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Michael J. Kelly

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A stylized world map in shades of blue and white, showing the continents and oceans, serving as a background for the top section of the cover.

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THE PRE-HISTORY OF PIRACY AS A CRIME & ITS DEFINITIONAL ODYSSEY

Michael J. Kelly

THE PRE-HISTORY OF PIRACY AS A CRIME & ITS DEFINITIONAL ODYSSEY

*Michael J. Kelly**

The legal definition of piracy has fluctuated throughout the centuries to account for both the methods of the perpetrators and the power of the state. The heinous nature of the act usually meant pirates were subject to universal jurisdiction, but what constitutes the act itself has ranged from straightforward robbery at sea to, recently, violence at sea that includes engaging in acts of political protest. The modern trend of employing an expansive “violent attacks at sea” definition is appealing because of its ability to account for a wide variety of conduct in a wide variety of contexts. But the consequences of such an approach include a risk of returning to past experiences where political expediency was prioritized over due process. States should instead consider ways to implement a uniform and appropriate approach to this scourge, and the U.N. Convention on the Law of the Sea provides one way to do so.

CONTENTS

I. INTRODUCTION	26
II. THE EVOLVING DEFINITION OF PIRACY	28
III. CONCLUSION.....	42

* Professor of Law and Associate Dean for Faculty Research & International Programs, Creighton University School of Law, and President of the U.S. Chapter of L'Association Internationale de Droit Penal (AIDP) which co-sponsored this symposium *Endgame! An International Conference on Combating Maritime Piracy* at Case Western Reserve University School of Law. Special thanks to my very able research assistant, Frank Ginsbach, in the preparation of this article.

I. INTRODUCTION

“There is none of you but will hang me, I know,
whenever you can clinch me within your power.”
—*The Pirate Bartholomew Roberts, a.k.a. Black Bart*¹



How is it that a Somali national engaged in piracy against a Saudi vessel on the high seas off the Horn of Africa can be seized by a French warship and taken to a national court in Nairobi, Kenya to stand trial?³ Because he's a pirate! This same logic applies in other instances: How is it that a German national implicated in the

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1. DANIEL DEFOE, A GENERAL HISTORY OF THE PYRATES: FROM THEIR FIRST RISE AND SETTLEMENT IN THE ISLAND OF PROVIDENCE, TO THE PRESENT TIME 235 (2d ed. 1724), *available at* <http://www.gutenberg.org/files/40580/40580-h/40580-h.htm>. Bartholomew Roberts (1682-1722) was “[t]he most successful raider in the history of piracy, he took prisoner an astounding 470 vessels, and so renowned was his ferocity that many of those ships were surrendered to him without a fight.” Christopher Hudson, *The Real Jack Sparrow: He Would Have Eaten Johnny Depp for Breakfast*, DAILY MAIL (May 26, 2007), <http://www.dailymail.co.uk/femail/article-457724/The-Real-Jack-Sparrow-He-eaten-Johnny-Depp-breakfast.html>.
 2. Joe Cas, *The Jolly Roger*, HOIST YOUR COLORS, (Nov. 24, 2010), <http://hoistyourcolors.com/the-jolly-roger/#more-193> (showing the ensign of Black Bart).
 3. See Jeffrey Gettleman, *The West Turns to Kenya as Piracy Criminal Court*, N.Y. TIMES, Apr. 23, 2009, at A8, *available at* http://www.nytimes.com/2009/04/24/world/africa/24kenya.html?_r=1& (“Kenya is emerging as the venue of choice for piracy cases and an important piece of the worldwide crackdown on piracy. The spate of recent hijackings off Somalia’s coast has stiffened international resolve. . . . [P]iracy suspects are getting a one-way ticket to Mombasa . . . where Kenyan officials are all too eager to punish the seafaring thugs imperiling their vital shipping industry. Under recent, innovative agreements with the United States, Britain and the European Union, Kenya has promised to try piracy suspects apprehended by foreign navies. In return, the other countries have agreed to improve Kenya’s antiquated courts.”).

Holocaust could be seized by Israeli agents outside Buenos Aires, Argentina and spirited back to Jerusalem to stand trial?⁴ Because he's a Nazi! Slave traders, *genocidaires*, war criminals, torturers and others are treated similarly.⁵

At first blush, the implication is that criminal jurisdiction stems from *who* one is—but the more accurate description is that jurisdiction stems from *what* one has done. “Application of universal jurisdiction is predicated largely on the notion that some crimes are so heinous that they offend the interest of all humanity, and, indeed, imperil civilization itself,”⁶ and piracy has long been considered the grandfather of universal crimes.⁷ As such, any state, anywhere in the world, can prosecute a pirate even if that state has no connection whatsoever to the underlying acts the defendant has committed.⁸

