally accepted the premise that universal jurisdiction empowers any nation, where an offender may be found, to prosecute acts of general piracy.⁶³ To the same extent, customary international law permits a nation to assert adjudicative authority over an individual engaged in acts of general piratical magnitude.⁶⁴ This is true even where the offender's acts occur in or against a foreign country,⁶⁵ even if the perpetrator has no connection with that country.⁶⁶

The following expounds upon the customary international law on general piracy and to whom jurisdiction over general piracy matters is afforded.

1. International Customary Law and Law of Nations

The law of nations represents a paradigm of customary international law.⁶⁷ Out of a sense of legal obligation, the nations at large bound themselves to this general body of rules.⁶⁸ The law of nations embodies a collection of national common laws that provides criminal remedies for certain conduct occurring beyond domestic boundaries and thus within the transnational realm.⁶⁹ In that regard, no single authoritative source epitomizes international customary law in its en-

59. *Id.* at 606.

60. *Id.*

61. *Id.*

62. *Shi*, 525 F.3d at 723; *Hasan*, 747 F. Supp. 2d at 605 (stating international crime of piracy was only universal jurisdiction crime by eighteenth century).

63. *Id.* (citing Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 TEX. L. REV. 785, 803 (1988) [hereinafter *Universal Jurisdiction*]).

64. Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149, 157-62 (2006) [hereinafter *Legal Limits*].

65. *Id.*

66. *Id.*

67. *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 154 (2d Cir. 2003).

68. *Id.* (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1986)).

69. *Sosa*, 542 U.S. at 715.

tirety.⁷⁰ To determine if a particular law, rule or practice coincides with customary law, courts must first find such evidence in the customs and practices of civilized countries, particularly through formal laws and judicial decisions.⁷¹ Courts further substantiate their findings by examining and assessing corroborative secondary sources such as scholarly articles.⁷²

When the United States declared its independence from Great Britain, it remained bound to the law of nations.⁷³ Commentators have noted that the United States, in lieu of its declaration, remained fixated to the international common law of certain crimes.⁷⁴ In 1781, Congress charged states to enforce the law of nations against those expressed, customary offenses – one of which included general piracy.⁷⁵

2. Universal Jurisdiction

The doctrine of universal jurisdiction generally provides that “a state may define and prescribe punishment for any offense recognized by the community of nations as having universal concern even where there is no traditional basis for jurisdiction.”⁷⁶

As a universal crime, general piracy occurs beyond municipal reach. It involves individuals acting without national authorization, and disrupts international commerce and navigation.⁷⁷ These characteristics render general piracy jurisdictionally unique.⁷⁸ As previously mentioned, the crime falls within the purview of international customary law.⁷⁹ Also, the offense often generates significant maritime concerns.⁸⁰ For these reasons, the phrase “general piracy” bears a technical significance in international law.⁸¹

70. *Said*, 757 F. Supp. 2d at 558 (quoting *Guinto v. Marcos*, 654 F. Supp. 276, 279 (S.D. Cal. 1986)).

71. *Flores*, 343 F.3d at 156.

72. *Id.*

73. *Sosa*, 542 U.S. at 715 (quoting *Ware v. Hylton*, 3 U.S. 199 (1796)).

74. *Sosa*, 542 U.S. at 715.

75. *Id.* at 715-16.

76. *Hasan*, 747 F. Supp. 2d at 608 (internal quotations omitted).

77. *Id.* at 611.

78. *Id.* at 605 (noting Framers of Constitution recognized piracy as a unique offense, one that permitted nations to invoke universal jurisdiction and enable any country to apprehend and prosecute pirates under their municipal jurisdiction, “irrespective of the existence of a jurisdictional nexus”); Kontorovich, *supra* note 30, at 165.

79. *Shi*, 525 F.3d at 723.

80. Kontorovich, *supra* note 34, at 166.

81. *Id.*

Historically, the dichotomy of piracy in determining whether an act constitutes an international crime or municipal crime has confused states in regards to the circumstances in which something broader than municipal jurisdiction may be exercised.⁸² Therefore, jurisdiction as it pertains to international law necessarily falls within the scope of international customary matters as well.⁸³ Jurisdiction over a particular crime is based on collective state practices,⁸⁴ *opinio juris* (opinion of law),⁸⁵ or a state's belief that it serves a legal purpose when it prosecutes that crime.⁸⁶

Although customary law confers such discretionary authority upon the sovereign states, it does so with a distinct restriction. A state's adjudicative jurisdiction (power to subject an individual or thing to its judicial process)⁸⁷ depends upon its prescriptive jurisdiction (power to apply its law to those objects).⁸⁸ This means that a state may subject an individual or thing to its judicial process only if it has legislative power over the object.⁸⁹

Traditionally speaking, a state may exercise its prescriptive jurisdiction over a foreigner's conduct that (1) happens within that state's territory (subjective theory); (2) affects the state's territory (objective theory); (3) involves its national citizens (active or passive theories); or (4) threatens national security (protective theory).⁹⁰ Notwithstanding a foreigner's harm against a nation's interest, a state may not "unilaterally" enforce its municipal laws within the territory of another state.⁹¹

However, universal jurisdiction may be invoked when the conduct in question constitutes a universal crime.⁹² More specifically, a state may assert criminal jurisdiction over an individual whose alleged crimes were committed beyond the boundaries of the prosecuting state, irrespective of nationality, country of residence or the like.⁹³ For instance, a flagged vessel – one that is registered to a particular nation – is deemed an interest of its home nation's flag jurisdiction when the

82. Dickinson, *supra* note 18, at 336.

83. Colangelo, *supra* note 64, at 157.

84. *Id.* at 158.

