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# How Piracy Has Shaped the Relationship Between American Law and International Law

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# How Piracy Has Shaped the Relationship Between American Law and International Law

**Keywords**

Judiciary Act, Piracy, Piracy cases, International Law. Piracy law

# HOW PIRACY HAS SHAPED THE RELATIONSHIP BETWEEN AMERICAN LAW AND INTERNATIONAL LAW

JOEL H. SAMUELS\*

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## INTRODUCTION

Piracy has been at the heart of the formation of international law at every major stage of its development. Indeed, many of the most basic doctrines of international law have been formed either around piracy specifically or with piracy in mind. The reason for this is quite simple: piracy occurs on the high seas, outside the sovereign territory of any state, such that national laws alone do not apply to piratical acts outside a nation's territory.<sup>1</sup>

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1. Dr. Maria Jacobsson, Alternate Head of Delegation of Sweden on behalf of the European Union, Statement in Discussion Panel B at United Nations: Combating Piracy and Armed Robbery at Sea (May 10, 2001), in 2 *TERROR ON THE HIGH SEAS* 471 (Yonah Alexander & Tyler B. Richardson eds., 2009) ("Piracy is an international crime that by definition can only be committed outside of the territory of a state."); Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of*

Furthermore, pirates do not generally target any single nation or individual; instead, they attack the vessels of any nation.<sup>2</sup> Thus, in the absence of international law, pirates would be able to run (or sail) free and clear of legal obligations. This Article seeks to take the resurgence of piracy over the past several years as an invitation to revisit the role piracy has played in the formation of American law, specifically with regard to its incorporation of international law into domestic law.<sup>3</sup>

This Article will focus on two related lines of historical inquiry. First, this Article explores the Acts of the Continental Congress and the states in the early years of the American Republic to understand how piracy influenced early American lawmaking. This Article then traces the

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*National and International Law*, 48 HARV. INT'L L.J. 121, 144 (2007) (describing how pirates "brought themselves outside of any state's specific jurisdiction, and were instead subject to the 'law of nations,' which all states could enforce without fear of trading on any other state's sovereignty"); Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 TUL. MAR. L.J. 1, 11–13 (2008) (noting that the United Nations Convention on the Law of the Sea has defined piracy as, *inter alia*, an act "committed on the high seas or in a place outside the jurisdiction of any state"). Indeed, the United Nations Convention on the Law of the Sea includes explicit language intended to combat this threat. See United Nations Convention on the Law of the Sea art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397.

2. Moreover, those vessels are generally vulnerable and convenient targets. More than eighty percent of cargo worldwide is transported on the seas, and yet those same waters are patrolled and regulated far less than land or even air. See Gal Luft & Anne Korin, *Terrorism Goes to Sea*, 83 FOREIGN AFF. 61, 62 (2004).

3. See 1 TERROR ON THE HIGH SEAS, *supra* note 1, at 34 (noting that piracy in East Africa and Nigeria has grown significantly, and while complete statistics are not available, "some of the incidents have been spectacular"); Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1, 6 (2007) (recognizing the growing reemergence of piracy and arguing that positive international law and customary international law are sufficient to counter it); Niclas Dahlvang, *Thieves, Robbers, & Terrorists: Piracy in the 21st Century*, 4 REGENT J. INT'L L. 17, 17 (2006) ("Despite the perception that pirates have been relegated to history with its muskets and the Spanish Main, maritime piracy remains a significant threat to international commerce and security."); Timothy H. Goodman, "Leaving the Corsair's Name to Other Times: How to Enforce the Law of Sea Piracy in the 21st Century Through Regional International Agreements," 31 CASE W. RES. J. INT'L L. 139, 153 (1999) (recognizing that even though piracy statistics indicate that pirates are flourishing, these numbers are likely to be grossly underreported due to a fear of increased insurance premiums, delayed shipments, and loss of clients); James Kraska & Brian Wilson, *The Pirates of the Gulf of Aden: The Coalition Is the Strategy*, 45 STAN. J. INT'L L. 243, 245 (2009) (claiming that the "audacity and scope" of attacks by Somali pirates are unprecedented to the point that researchers have noted that "[w]e have never seen this before, these kinds of numbers, the number of ships that have been attacked" (internal citation omitted)); Milena Sterio, *Fighting Piracy in Somalia (and Elsewhere): Why More is Needed*, FORDHAM INT'L L.J. (forthcoming), available at <http://ssrn.com/abstract=1468021> (stating that while piracy decreased for most of the twentieth century, it resurfaced at the end of that century and the start of the current one and arguing that pirates should be treated as terrorists); Mark McDonald, *For Somali Pirates, 2009 Is a Record Year*, N.Y. TIMES, Dec. 30, 2009, at A9, available at [http://www.nytimes.com/2009/12/30/world/africa/30piracy.html?\\_r=1](http://www.nytimes.com/2009/12/30/world/africa/30piracy.html?_r=1) ("Somali pirates carried out a record number of attacks and hijackings in 2009, despite the deployment of international warships to thwart them and a United Nations Security Council resolution to bring the fight against them to shore.").