All pirates know this, as reflected in the eighteenth century admission of Black Bart. Although it should be noted that the basis for universal jurisdiction over the crime of piracy has shifted through the ages. The original rationale for universal jurisdiction over pirates sprang from the locus of the crime—the high seas. No state had jurisdiction extending from its coastal waters into the common area of the high seas, and so every state was granted jurisdiction over pirates if it could catch them.⁹ Now, as piracy is recognized as a *jus cogens* peremptory norm, the universal jurisdiction rationale springs from the conduct itself. Universal jurisdiction over *jus cogens* conduct is drawn

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4. ANDREA BIRDSALL, THE INTERNATIONAL POLITICS OF JUDICIAL INTERVENTION 52–55 (2009).
 5. See *id.* at 47 (“*Jus cogens* offences create the possibility of universal jurisdiction by individual states.”); INTERNATIONAL CRIMINAL LAW, VOL. II, at 207 (M. Cherif Bassiouni ed., 3d ed. 2008) (noting that genocide, war crimes, and slavery are *jus cogens* crimes).
 6. INTERNATIONAL CRIMINAL LAW, VOL. II, *supra* note 5, at 207.
 7. See *id.* at 169; Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 791 (1988).
 8. See MITSUE INAZUMI, UNIVERSAL JURISDICTION IN MODERN INTERNATIONAL LAW: EXPANSION OF NATIONAL JURISDICTION FOR PROSECUTING SERIOUS CRIMES UNDER INTERNATIONAL LAW 51 (2005).
 9. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 193 n.83 (Richard Henry Dana ed., 8th ed. 1866) (“[A] pirate *jure gentium* can be seized and tried by any nation, irrespective of his national character, or of that of the vessel on board which, against which, or from which, the act was done. The reason of this must be, that the act is one over which all nations have equal jurisdiction. This can result only from the fact, that it is committed where all have a common, and no nation an exclusive, jurisdiction—*i.e.*, upon the high seas; and, if on board ship, and by her own crew, then the ship must be one in which no national authority reigns.”).

from the heinous nature of the act.¹⁰ This theoretical shift from the geographic location of the crime to the nature of the crime as the basis for universal jurisdiction over the crime questions the efficacy of continuing to insist that piracy can only occur on the high seas.

But what qualifies as piracy, and how did it come to be the first scourge of mankind enshrined as the oldest international crime amenable to universal jurisdiction? This article looks astern, back to the pre-history of piracy, to discover the criminalization and evolving definition of the act. It then provides a case study of the definition's transformation over a span of 222 years in the United States. Many interesting jurisdictional issues are discussed by other authors in this symposium volume, so questions of jurisdiction are not addressed in depth here.

Piracy, at bottom, is nothing more than robbery. However, when robbery occurs on land, it is fairly evident which governmental power can punish it. When robbery occurs at sea or in the air, where people are more vulnerable, the act is considered more heinous and, as such, the actor is subject to *any* government's power to punish him. Thus, jurisdictional dilemmas are neatly resolved. However, different national jurisdictions may not all use an accepted international definition of piracy. Indeed, they may have wildly divergent definitions on their books, and this variance can change—and ultimately determine—the fate of an alleged pirate.

So let's start at the beginning.

II. THE EVOLVING DEFINITION OF PIRACY

Piracy has been with us since men first set sail.¹¹ Or, as one judge from the International Tribunal for the Law of the Sea put it, “[t]he very first time something valuable was known to be leaving a beach on a raft the first pirate was around to steal it.”¹² Historically, as maritime commerce grew, so did incidents of piracy. A state's ability to escort merchant shipping with warships to ward off pirates was necessarily limited during times of peace and especially so during times of war. Consequently, harsh and quite rigid rules against piracy were developed as an additional deterrent.

The Rhodian Sea Laws were the first attempt at codifying maritime law, which consisted of the customs that long outdated this

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10. *See id.* at 207 (stating that in order for piracy to qualify as a “universal” crime, it must violate a “legal standard of morality,” which is evidenced by the laws, treaties, and practices of states).
 11. *See* José Luis Jesus, *Protection of Foreign Ships Against Piracy and Terrorism at Sea: Legal Aspects*, 18 INT'L J. MARINE & COASTAL L. 363, 364 (2003).
 12. *Id.* (quoting J.A. GOTTSCHALK ET AL., *JOLLY ROGER WITH AN UZI: THE RISE AND THREAT OF MODERN PIRACY* 11 (2000)).

effort by the Greeks between 800 and 900 B.C.¹³ As Arab and Slavic piracy increased, the Sea Laws not only extended universal jurisdiction over brigands¹⁴ but also regulated losses and “served as a form of insurance, dividing the cost of the losses between the ship owner, the owners of the cargo, and the passengers.”¹⁵ Later adopted and extended by the Romans and Byzantines, these provisions were still in place in some form; for instance, when Julius Caesar was captured by pirates as a boy in 78 B.C. and later ransomed.¹⁶ Even the Catholic Church condemned piracy in the Third Lateran Council in 1179 and placed pirates “under penalty of excommunication, but, characteristically enough, only if it was committed against Christians.”¹⁷