85. BLACK'S LAW DICTIONARY 1125 (9th ed. 2009).

86. Colangelo, *supra* note 64, at 159.

87. *Id.* at 158.

88. *Id.*

89. *Id.*

90. *Id.* at 159.

91. *Id.* at 160.

92. *Id.*

93. *Id.* at 157-60

vessel was attacked on common international waters.⁹⁴ Any victims on board the vessel are also subject to the nation's passive jurisdiction because they are nationals of the state.⁹⁵

In sum, a pirate acting against a foreign country subjects himself to universal prescriptive and consequently universal adjudicative jurisdiction when he commits an offense against a vessel on high seas.⁹⁶ Any state that may encounter a pirate can claim criminal jurisdiction to apprehend and prosecute the perpetrator for his or her alleged piratical acts.⁹⁷

This notion of exercising universal jurisdiction over crimes like general piracy is a unique concept in light of the doctrine's distinct principles. First, the law of nations, by way of international customary laws, directly dictates the substance of universal prescriptive jurisdiction.⁹⁸ Stated differently, the law of nations establishes the legislative parameters within which the states, in exercising universal jurisdiction, can adjudicate any subject matter in accordance with its municipal laws.⁹⁹ It therefore follows that universal prescriptive jurisdiction both defines the substance of universal crimes and authorizes foreign tribunals to prosecute those crimes.¹⁰⁰

Viewed in its entirety, universal jurisdiction operates as a tool by which the law of nations may engender jurisdiction throughout all sovereign states as it relates to the prosecution of international crimes such as general piracy.¹⁰¹

3. Expansive Recognition of Universal Jurisdiction

For decades, many nations perceived universal jurisdiction as merely a theory, rather than a practice.¹⁰² A handful of governing bodies from various nations considered the doctrine as controlling against all universal crimes. Other states, including the United States, refused to accept universal jurisdiction as a credible source of authority.¹⁰³ In time, high-profiled events called for an expansion of

94. Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 190 (2004) [hereinafter *Piracy Analogy*].

95. *Id.*

96. Colangelo, *supra* note 64, at 151.

97. *In re Piracy Jure Gentium*, [1934] A.C. 586, 589 (P.C.) (H.K.).

98. Colangelo, *supra* note 64, at 161.

99. *Id.*

100. *Id.*

101. *In re Piracy Jure Gentium*, *supra* note 97, at 589.

102. Kontorovich, *supra* note 94, at 192.

103. *Id.*

universal jurisdiction. Commentators have noted three particular events that influenced this movement: (1) post-World War II prosecutions of German war criminals in Nuremberg;¹⁰⁴ (2) the capture of Adolf Eichmann and his prosecution for Nazi-affiliated massacres of Jews (1961);¹⁰⁵ and (3) Britain's detention of Augusto Pinochet for crimes committed against Chileans (1988).¹⁰⁶ Foreign tribunals have become persuaded that the "harmful and murderous effects" of these sorts of events, as well as piracy, have "shake[n] the international community to its very foundation," and the community recognizes the legitimacy of universal jurisdiction over crimes against humanity.¹⁰⁷

III. CURRENT PIRACY LAWS SINK JACKSON'S DECISION

A. U.S. Code on General Piracy

Title 18, Chapter 81 of the United States Code codifies a historical compilation of United States piracy laws in their evolved forms.¹⁰⁸ Particularly, section 1651 embodies remnants of the framers' original intent to empower Congress to define and punish piracy.¹⁰⁹ Various commentators have questioned the efficiency of section 1651 due to its substantive implications and "obsolete" Supreme Court precedent regarding the prosecution of piratical acts.¹¹⁰ While Congress enacted several piracy laws over the course of two centuries, American judicial interpretation provided minimal guidance as to how courts should apply the current law to best reflect recent developments in maritime crime.¹¹¹

1. Act of 1790 and Palmer's Interpretation

Congress enacted the Act of April 30, 1790 ("Act of 1790") as the initial, substantive law against maritime offenses.¹¹² It states in pertinent part:

104. Randall, *supra* note 63, at 805-06.

105. *Id.* at 810-12

106. *Hasan*, 747 F. Supp. 2d at 611.

107. Randall, *supra* note 63, at 812; *Att'y Gen. of Isr. v. Eichmann*, 36 I.L.R. 277, 299 (Isr. Sup. Ct. 1962).

108. Samuel Pyeatt Menefee, "Yo Heave Ho!": *Updating America's Piracy Laws*, 21 CAL. W. INT'L L.J. 151, 152 (1990) [hereinafter *Updating*].

109. *Id.* at 161.

110. See generally Dickinson, *supra* note 18.

111. Menefee, *supra* note 108, at 153.

112. *Hasan*, 747 F. Supp. 2d at 612.

[t]hat if any person or persons shall commit upon the high seas, or in any river, haven, basin or bay, or of the jurisdiction of any particular state, murder or robbery . . . would by the laws of the United States be punishable with death; or if any captain or mariner of any ship or other vessel, or any goods or feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death¹¹³

The plain language of the Act explicitly states that it applies to “any person” and therefore suggests that the Act was likely drafted to prescribe a general piracy law grounded in the universal jurisdiction doctrine.¹¹⁴ The Supreme Court, nonetheless, refused to advance such an interpretation.¹¹⁵

The Court first interpreted the Act of 1790 in *United States v. Palmer*¹¹⁶ where the Court was charged with determining the Act’s applicability to foreign nationals.¹¹⁷ In *Palmer*, three foreign defendants set sail from the United States, encountered and boarded a Spanish-owned ship, assaulted the mariners, and plundered valuable merchandise.¹¹⁸ Upon being captured and apprehended, the defendants were indicted for piracy under the Act of 1790.¹¹⁹ The Supreme Court ruled that the U.S. piracy law did not apply to a foreign national who committed robbery against a foreign vessel at sea.¹²⁰

In analyzing the language of the Act, the Court looked past its plain meaning and attempted to articulate reasons for narrowly construing the scope of the Act.¹²¹ Though it focused on the phrases “any person or persons” and “any captain, or mariner of any ship or other vessel,” the Court refused to believe Congress intended to punish citizens *and* foreigners.