Although most of the ancient sea codes are lost to the mists of time, later efforts to regulate maritime law in the Middle Ages included the extension of universal jurisdiction over pirates at sea, hearkening back to Cicero’s admonition in the late Roman Republic era that pirates were:

“[E]nemies” of all societies (*hostes humani generis*), implying that these law-breakers were in a constant state of war with civilization as a whole. Conferring this unique legal status upon robbers (*praedones*) at sea indicates how seriously the problem of piracy was taken by Rome, as also by the Chinese Empire

The notion that piracy was subject to “universal” jurisdiction . . . is reflected in numerous international laws compiled in the West in ancient times. These laws included: the . . . Rhodian Sea Law . . . Rolls of Oleron [12th Century]; the North European ordinances associated with the Hanseatic League, which grew out of the Sea Laws of Wisby in the 13th Century; and the subsequent Consolato del Mare [11th to 13th Centuries]

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13. Gordon W. Paulsen, *An Historical Overview of the Development of Uniformity in International Maritime Law*, 57 TUL. L. REV. 1065, 1068 (1983).
 14. See DOUGLAS M. JOHNSTON, *THE HISTORICAL FOUNDATIONS OF WORLD ORDER: THE TOWER AND THE ARENA* 401 (2008).
 15. *Rhodian Sea Law*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/501661/Rhodian-Sea-Law/> (last visited Mar. 16, 2014).
 16. Jesus, *supra* note 11, at 364.
 17. ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 30–31 (3d ed. 1961).

. . . Gentili [1552-1608] was the first of the early modern jurists to argue that piracy was forbidden under the law of nations: that is, under *public* international law. His argument was that all takings at sea were illegal under the law of nations unless authorized by a sovereign ruler [thereby leaving room for privateers]

Grotius [1583-1645], however, took a narrower . . . view of the matter, arguing that the term “pirates” should be limited to those groups that have banded together solely for wrongdoing. Perhaps Grotius could not accept such groups as “natural” communities, but saw them falling rather under the category of . . . “organized crime.”¹⁸

Interestingly, this seventeenth century disagreement between Gentili and Grotius over a broader or narrower definition of piracy is mirrored in twenty-first century American case law; two federal courts in the Eastern District of Virginia similarly split.¹⁹ In August 2010, U.S. District Judge Raymond Jackson dismissed a case against six Somali pirates who had attacked the warship USS *Ashland*.²⁰ In so doing, Judge Jackson applied the definition of piracy as “robbery at sea,” which was crafted by the U.S. Supreme Court in 1820 in *United States v. Smith*—the last time the United States had tried a formal piracy case.²¹ Ultimately, Judge Jackson found that the Somali defendants had neither successfully boarded nor robbed the *Ashland*.²²

Conversely, in October 2010, Judge Mark Davis determined that neither the boarding nor robbing requirements were relevant because the *Ashland* court had applied the wrong definition of piracy.²³ In finding five Somali pirates guilty of committing piracy by attacking the warship USS *Nicholas*, Judge Davis instead applied the modern U.N. definition of piracy, codified in the U.N. Convention on the Law of the Sea (UNCLOS):

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

18. JOHNSTON, *supra* note 14, at 401.
19. See Rodney Q. Fonda, *Piracy from a Marine Insurance Perspective*, 9 BENEDICT’S MAR. BULL. (Matthew Bender & Co., Newark, N.J.), Jan. 2012, at 191, 192.
20. *United States v. Said*, 757 F. Supp. 2d 554, 556 (E.D. Va. 2010).
21. *Id.* at 558–59; *United States v. Smith*, 18 U.S. 153 (1820).
22. *Said*, 757 F. Supp. 2d at 567.
23. *United States v. Hasan*, 747 F. Supp. 2d 599, 640–41 (E.D. Va. 2010).

- (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 the facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).²⁴

Judge Davis' rationale underlying the preference for the international definition was that the definition of piracy in 18 U.S.C. § 1651 could only be determined by referring to the modern law of nations. Consequently, the court had to use the "international consensus definition at the time of the alleged offense,"²⁵ and not the international definition available in 1820 in the *Smith* case—which was robbery at sea.

The "robbery at sea" definition of piracy is narrower, while the "violent attacks at sea" definition is more expansive. Resolving the district court split, the U.S. Fourth Circuit Court of Appeals overturned Judge Jackson's decision in the *Ashland* case, opting for the more expansive definition of piracy in the *Nicholas* case.²⁶ However, that is not the end of the story. American jurisprudence is casting the net for piracy under this broader violent attacks definition even wider.