113. Act of Apr. 30, 1790, § 8, 1 Stat. 112.

114. *Hasan*, 747 F. Supp. 2d at 612.

115. *See infra* *United States v. Palmer*, 16 U.S. 610 (1818).

116. *Id.*

117. *Id.* at 613-17.

118. *Id.* at 611-12.

119. *Id.*

120. *Id.* at 633-34.

121. *Id.* at 623-33.

2. Congress's Response: The Act of 1819

Following the Court's decision in *Palmer*, Congress enacted the Act of 1819 to clarify its intention to prescribe piracy legislation capable of invoking universal jurisdiction over *all* piratical perpetrators.¹²² The pertinent portion of the Act, Section 5, provides:

[t]hat if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders, shall afterwards be brought into or found in the United States, every such offender or offenders shall, upon conviction thereof, before the circuit court of the United States for the district into which he or they may be brought, or in which he or they shall be found, be punished with death.¹²³

Again, in 1820, the Supreme Court immediately found itself interpreting section 5 of the Act in the seminal case of *United States v. Smith*.¹²⁴ *Smith* exemplified a classic case of piracy, where the defendants commandeered a seagoing vessel under foreign authority.¹²⁵ Contra to *Palmer*, the Court ventured further into its analysis to determine *what*, as well as *whom*, the crime of piracy specifically entailed.¹²⁶

3. *United States v. Smith*

In *Smith*, prisoners that used violent resistance to overthrow a private armed Spanish vessel near the port of Margaritta were indicted in the United States for piracy.¹²⁷ The Court held that, up to the ruling of *Smith*, writers of common law, English civil law, and maritime law had concurred that "robbery at sea" constituted piracy.¹²⁸ Although the Court may have intended for the substantive definition of piracy, which required the robbery element, to be exhaustive, it seems that such a definition was limited to *Smith's* facts.¹²⁹

Based on federal case law in the nineteenth and twentieth centuries, the *Smith* decision was susceptible to criticism and consequent modification.¹³⁰ Also, within the language of the Act of 1819, Congress

122. *United States v. Hasan*, 747 F. Supp. 2d 599, 612 (E.D. Va. 2010).

123. *Act of March 3, 1819, ch. 77, § 5, 3 Stat. 510* (1819) (current version at 18 U.S.C. § 1651 (2011)).

124. *United States v. Smith*, 18 U.S. 153 (1820).

125. *Id.* at 154-55.

126. *Id.* at 161-62, 163, n.h.

127. *Id.* at 154-55.

128. *Id.* at 162.

129. *United States v. Hasan*, 747 F. Supp. 2d 599, 621 (E.D. Va. 2010).

130. *Id.* at 622.

deferred to the law of nations such that the definition of piracy would continuously incorporate perpetual changes in the law, rather than constantly revising it.¹³¹ Given the purported adaptive nature of the substantive definition, the notion that the nineteenth and twentieth century definition for piracy was exhaustive no longer seemed to pass legislative muster. As previously noted, federal courts must, from time to time, adopt the law of nations' most current definition.¹³²

4. Section 1651

Section 1651 in Title 18 of the United States Code, the modern-day piracy statute, provides that “[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”¹³³ Although, the statute establishes a criminal remedy for piracy “as defined by the law of nations,” confusion remains amongst federal courts of the same district in regards to the contemporary law of nations.¹³⁴

B. Piracy and Its Effect on Modern U.S. Cases

In 2011, for the first time since the *Smith* decision in 1820, the United States District Court for the Eastern District of Virginia reviewed the federal precedent and attempted to ascertain the current definition of piracy as defined by the law of nations.¹³⁵ Despite its efforts, the Court still managed to render two conflicting holdings in *United States v. Said*¹³⁶ and *United States v. Hasan*,¹³⁷ decided barely two months apart.

1. *United States v. Said*

The defendants in *Said*, while cruising in the Gulf of Aden in a small skiff, encountered the USS Ashland, an American vessel, and fired upon it.¹³⁸ Crew members aboard the vessel returned fire and

131. *Id.* at 624.

132. *See* *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980).

133. 18 U.S.C. § 1651 (2011); *cf.* *Act of March 3, 1819, ch. 77, § 5, 3 Stat. 510* (1819) (prescribing the death penalty instead of life imprisonment).

134. *Id.*

135. *See* discussion *infra* Part III.B.i-iii.

136. *United States v. Said*, 757 F. Supp. 2d 554 (2010).

137. 747 F. Supp. 2d 599 (E.D. Va. 2010).