In 2013, the U.S. Ninth Circuit Court of Appeals followed the Fourth Circuit's lead. In *Cetacean Research v. Sea Shepherd*, the Ninth Circuit overturned the district court, finding that environmental organization Sea Shepherd's vigorous disruptive efforts to deny Japanese whaling ships of their prizes during seasonal hunts were piratical.²⁷ The existence of a motive to steal, which was

24. *Id.* at 619–20 (quoting U.N. Convention on the Law of the Sea art. 101, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS]).

25. *Id.* at 623.

26. *United States v. Dire*, 680 F.3d 446, 467, 469 (4th Cir. 2012).

27. *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 708 F.3d 1099, 1102 (9th Cir. 2013). In his majority opinion, Chief Judge Alex Kozinski said of the environmental activists' methods of disrupting Japanese whaling:

You don't need a peg leg or an eye patch. When you ram ships; hurl glass containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke bombs

determinative in the district court's dismissal of the case, was deemed irrelevant.²⁸

Russia is likewise following suit. In September 2013, Greenpeace activists, protesting deployment of the first offshore oil platform in the Arctic Sea built to resist ice floes, were arrested by Russian authorities and are being subjected to a piracy investigation:

Russian border guards seized the Greenpeace ship, the Arctic Sunrise, in international waters in the Pechora Sea on Thursday, a day after several members of the crew tried to board the Prirazlomnaya platform, which is operated by the Russian state energy giant Gazprom.

The ship was towed to port in Murmansk, arriving on Tuesday. Its crew of 30, held incommunicado since the seizure, includes citizens of 18 countries, among them one American, raising the prospect of a diplomatic confrontation given the gravity of the piracy charges, which carry a sentence of up to 15 years in prison.²⁹

Is this really what pirates are? Anti-whaling or anti-drilling environmental groups? The states involved in such prosecutions could certainly be abusing the U.N.'s piracy definition to silence environmental protests and activism.³⁰ Moreover, if it begins there, will human rights activism be next? Add to this the element of aiding and abetting, and the piracy definition becomes significantly broader.

In 2013, the D.C. Circuit Court of Appeals in *United States v. Ali* grafted aiding and abetting onto the piracy definition.³¹ In that case, a

and flares with hooks; and point high-powered lasers at other ships, you are, without a doubt, a pirate, no matter how high-minded you believe your purpose to be.

Id. at 1101.

28. See *id.* at 1101–02 (holding that the district court erred in narrowly construing the “private ends” language in UNCLOS’ definition of piracy to cover purely financial gain, whereas multiple persuasive authorities support a finding that private ends may also “include those pursued on personal, moral, or philosophical grounds, such as Sea Shepherd’s professed environmental goals”).
29. Steven Lee Myers, *Greenpeace Activists May Face Russian Piracy Charges*, N.Y. TIMES (Sept. 24, 2013), <http://www.nytimes.com/2013/09/25/world/europe/greenpeace-activists-face-possible-piracy-charges-in-russia.html>.
30. See *id.* (“Russia announced . . . that it had opened a piracy investigation against the crew of a Greenpeace ship after its activists scaled an offshore oil platform last week. The step signaled that the authorities intended to act decisively to thwart more protests against Russia’s ambitious plans to expand energy exploration in the region.”).
31. *United States v. Ali*, 718 F.3d 929, 938, 940 (D.C. Cir. 2013).

Somali national, Ali Mohamed Ali, was convicted of aiding and abetting piracy when he negotiated the release of a Danish merchant ship that had been captured by Somali pirates in exchange for a \$1.7 million ransom, of which he received a \$16,500 cut and a separate \$75,000 payment that he demanded during the negotiations for his translation and negotiation services and which the ship owners wired to his bank account.³²

Ali was also nominally the Somali Education Minister.³³ As such, he accepted an invitation to attend an education conference in the United States, where law enforcement was waiting to arrest him when he arrived at Dulles Airport.³⁴ He was charged with conspiracy to commit piracy “in violation of 18 U.S.C. § 371, which makes it a crime for ‘two or more persons’ to ‘conspire . . . to commit any offense against the United States,’” and aiding and abetting piracy under Section 2 of the same code, but not piracy itself.³⁵ Judge Brown successfully found a home for the aiding and abetting charge in the “facilitating” language of the UNCLOS definition of piracy but could not do so for the conspiracy charge, which he determined the lower court correctly dropped.³⁶

While useful to go after financial backers of piracy and perhaps even account holders when proceeds are deposited, the aiding and abetting theory completely unleashed, although not as theoretically wide as conspiracy, can have unintended consequences. Can corporations aid and abet piracy? Perhaps a more nuanced definition of the “facilitating” clause, along the lines of Gentili, who excluded privateers from the definition 300 years ago, is in order. Although as legal persons, corporations in theory should be held to the same standards as natural persons with respect to criminal conduct.³⁷

Nineteenth century legal experts similarly wrestled with this question—although by then, stateless piracy had largely been eradicated.³⁸ Nevertheless, there was always classically a direct correlation between piracy, robbery, and placement on the high seas. Oxford Professor Travers Twiss discussed piracy in his 1861 treatise, *Law of Nations*, precisely in those terms:

32. *Id.* at 933.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 941.

37. See generally Michael J. Kelly, *Prosecuting Corporations for Genocide Under International Law*, 6 HARV. L. & POL’Y REV. 339 (2012) (imputing the legal status of corporate personhood to international criminal statutes that place liability on “persons”).

38. See NUSSBAUM, *supra* note 17, at 128.

The High Seas are . . . *nullius territorium*, as not being subject to the exclusive Possession or Empire of any Nation. In another sense they may be called the *common highway* of Nations . . . seeing that all who navigate them are subject to a Common Law of Nations. . . . The maintenance of the peace of the Sea is one of the objects of that Common Law, and all offences against the peace of the Sea are offences against the Law of Nations, and of which all Nations may take cognizance. The robber equally with the murderer on the High Seas is technically a sea-felon or pirate, and every hand may be lawfully raised against him; he is, in fact, regarded as an enemy of the human race (*hostis humani generis*). The Pirate has no National character, and to whatever country he may have originally belonged, he is *justiciable* everywhere, being reputed out of the protection of all laws and privileges whatever.³⁹

However, once a pirate was within the territorial sea of a coastal state, he was within its exclusive jurisdiction.⁴⁰ The breadth of the territorial sea was historically measured according to the distance by which the adjacent coastal state could defend it.⁴¹ For instance, the origin of the traditional three-mile wide territorial sea was the distance of a cannon shot.⁴² This lengthened over time to the twelve mile territorial sea that customary law and UNCLOS embrace today.⁴³

Beyond the jurisdictional constraints, there were generally accepted elements of the crime of piracy, even if there was disagreement on the application of those elements. William Manning's 1875 edition of the *Law of Nations* notes:

The fact of there being such a crime as piracy has never been doubted since the Law of Nations acquired its modern form, nor have the chief elements of the crime been matter of doubt. The exact nature and number, however, of the offences comprehended by the term is still a matter of uncertainty, and the text-book writers have been in great perplexity in their search for a satisfactory definition. The characteristic elements in the crime of piracy are—(1) a violation, actual or attempted, of the general rights by sea of all States, whether in respect of persons or things; and (2) an absence of allegiance to any one

39. TRAVERS TWISS, *THE LAW OF NATIONS CONSIDERED AS INDEPENDENT POLITICAL COMMUNITIES: ON THE RIGHTS AND DUTIES OF NATIONS IN TIMES OF PEACE* 290 (2d ed. 1884).

40. *Id.* at 291.

41. *Id.* at 292.

42. Fonda, *supra* note 19.

43. UNCLOS, *supra* note 24, art. 3, 1833 U.N.T.S. at 400.

State, or an intention, actual or presumed, to establish an organisation subsisting by general rapine.⁴⁴

Much discussion then followed about whether the term piracy could be stretched to encompass slave-trading by ship—resolved finally by proposing that it could be so expanded by individual state criminal definitions.⁴⁵ Henry Wheaton adds, “[t]he African slave-trade, though prohibited by the municipal laws of most nations, and declared to be piracy by the statutes of Great Britain and the United States, and [by treaty] Austria, Prussia and Russia, is not such by the general international law”⁴⁶

Theodore Woolsey agrees with this point in his 1878 treatise, *International Law*,⁴⁷ but focuses his definition of piracy on three classes of persons committing the crime:

Piracy is robbery on the sea, or by descent from the sea upon the coast, committed by persons not holding a commission from, or at the time pertaining to, any established state. It is the act (1) of persons who form an organization for the purposes of plunder . . . (2) of persons who, having in defiance of law seized possession of a chartered vessel, use it for purpose of robbery; (3) of persons taking a commission from two belligerent adversaries.⁴⁸

Wheaton, a decade earlier than Woolsey, dealt with both robbery and violence, as well as the nationality (or lack thereof) of the perpetrators:

To constitute piracy *jure gentium* it is necessary, 1st, That the offence, being adequate in degree,—for instance robbery, destruction by fire, or other injury to persons or property,—must be committed on the high seas, and not within the territorial jurisdiction of any nation; and, 2d, That the offenders, at the time of the commission of the act, should be in

44. WILLIAM OKE MANNING, COMMENTARIES ON THE LAW OF NATIONS 121 (Sheldon Amos ed., 1875).

45. *Id.* at 121–22.

46. WHEATON, *supra* note 9, at 197–98. Mirroring the modern disagreement among lower federal courts on piracy’s definition, Wheaton notes that there was a similar split in the early nineteenth century with respect to whether slave-traders fell under the definition of piracy: “In the United States, there was a conflict in the inferior tribunals; but the Supreme Court, in *The Antelope* [23 U.S. 66 (1825)], decided that the [slave] trade was not piracy *jure gentium*.” *Id.* at 214 n.89.