138. *Said*, 757 F. Supp. 2d at 566-57.

destroyed the skiff.¹³⁹ The record notes that none of the defendants attempted to board the vessel and therefore had no opportunity to remove property from the ship.¹⁴⁰ The American crew members apprehended the defendants, and thereafter, the defendants were indicted on several counts of piracy.¹⁴¹ The defendants moved to dismiss the indictment, contending that the government failed to present facts demonstrating that the defendants boarded or took control of the USS Ashland and obtained anything of value.¹⁴² The government argued for the Court to deny the motion because piracy historically included different types of conduct and was not limited to the common law definition of robbery on land.¹⁴³

In holding that the crime of piracy requires robbery at sea, the presiding Judge Jackson relied heavily on *Smith*, given that the case was the only authority directly examining the proper definition.¹⁴⁴ In his opinion, Jackson mostly analogized court decisions rendered within the same century as *Smith*.¹⁴⁵ The *Said* Court further advanced this position with the support of Congressional revisions of Title 18 and Commission reports.¹⁴⁶ Jackson also accepted the defendants' argument that the emergence of varying opinions from international critics caused a global rift as to piracy jurisprudence. Thus, *Smith* provides the clearest safeguard for American courts.¹⁴⁷ Scholars were inconclusive on whether the international community articulated an exhaustive definition of general piracy.¹⁴⁸ Moreover, the Court asserted that each country is entitled to prosecute piracy according to their individual municipal laws and penalties.¹⁴⁹

In Judge Jackson's opinion, piracy had to remain defined as robbery at sea, reasoning that the broad international standard conflicted with *Smith's* stable precedent.¹⁵⁰ Therefore, the District Court for the Eastern District of Virginia first deemed section 1651 inapplicable in piracy cases where the government fails, as it did in *Said*, to establish facts showing a physical taking of property from a seagoing

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 557.

143. *Id.*

144. *Id.* at 562.

145. *Id.* at 560.

146. *Id.* at 562-63.

147. *Id.*

148. *Id.* at 564.

149. *Id.* at 565.

150. *Id.* at 567.

vessel.¹⁵¹ Two months later, however, the same court reviewed the same issue, based on similar facts, but ultimately held differently as to the merits of the claim at bar.¹⁵²

2. United States v. Hasan

In *Hasan*, five Somalis set sail from Somalia with the intent to locate, attack, and capture a vessel occupying the high seas.¹⁵³ The defendants spotted and approached a merchant ship that turned out to be the USS Nicholas, a U.S. Navy ship.¹⁵⁴ After the Somalis fired at the vessel, the USS Nicholas returned fire, and subdued and apprehended the alleged pirates.¹⁵⁵ Subsequently, a federal grand jury indicted the Somalis for piracy.¹⁵⁶ Like *Said*, each defendant filed separate motions to dismiss the action on the grounds that the government could not establish the robbery element necessary to support a piracy claim.¹⁵⁷

The question presented for review regarded the definition of piracy, pursuant to section 1651.¹⁵⁸ To answer the question, the *Hasan* Court first determined that the Define and Punish Clause of the Constitution confers to Congress universal jurisdiction to criminalize certain crimes, including general piracy.¹⁵⁹ The Court also noted that a state may invoke this doctrine to prosecute piratical acts that fall within the scope of the types of conduct that the international community recognizes today.¹⁶⁰ Based on Supreme Court and foreign case law, as well as international treaties, the law of nations as explicitly referenced in section 1651 requires application of the modern-day customary definition of general piracy.¹⁶¹

Taking into account the evolved state of the law of nations, which Judge Jackson ostensibly overlooked, the *Hasan* Court found that the definition of piracy included acts of violence committed at sea for personal gain, even in the absence of an actual taking away of prop-

151. *Id.*

152. *See* United States v. Hasan, 747 F. Supp. 2d 599 (E.D. Va. 2010).

153. *Id.* at 601.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 603.

158. *Id.*

159. *Id.* at 605.

160. *Id.* at 608-09.

161. *Id.* at 616-30.

erty.¹⁶² The Court held that the fact that two of the defendants sailed their assault boat towards and fired upon the USS Nicholas indicated sufficient acts of violence committed at sea for private ends.¹⁶³ Also, because the other three Somalis boarded the assault cruiser with the co-conspirators, they voluntarily and knowingly participated in the assault.¹⁶⁴ Unlike *Said*, the District Court in *Hasan* determined that the law of nations and thus section 1651 did not require the government to allege facts that the Somalis perpetrated an actual robbery upon the USS Nicholas.¹⁶⁵ Therefore, the defendants were properly charged with piracy.¹⁶⁶

3. Other Supreme Court Opinions

While the Supreme Court established a working definition for general piracy in 1820, the Court almost immediately qualified the definition. Five years after ruling *Smith*, the Court purportedly suggested in *The Antelope*,¹⁶⁷ in part, that the law of nations, to which the *Smith* decision and the Act of 1790 were amensalistic, was not crystallized.¹⁶⁸

In *The Antelope*, where United States citizens hunted and boarded foreign ships and seized Portuguese and Spanish-owned slaves,¹⁶⁹ the threshold issue for determination was whether the United States had a paramount interest, over the Portuguese and Spanish Consuls, as to the captured slaves.¹⁷⁰ Because various sovereign nations during the early nineteenth century had not yet proscribed the international slave trade, the Court first rejected the Portuguese's and Spanish's arguments that such trade practice implicated piracy.¹⁷¹ In the Court's view, no one nation may dictate the law of nations or unilaterally impose its laws onto another country.¹⁷²

162. *Id.* at 640-41 (referencing Geneva Convention on the High Seas ("High Seas Convention"), art. 15, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 397; U.N. Convention on the Law of the Sea, art. 101, opened for signature Dec. 12, 1982, 1833 U.N.T.S. 397).

163. *Hasan*, 747 F. Supp. 2d at 641.

164. *Id.*

165. *Id.* at 642.

166. *Id.*

167. *The Antelope*, 23 U.S. 66 (1825).

168. *Id.* at 91 (holding that in light of the law of nations, the slave trade did not conflict with the law of nations because it was "tolerated and encouraged" up until that moment in time).

169. *Id.* at 67-68.

170. *Id.*

171. *Id.* at 66, 122.

172. *Id.* at 122.