47. THEODORE D. WOOLSEY, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW § 144 (5th ed. 1878).

48. *Id.*

fact free from lawful authority, or should have made themselves so by their deed, or, as Sir L. Jenkins says (ii. 714), “out of the protection of all laws and privileges,” or, in the words of the Due de Broglie (Ecrits, i. 365), “qui n’ait ni feu ni lieu.” in short, they must be in the predicament of *outlaws*.⁴⁹

Whether the focus is on the perpetrator, the action, or the locus of the crime on the high seas, nuances in the definition of piracy waxed and waned over time as judges, scholars and governments attempted to fit unique “non-piratical” conduct (at least according to motive) into the legal definition of piracy. Like the dilemma with modern day maritime environmental activists, this effort was likely sometimes in good faith but other times may have been for political expediency, which would result in an abuse of the definition.

Extending the definition of piracy to include rebels was one such practice, followed later by the U.S. government during the Civil War. For example:

In 1873 a communalist insurrection broke out in the southeast of Spain, and the Spanish squadron stationed at Cartagena fell into the hands of the insurgents. The crews of the vessels composing the squadron were proclaimed pirates by the government of Madrid and it became necessary for states having vessels of war in the western Mediterranean to instruct the commanders as to the line of conduct to be adopted by them. Instructions were accordingly given by the governments of England, France and Germany [and] . . . naval commanders were ordered to allow freedom of action to the insurgent vessels so long as the lives or the property of subjects of their respective states were not threatened; the orders given to British officers differed only in directing interference in the case of danger to Italian as well as to English persons or property. If in the course of any interference which might be needed, Spanish persons or ships were captured, British commanders were to hand over their prisoners and the property seized to the agents of the government of Madrid. Thus, the piracy of the Cartagenians being political, no criminal jurisdiction was assumed over them; and though the right of summary action was asserted, its exercise was limited to the requirements of self-protection.⁵⁰

The current effort stretches the piracy definition even further. The D.C. Circuit’s decision to graft aiding and abetting theory onto the piracy definition in *Ali*, referenced above, is but the latest example.

49. WHEATON, *supra* note 9, at 194 n.83.

50. WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 275 (A. Pearce Higgins ed., 7th ed. 1917).

The definitional journey of piracy as a crime in the United States is an interesting case study. Recall first that all the treaties on public international law were in accord on the proposition that there could be, and often was, a divergence between the definition of piracy according to the law of nations and that which was found in the municipal law of a state.⁵¹

The American experience with the piracy definition has been an ongoing tussle between the legislature and the judiciary. The Constitution assigned the specific job of defining piracy to Congress,⁵² which it did with the passage of the Crimes Act of 1790.⁵³ Piracy was defined across five articles, with two key sections:

§ 8 [I]f any person or persons shall commit upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence which if committed within the body of a county, would by the laws of the United States be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and 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 death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought.⁵⁴

§ 12 [I]f any seaman or other person shall commit manslaughter upon the high seas, or confederate, or attempt or endeavor to corrupt any commander, master, officer or mariner, to yield up or to run away with any ship or vessel, or with any goods, wares, or merchandise, or to turn pirate, or to go over to or confederate with pirates, or in any wise trade with any pirate

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51. *Id.* at 277 (“[The] municipal laws extending piracy beyond the limits assigned to it by international custom affect only the subjects of the state enacting them and foreigners doing the forbidden acts within its jurisdiction.”).
 52. U.S. CONST. art. I, § 8, cl. 10 (providing Congress with the power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations”).
 53. An Act for the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112 (1790).
 54. *Id.* § 8, 1 Stat. at 113–14.

knowing him to be such, or shall furnish such pirate with any ammunition, stores or provisions of any kind, or shall fit out any vessel knowingly and with a design to trade with or supply or correspond with any pirate or robber upon the seas; or if any person or persons shall any ways consult, combine, confederate or correspond with any pirate or robber on the seas, knowing him to be guilty of any such piracy or robbery; or if any seaman shall confine the master of any ship or other vessel, or endeavor to make a revolt in such ship . . . such person or persons so offending, and being thereof convicted, shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars.⁵⁵

The Crimes Act of 1790 delivers the classic “one, two punch” in that it criminalizes the underlying act of piracy in Section 8, mandating death, and then criminalizes the facilitation of piracy in Section 12, mandating fines and imprisonment for accomplices.

The U.S. Supreme Court struggled with this definition, exempting its application within domestic waters⁵⁶ or rivers that were not the high seas,⁵⁷ and over American defendants.⁵⁸ By 1819, Congress opted for a simpler definition with the passage of the Act to Protect the Commerce of the United States and Punish the Crime of Piracy, which redefined piracy in Section 5 such that:

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 . . . be punished by death.⁵⁹

The U.S. Supreme Court accepted Congress’ lead this time and ruled in the oft-cited *United States v. Smith* case the following year that “piracy, by the law of nations, is robbery upon the sea, and that it is sufficiently and constitutionally defined” by the 1819 statute.⁶⁰ The matter seemed settled that customary international law would provide the definition.