However, the Court noted that “[a] right, then, which is vested in all by the consent of all, can be ‘divested’ only by consent”¹⁷³ The majority ostensibly foreshadowed the *Hasan* Court’s charge to the United States government of ensuring it deliberates amongst the sovereign nations from time to time to ascertain the most current law of nations.¹⁷⁴

Before the turn of the nineteenth century, the Supreme Court articulated a similar holding in *United States v. Arjona*,¹⁷⁵ in which the government indicted foreigners for counterfeiting within the United States of notes, bonds, and other securities of foreign governments.¹⁷⁶ The issue was whether the law of nations could mandate Congress to punish non-citizens that counterfeit foreign notes within the United States.¹⁷⁷ The majority opinion found that international customary law, as it was then-currently reformed to incorporate emerging economic trends, squarely applied to the recent developments of transnational banking and foreign securities.¹⁷⁸

The Court noted that the law, throughout the eighteenth century, recognized the obligation to punish an individual who, within their country, counterfeited coin money of another nation.¹⁷⁹ Prior to the nineteenth century, foreign exchange was not a common custom such that foreign markets would conceive that special protection against transnational coin counterfeiting would be necessary.¹⁸⁰ However, the vast upsurge of public enterprises and extensive borrowing prompted United States banks to seek stricter safeguards for their commercial securities in foreign markets.¹⁸¹ Almost immediately thereafter, the international obligation to reciprocally enforce the law of nations against transnational counterfeit activity became apparent.¹⁸² The Court’s decision in *Arjona* exemplified the undying principle that the law of nations was and continues to evolve with time.¹⁸³

Most recently, the Court also reviewed the binding effects of international customary law under a slightly different lens. The

173. *Id.*

174. *See* *United States v. Hasan*, 747 F. Supp. 2d 599, 629 (E.D. Va. 2010).

175. *United States v. Arjona*, 120 U.S. 479 (1887).

176. *Id.* at 480.

177. *Id.* at 483.

178. *Id.* at 486.

179. *Id.* at 484.

180. *Id.*

181. *Id.* at 485-86.

182. *Id.* at 487.

183. *United States v. Hasan*, 747 F. Supp. 2d 599, 627 (E.D. Va. 2010).

Supreme Court granted certiorari in the 2004 case of *Sosa v. Alvarez-Machain* to determine whether the internationally accepted customs deemed an alien's claim of arbitrary detention as cognizable in the federal courts.¹⁸⁴ In reiterating the notion that the law of nations evolves from time to time,¹⁸⁵ the Court further asserted that federal courts may rely on the present-day norms to reach decisions that would be at odds with past rulings:

Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the [eighteenth-century] paradigms we have recognized . . . It is enough to say that Congress may . . . modify or cancel any judicial decision so far as it rests on recognizing an international norm as such.¹⁸⁶

The foregoing Supreme Court decisions demonstrate that the Court preserved its intent to divorce the *Smith* decision when international customary law so required.

C. Piracy and Its International Effects

Barely 75 years ago, the Privy Council *In re Piracy Jure Gentium* adjudicated charges against individuals for engaging in piratical raids that occurred off the coast of China.¹⁸⁷ Grounds for the case arose when Chinese nationals cruising in junks had fired upon a Chinese merchant ship.¹⁸⁸ After the crewman of the vessel and servicemen of the British Navy apprehended the defendants, the defendants were indicted for piracy before the Court of Hong Kong.¹⁸⁹ The Court acquitted the defendants, holding that actual robbery, which the government failed to allege, was necessary to support a conviction of piracy.¹⁹⁰

On review, the Privy Council held that actual robbery was an immaterial element of the crime.¹⁹¹ Because the law of nations defined piracy, the Council deferred to international treaties, state papers, mu-

184. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

185. *Hasan*, 747 F. Supp. 2d at 629.

186. *Id.* at 725, 731.

187. *In re Piracy Jure Gentium*, *supra* note 97.

188. *Id.* at 586.

189. *Id.* at 587.

190. *Id.* at 588.

191. *Id.* at 586.

nicipal acts of Parliament, acts of municipal courts, and other scholarly writings to ascertain the substantive requirements of piracy.¹⁹²

Like *Hasan*, the Council first examined national legislation, specifically the Act of Henry VIII., cap. 15 of 1536 ("Act").¹⁹³ Analogous to *Palmer*, Lord Sankey noted that misinterpretations of the Act generated confusion concerning the definition of piracy.¹⁹⁴ Moreover, Lord Charles Hedges opined that robbery was a requisite element of criminal piracy and this was the anchor decision which promulgated the robbery requirement.¹⁹⁵

As opposed to Judge Jackson's *stare decisis* approach in *Said*, the Privy Council then conducted a thorough analysis of international practices, proceedings, and commentaries (including American sources), which unveiled several negating discrepancies.¹⁹⁶ First, the working definitions of piracy were not exhaustive.¹⁹⁷ The Privy Council determined that the current definition of piracy was expansive to reflect unforeseen occurrences.¹⁹⁸ To verify its determination, the Council referenced scholarly writings – ranging from American and English jurists to Scottish textbooks.¹⁹⁹ Furthermore, it held that courts had misconstrued the Act to prescribe piracy as a common law felony, rather than a civil law felony.²⁰⁰

The presiding panel concluded that the events of time expanded the substance of international customary law against general piracy.²⁰¹ Consequently, incorporation of recent events, either not previously contemplated or existing, warranted the broadening of piracy's definition.²⁰²

Hence, federal courts must now interpret international law to reflect its evolved state, rather than its construction in the late-eighteenth century.²⁰³ In other words, the law of nations should be applied as the sovereign nations would generally apply it in the present-day.²⁰⁴

192. *Id.* at 588.