This was not an unknown tactic for Congress. It had, in the 1789 Alien Tort Statute, provided for federal court jurisdiction over cases

55. *Id.* § 12, 1 Stat. at 115.

56. *See* *United States v. Bevans*, 16 U.S. 336, 339 (1818).

57. *See* *United States v. Wiltberger*, 18 U.S. 76, 77 (1820).

58. *See* *United States v. Palmer*, 16 U.S. 610, 633–34 (1818).

59. An Act to Protect the Commerce of the United States, and Punish the Crime of Piracy, ch. 77, § 5, 3 Stat. 510, 513–14 (1819).

60. *United States v. Smith*, 18 U.S. 153, 162 (1820).

between foreign plaintiffs and foreign defendants involving “a tort only in violation of the law of nations.”⁶¹ As the law of nations evolved, so too would the definition of crimes or torts. This allowed for a convenient elasticity to such statutes that Congress could then leave to the courts to monitor.

However, there was a dissenter in the *Smith* case. Justice Livingston insisted that the constitutional mandate to Congress in Article I to define the crime of piracy specifically listed piracy because it wanted Congress to define it with more specificity than just incorporating whatever the international definition happened to be.⁶² That year, Congress duly amended the statute by adding three more parameters to the crime of piracy that included robbery of a ship, crew, or contents and direct as well as indirect slave-trading.⁶³ All were punishable by death.

Thus, in a thirty-year span at the beginning of this Republic, the United States moved from a domestic definition of piracy to an international one and then back again for a hybrid version. America had thus become one of those states possessing a more stringent definition (by including slave-trading) in its municipal law that the treatise-writers had discussed.

And so the matter rested for 30 more years. However, the United States soon found itself on a war footing that would change the rules once more. This time, the tussle over piracy was between the Executive branch and the U.S. Supreme Court. At the outset of the American Civil War, President Abraham Lincoln issued a proclamation blockading all Southern ports.⁶⁴ Part of that proclamation was the designation of blockade runners, essentially Confederate sailors, as pirates,⁶⁵ a legal classification the Supreme Court found difficult to accept:

On April 19, 1861, Lincoln proclaimed that the crews of Confederate warships and privateers were pirates—a designation which could subject them to execution if captured. . . . In June, the crew of the captured Confederate ship *Savannah* was tried for piracy; but the jury disagreed, and there was no conviction.

61. An Act to Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 77 (1789).

62. See *Smith*, 18 U.S. at 170–72.

63. An Act to Continue to Enforce “An Act to Protect the Commerce of the United States, and Punish the Crime of Piracy,” and Also to Make Further Provisions for Punishing the Crime of Piracy, ch. 113, §§ 3, 4, 3 Stat. 600, 600–01 (1820).

64. Proclamation 81, Declaring a Blockade of Ports in Rebellious States (Apr. 19, 1861), available at <http://www.presidency.ucsb.edu/ws/?pid=70101>.

65. See *id.*

[Confederate] President Davis threatened retaliation, if Confederate sailors were executed, by hanging some of the prisoners taken at Bull Run. When the crew of the Confederate privateer *Petrel* was tried for piracy in Philadelphia in 1861, Justice Grier of the Supreme Court declared that it was foolish to treat captured Confederate sailors differently from Confederate soldiers taken in battle, and refused to try any more piracy cases.⁶⁶

Eventually, the Lincoln Administration relented on this legal tactic to expedite the path of captured Southern sailors to the gallows and “reclassified blockade runners as prisoners of war a few months later.”⁶⁷ By attempting to stretch the piracy definition to include rebels, President Lincoln was not acting in an unprecedented manner. This is the same definitional stretch the Spanish had used a century prior against rebels, and other European powers had accepted it, acting in their own self-interests.⁶⁸

The British House of Lords debated President Lincoln’s 1861 proclamation and generally concurred that if Britain was not going to recognize the Confederacy, then rebels could be treated as pirates—deferring to the judgment of the “parent state;” but this was more a political rather than legal question.⁶⁹ Indeed, the same question had vexed the British during the American Revolution, and the legal solution adopted by Westminster was to label captured maritime rebels as pirates instead of prisoners of war, and detain them indefinitely instead of trying them.⁷⁰