193. *Id.* at 589 (empowering English courts to criminalize piracy committed at sea).

194. *Id.* at 590.

195. *Id.* at 591.

196. *Id.* at 589-94.

197. *Id.* at 594.

198. *Id.*

199. *Id.* at 593-97.

200. *Id.* at 594.

201. *Id.* at 593.

202. *Id.* at 600.

203. *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980).

204. *Kontorovich*, *supra* note 34, at 168.

IV. ANALYSIS

Juxtaposing the *Said* ruling with other Supreme Court decisions indicates one thing: The *Said* court rendered an inaccurate ruling due to an incomplete analysis of both binding and persuasive jurisprudence regarding contemporary piracy.²⁰⁵ Perhaps this is true because the presiding judge (Jackson) was appointed to judgeship in 1993 – soon after piracy’s modern-day upsurge in the eastern hemisphere, but before pirates threatened American vessels.²⁰⁶ Assuming Jackson faced this not-so-familiar issue in *Said*, it is reasonable to suggest that he followed the *stare decisis* route rather than the road less traveled. Essentially, however, the court’s decision to advance the “robbery” element of piracy was based on several assumptions and *Smith*’s obsolete precedent.

Nonetheless, several of the Supreme Court’s rulings support the position that *Smith*’s holding is limited²⁰⁷ to its time because piracy, as defined by the law of nations, is subject to perpetual evolution.²⁰⁸ First, the court’s *Sosa* decision illustrates two points: (1) district courts may recognize private causes of action for certain tort offenses against the law of nations, including piracy;²⁰⁹ and (2) judicial decisions may be overturned or modified to conform to the evolved state of the law.²¹⁰ In this, *Sosa* offers a remedy to Jackson’s first assumption that federal courts are entirely cautious to expand the construction of piracy beyond the “concrete consensus” of *Smith*.²¹¹ This decision magnifies Congress’s intent to endorse federal judges “general practice[s] of . . . exercising innovative authority over substantive law,” so long as the Legislature’s purpose guides such practices.²¹² In the same regard, Congress had no intention to confer authority upon federal courts to derive general common law from the law of nations and thus encroach on the discretion of the Legislative and Executive branches regarding

205. *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“[W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals . . . for trustworthy evidence of what the law really is.”).

206. *See At Sea*, *supra* note 1.

207. *United States v. Hasan*, 747 F. Supp. 2d 599, 622 (E.D. Va. 2010).

208. *See generally Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *The Antelope*, 23 U.S. 66 (1825); *United States v. Arjona*, 120 U.S. 479 (1887).

209. *Sosa*, 542 U.S. at 724.

210. *Id.* at 731.

211. *See United States v. Said*, 757 F. Supp. 2d 554, 560 (2010).

212. *Sosa*, 542 U.S. at 726.

foreign affairs.²¹³ However, Congress did not expect federal courts to disregard enforceable international causes of action merely because particular areas of common law lose “metaphysical cachet” over time.²¹⁴ Consequently, district courts may adjudicate those actionable violations of international law, namely piracy, that are *currently* couched in “specific, universal, and obligatory” universal norms.²¹⁵ It necessarily follows that, comparable to the *Sosa* court’s holding, piracy must be gauged in the light of the modern state of international law.²¹⁶ The rationale behind this holding is also significant because it protects citizens and foreigners from an *ex post facto* effect.²¹⁷ Applying the 1820 definition of general piracy to the interpretation of section 1651 would enable courts to unfairly prosecute acts that are no longer considered violations of the law of nations.²¹⁸ For instance, nineteenth-century piracy applied to acts committed beyond a three-mile radius from a nation’s shore, demarcating the point of international high seas.²¹⁹ Today, territorial waters extend twelve miles from a nation’s borders.²²⁰ Thus, unless section 1651 changes in accordance with international developments, individuals would be subject to prosecution for 1820 crimes that occur within three miles of the United States shorelines.²²¹

In *The Antelope*, the Court first asserted that the current law of nations is dependent on a full consensus of the civilized nations.²²² Jackson conceded a very clear principle by stating that even though the various nations are unsettled as to what constitutes piracy, worldwide deliberation is always encouraged.²²³ This demonstrates that although one, definitive answer may not exist, *many* answers currently do. Second, the Supreme Court inferred that some nations may unilaterally impose their municipal laws into other nations if the collective body fails to deliberate.²²⁴ Thrusting obsolete and prejudicial prece-

213. *Id.* at 727.

214. *Id.* at 730.

215. *Id.* at 724, 732.

216. *Id.* at 733.

217. *See Said*, 757 F. Supp. 2d at 566-67 (explaining due process concerns); *see also Hasan*, 747 F. Supp. 2d at 625 (stating that interpreting 18 U.S.C. § 1651 to require application of 1820 definition of general piracy could result in prosecutions of acts that no longer are deemed violations of the law of nations).

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *The Antelope*, 23 U.S. at 122; *see also Hasan*, 747 F. Supp. 2d at 629.

223. *See The Antelope*, 23 U.S. at 122.

224. *Id.*

dent like *Smith* onto foreign perpetrators could potentially cause tension between our federal judiciaries and foreign governments that are continuously striving to prosecute pirates with the maximum will of their authority.²²⁵ Application of these rationales to *Said* refutes Jackson's second assumption that there are no acts other than robbery or depredation at sea that constitute piracy.

Turning to *Arjona*, the Court expounded upon ways in which the law of nations had to evolve to ensure protection of common national interests during the emergence of foreign commercial securities.²²⁶ First, every nation possessed the inherent obligation to protect other nations from their own counterfeiters.²²⁷ In certain circumstances, states within each nation's boundaries can also facilitate the punishment of these perpetrators.²²⁸ This guaranteed that all nations would honor their moral obligations to protect one another.²²⁹ Moreover, countries that enforce universal counterfeit laws send the unequivocal message that their respective regions will tolerate no such crime. In this regard, each nation will also protect its economy and citizens, as well as promote government relationships with its foreign counterparts.

Nonetheless, Judge Jackson may contend that there is no single country that can enforce the various laws and regulations of the civilized nations.²³⁰ However, *Arjona's* reasoning cures this third assumption because international customary law is practically common law. It represents a continuously developing body of "judge-made laws regulating the conduct of individuals situated outside domestic boundaries," which the states historically have pledged to enforce.²³¹

225. See *Sosa*, 542 U.S. at 727 ("It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits.").

226. *Arjona*, 120 U.S. at 486.

227. *Id.* at 487.

228. *Id.* (holding a violation of municipal law in a state may also constitute an offense against the United States).

229. *Id.* (noting the United States' refusal to punish foreign counterfeiters "may not . . . furnish sufficient cause for war[] but [] would certainly give just ground of a complaint, and thus disturb th[e] harmony between the governments which each is bound to cultivate and promote. But if the United States can require this of another, that other may require it of them, because international obligations are of necessity reciprocal in their nature.").

230. See *The Antelope*, 23 U.S. at 122; Colangelo, *supra* note 64, at 160.

231. *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 154 (2d Cir. 2003); *Sosa*, 542 U.S. at 715.

Lastly, the Privy Council's analysis *In re Piracy Jure Gentium* does not support Jackson's findings. The Council ruled in favor of a broader and more modern interpretation of general piracy partly due to two factors: legislative intent and the "known unknowns."²³² The presiding Lord first recognized that an English court misconstrued The Act of Henry VIII, such that it ultimately caused the courts to treat as precedent the piracy definition which required robbery.²³³ Therefore, the *In re Piracy Jure Gentium* Council appeared to use the hearing as an opportunity to correct subsequent misinterpretation of the sixteenth-century law on piracy.²³⁴

The Council further suggests their Lordships were hesitant to parse a bright-line definition of piracy, which eventually would be materially affected by later unforeseen circumstances.²³⁵ Therefore, the holding rendered under the High Court recognizes that a turn of events can bring particular acts within the expansive purview of piracy, albeit such acts were previously deemed innocent commissions.²³⁶

Factors from the Privy Council's decision can squarely apply to the issue presented before the *Said* court. First, the fact that the various Congresses made subsequent variations to the piracy Act of 1790 indicates that Legislatures did not intend to enact a narrow piracy statute as one of the country's first international law of its kind.²³⁷ It is reasonable to presume that the Supreme Court's decision in *Palmer* to not extend the original Act to foreigners probably hindered the newly-independent nation's ability to send a clear message to piratical perpetrators abroad.²³⁸ It can also be argued that the courts' definitions of piracy had to fairly reflect the law of nations. Congress did not intend to enact comprehensive piracy statutes that were practically narrower than the international law; Congress left it to the federal

232. *In re Piracy Jure Gentium*, *supra* note 97, at 589-94.

233. *Id.* at 590-91.

234. *Id.* at 590.

235. *See id.* at 600 ("We have guarded against the dangerous ambition of wishing to regulate and to foresee everything. . . . A new question spring up. . . . To [decide] this question it is replied that the office of the law is to fix enlarged rules the general maxims of right and wrong, to establish firm principles fruitful in consequences, and not to descend to the detail of all questions which may arise upon each particular topic.").

236. *Id.*

237. *United States v. Hasan*, 747 F. Supp. 2d 599, 612 (E.D. Va. 2010) (stating Congress passed the Act of 1819, in response to the Supreme Court's narrow interpretation of the Act of 1790, to illustrate its intent to proscribe piracy as an international offense punishable under universal jurisdiction).

238. *Id.*

courts to determine the scope and extent of piracy's definition under the collective body of nations at the time of an alleged offense.²³⁹

Second, the subsequent modifications of the piracy statute demonstrate that Congress intended to leave room for error and unforeseen circumstances. Similar to the Privy Council, the Legislature will likely take into account the fact that the universal expansion made the law of nations susceptible to development.

Moreover, the reasoning in *Said* fails for a number of reasons regarding public interest. A threshold issue is that acquittal of alleged pirates due to a mere failure to find an occurrence of a robbery at sea facilitates an endless cycle of funneling those perpetrators back into the piracy world. It is also troubling enough that Somalis continuously recruit new, young fleets; failure to prosecute even the slightest gestures of aggression towards seagoing vessels could weaken the deterrent factor the Obama Administration sought to effectuate when it authorized the use of force against pirates.²⁴⁰ Another issue within the court's analysis is that Judge Jackson disregarded the Government's main argument, which illuminated the very core of the *Hasan* court's reasoning: *Smith* did not address acts other than robbery or forcible depredation that likely constituted piracy.²⁴¹ The rejection of this argument was chiefly grounded in due process concerns, particularly that construing section 1651 to promulgate a flexible definition of general piracy and thus reflect developing international norms would subject alleged pirates to unconstitutionally vague crimes.²⁴² This contention is unprecedented, however, because the universal condemnation of piracy under the High Seas Convention and the UNCLOS clearly proscribes general piracy as a modern-day offense against customary international law.²⁴³ As previously stated, the Government further cautioned the court that the facts of *Smith* were specifically limited to robbery encounters.²⁴⁴

Pursuant to these treatises, Congress, in parsing the broad language of section 1651, invited federal judges to reference the

239. *Id.* at 623; see also *Ex Parte Quirin*, 317 U.S. 1, 29-30 (1942) (finding that Congress decided against "crystallizing in permanent form and in minute detail every offense against the law of war;" instead Congress authorized courts to recognize applicable offenses).