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66. CLEMENT EATON, *HISTORY OF THE SOUTHERN CONFEDERACY* 170 (1965).
67. John Osborne, *In Philadelphia, U.S. Justice Grier Rebels Against Piracy Cases Interrupting U.S. District Court Business*, HOUSE DIVIDED (Oct. 19, 2011), <http://hd.housedivided.dickinson.edu/node/38130> (citing J. THOMAS SCHARF & THOMPSON WESCOTT, *HISTORY OF PHILADELPHIA 1609-1884*, IN THREE VOLUMES, VOL. I, at 786 (1884)). See also WHEATON, *supra* note 9, at 196–97 n.84 (questioning Lincoln’s proclamation expanding the scope of piracy).
68. See HALL, *supra* note 50, at 275 (explaining how certain insurgents aboard vessels were declared pirates for seemingly political reasons).
69. See WHEATON, *supra* note 9, at 197 n.84 (“If the acts are sufficient to constitute piracy, unless the authority is a defence, the court of the neutral country must follow the lead of the political department of its government, as recognition of belligerency is a political, and not a judicial, question. . . . The Courts of the parent State and of the neutral power both follow the lead of the political department.”).
70. *Id.* at 198 n.84. Of course, one cannot help but be struck by the parallel between the Crown treating maritime colonial rebels as non-POW pirates for purposes of indefinite detention, and the U.S. later treating Al-Qaeda terrorist suspects as non-POW terrorists for purposes of indefinite detention:

A century and a half later, America revisited the issue by split decisions within the Fourth Circuit. Essentially, the definitional choice faced by the courts came down to “robbery at sea” versus “violent attacks at sea.” The Fourth Circuit and the Ninth Circuit opted for the broader violent attacks definition with the accompanying facilitating language, with the Ninth Circuit even adding aiding and abetting.

The root of this definitional dilemma could be the fact that piracy co-exists as a crime domestically and internationally and has done so for centuries. While other heinous crimes similarly co-exist (genocide, crimes against humanity, torture, etc.), they are of relatively recent vintage. Consequently, they have not been subjected to hundreds of legal opinions, prosecutions, and overlapping alterations in state practice as has piracy. As Nussbaum notes:

By the end of the seventeenth century, English statutory law developed a differentiation, later adopted by the United States, between “piracy *jure gentium*,” meaning approximately robbery on the high seas by private vessels, and “piracy by statute,” meaning similar acts (e.g., committed by rebel ships) considered as piratical according to particular acts of legislation. In the first case, the courts were ostensibly directed to apply the “law of nations” as such, though in reality they did so in the light of English conceptions.⁷¹

The course pursued by the British Government during the war of the American Revolution seems to have been this: An Act of Parliament was passed (17 Geo. III. ch. 9, 1777) reciting that acts of treason, piracy, and felony had been committed by sundry persons, many of whom were, and would thereafter be, confined for trial on charges of such crimes, and that it might be inconvenient to try them forthwith, and of evil example to let them go at large, and authorizing the detention of such persons by the crown, with bail or judicial intervention, for one year. This act was renewed annually until the end of the war. Its object was to obtain a parliamentary declaration that the legal *status* of American rebels was that of felons or pirates, and to secure a mode of detaining them in custody without recognizing them as prisoners of war, or being obliged to bring them to trial as criminals. In the mean time, between the armies in America, prisoners were treated as prisoners of war, exchanged, paroled, &c.; and it is believed that no persons were judicially tried and punished as criminals during the war: and the recognition of independence disposed of the question.

Id.

71. NUSSBAUM, *supra* note 17, at 128.

III. CONCLUSION

The definitional odyssey of piracy as a crime is fascinating in and of itself with a compelling historical trajectory across the ages, colorful characters associated with gripping adventures, and mercenary interests seeking wealth and fame. But the legal interest to be served here is the same legal interest to be served with other serious crimes like murder, treason, and robbery.

Societies predicated on the rule of law depend on a clear, manageable, and precise definition of the law. This is especially true with respect to criminal law. Without a solid foundation provided by the predictable application of law, the stability of such societies erodes. Governments that tinker with legal definitions of crimes to suit their own, often short-term, interests should be discouraged from doing so. It is true that the law evolves over time, but it should be in a determined and beneficial manner.

Perhaps a better, and more uniform, method for trying pirates would be to create a venue within the permanent International Criminal Court (ICC) in The Hague.⁷² If all the parties to UNCLOS agreed to this venue using a single definition of piracy, then it would not matter whether they were also state parties to the Rome Statute of the ICC. They could simply turn over alleged pirates and all accompanying evidence to the court, or a chamber of the court, which might happen to be sitting somewhere in East Africa or around the Indian Ocean. This would also obviate the judicial gymnastics encountered when dueling definitions of the crime are available.

As it now stands, however, Black Bart was correct that any state that could catch him could “hang” him since he was a pirate. However, whether a prosecution would succeed today is a separate question. Once jurisdiction is asserted, a broader or narrower conception of piracy would be used to try him in court, and that could determine entirely whether he swings from the yardarm or gets off the hook!

72. See generally 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, 201 (2010) (arguing that the ICC is the best international legal forum to address piracy offenses).



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