240. Grier, *supra* note 9.

241. *United States v. Said*, 757 F. Supp. 2d 554, 560 (E.D. Va. 2010).

242. *Id.* at 566.

243. *Hasan*, 747 F.Supp. 2d at 638-39 (noting most countries have ratified the UNCLOS, which reflects the current definition of general piracy; Somalia ratified the UNCLOS in 1989, so it is reasonable to assume Somali nationals are familiar with the piracy provisions in the treatise).

244. *Said*, 757 F. Supp. 2d at 566.

international consensus from time to time for guidance in determining the contemporary definition of piracy.²⁴⁵ Just as the Supreme Court overlooked the significance of the eighteenth-century Congress's broad parsing of the Act of 1790,²⁴⁶ Judge Jackson failed to construe section 1651 such that its reading would "reflect[] the definitive modern definition of general piracy under customary international law."²⁴⁷

In light of the *Said* court's failure to recognize the actual impact of universal expansion towards the current law of nations, it erred in its ruling that the definition of general piracy requires an act of robbery or depredation.

V. CONCLUSION

As previously stated, Judge Jackson erred in determining that piracy can only be robbery at sea. It appears that the court rendered this decision in light of exclusive reliance on the obsolete ruling of *Smith*.²⁴⁸

This note demonstrates that Congress, in exercising its Define and Punish powers, drafted piracy legislation that mirrored the law of nations.²⁴⁹ More importantly, Congress conferred the responsibility to federal district courts to determine the scope and extent of piracy's definition as reflected in the contemporary consensus of customary international law. Just as our Legislature attentively recognized the international community's general tendency to expand its jurisprudence, the Legislature also accepted as true that our municipal laws must be assessed in accordance with the international unanimity.²⁵⁰ Unforeseen circumstances, such as the murders of American crew members in 2010, have raised heightened concerns about maritime safety.²⁵¹ For this reason, the courts made clear that the United

245. *Hasan*, 747 F. Supp. 2d at 623-24 (stating "Congress made a conscious decision to adopt a flexible – but at all times sufficiently precise – decision of general piracy that would automatically incorporate developing international norms regarding piracy. . . . [R]ather than having to revise the general piracy statute continually to ensure that it continued to mirror the international consensus definition, Congress merely decided to define piracy by explicit reference to the law of nations, such that any future change in the definition . . . would be automatically incorporated into United States law.").

246. *Id.* at 612.

247. *Id.* at 639.

248. *Said*, 757 F. Supp. 2d at 559 (holding *Smith* is the only case to directly examine the definition of piracy under section 1651).

249. *Hasan*, 747 F. Supp. 2d at 612-14.

250. *Id.* at 623.

251. Grier, *supra* note 9.

States, like other countries, must interpret the law of nations as it exists in its evolved state.²⁵²

In that regard, our federal courts and foreign tribunals no longer confine the definition of piracy to the narrow scope of robbery at sea.²⁵³ Construing section 1651 as anything less than such would offend the spirit of the statute, reestablish the issue of arrogance towards the law of nations that the drafters contemplated, and jeopardize future credibility of American jurisprudence. Furthermore, federal courts should reject Judge Jackson's decision in the public interest to prosecute piracy and deter future threats against American vessels. Again, as the courts have previously articulated:

Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized . . . It is enough to say that Congress may . . . modify or cancel any judicial decision so far as it rests on recognizing an international norm as such.²⁵⁴

The courts have realized that both the legislative and judicial systems are flawed and fallible. As a matter of protecting individual citizens and maritime interests, the courts should exercise a firm sense of judicial reconstruction. This is significant to the perception of the United States, given that it puts the world on notice that the United States vows to honor its moral obligation not only to protecting its own but to advance the overarching international mission.²⁵⁵

Piracy is a crime that may be found anywhere. Considering the vast progression of the universal piratical movement, our courts should do everything within their power to protect our country, as well as the international community at large.

252. *Hasan*, 747 F. Supp. 2d at 632.

253. *See, e.g., id.* at 632; *In re Piracy Jure Gentium*, [1934] A.C. 586, 588 (P.C.) (H.K.).

254. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725, 731 (2004).

255. *See United States v. Arjona*, 120 U.S. 487 (1887).

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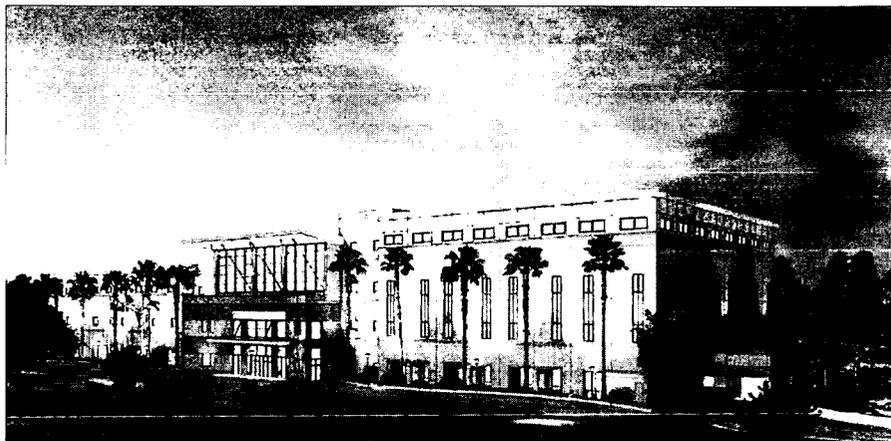
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