treatment of piracy between the signing of the Declaration of Independence and the sweeping Judiciary Act of 1789, a period largely unexplored in academic literature. The decisions by the Framers of the Constitution with regard to piracy and its relationship with domestic law, as well as international law (the law of nations), were largely informed by state legislation from 1776 to 1789.<sup>4</sup> As such, that period necessarily offers important insights into how piracy has framed American law. Second, the Article looks at the role that piracy played in the formation of American law with regard to core concepts of international law, such as the responsibility of individual actors, sovereignty of states, and universal jurisdiction (i.e., the power to exercise jurisdiction for particularly heinous crimes).<sup>5</sup>

The roots of piracy date back more than a millennium.<sup>6</sup> The term “pirate,” derived from the Latin *pirata* and Greek *peirates*,<sup>7</sup> appeared in Greek literature as early as 140 B.C.<sup>8</sup> Acts of piracy have resulted in legal procedures for nearly as long. For example, the Roman Republic’s Senate passed a law in 68 B.C. to commission Pompey the Great to subdue the pirates’ “sovereignty” with Roman sovereignty,<sup>9</sup> and Cicero wrote that oaths to pirates ought not be legally kept as pirates are enemies of all mankind (*hostis humani generis*).<sup>10</sup> In the late fifteenth century, beginning

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4. See *infra* Part II (detailing the legislative reactions of several states to acts of piracy).

5. See generally PRINCETON UNIV., THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 28 (2001) (defining universal jurisdiction as applying “based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction”).

6. For a broad-ranging, if somewhat scattered, treatment of many early examples of piracy and the responses to it, see A. T. Whatley, *Historical Sketch of the Law of Piracy*, 3 LAW MAG. & REV. 536 (1874).

7. ALFRED P. RUBIN, THE LAW OF PIRACY 1 (2d. ed. 1998).

8. *Id.* at 7.

9. *Id.* at 10; 1 TERROR ON THE HIGH SEAS, *supra* note 1, at 9.

10. Rubin, *supra* note 7, at 17; see also ALFRED S. BRADFORD, FLYING THE BLACK FLAG: A BRIEF HISTORY OF PIRACY 44 (2007) (recounting Cicero’s stance that pirates are criminals not protected by the laws of war). This concept developed in a time when the Mediterranean was far from safe and piracy was common. ANGUS KONSTAM, PIRACY: THE COMPLETE HISTORY 13 (2008). However, the reaction to piracy was not uniform. *Id.* In ancient Greece, some city-states encouraged piracy, while others, such as Athens, fought pirates to keep trade routes clear. *Id.* It has been argued that piracy was generally accepted and that attempts to curb piracy by Athens could be seen as half-hearted. PHILIP DE SOUZA, PIRACY IN THE GRAECO-ROMAN WORLD 39–40 (1999). The island of Crete served as a pirate base for almost eight centuries. KONSTAM, *supra*, at 13. Attempts by anti-piracy city-states never managed to fully curb the threat of pirate raids. *Id.* When a growing Rome expanded into the eastern Mediterranean, it became a target of pirate raids. *Id.* at 15. In approximately 100 B.C., the Roman Senate acted and passed a law forbidding entry of any pirate ships into its ports, and ordered allied kingdoms to guarantee that no pirates would use their territory as a base. DE SOUZA, *supra*, at 110–11; RALPH WARD, PIRATES IN HISTORY 39 (1974). The law was ineffective and merely led the pirates to consolidate their forces. DE SOUZA, *supra*, at 114.

with the Spanish expulsion of the Moors in 1492, European states and their merchant vessels were under constant threat from Moorish pirates.<sup>11</sup> Piracy also led to early instances of cooperation between States, as in the late sixteenth century when “merchant shipping in the Mediterranean had become so perilous . . . that all the nations of Europe banded together” to combat piracy.<sup>12</sup> The stakes involved in the control of trade routes and the transport of vast wealth by merchant vessels provided compelling reasons for States, individually and collectively, to combat the actions of pirates.

Since its earliest days, the United States has also taken direct action to combat piracy. Indeed, the first successful campaign by the United States beyond its borders was a war triggered by piracy.<sup>13</sup> The Barbary Wars, waged in the early nineteenth century against the Barbary States of North Africa (modern-day Morocco, Algeria, Tunisia, and Libya) sought to stem pirate attacks originating from those territories against merchant ships (including American ships) in the Mediterranean Sea.<sup>14</sup>

The early examples of international efforts to combat piracy demonstrate not only the threat posed by pirates but also the recognition by international actors that in the absence of a body of international law, pirates could engage in otherwise illegal behavior without any threat of punishment.<sup>15</sup> In the face of the unique problems of illegal activity in a territory controlled by no individual state (the high seas), the community of nations worked together to craft a body of law to criminalize and punish pirates.

Again, just as piracy has been at the center of international legal reform, it has been an important part of domestic law in the United States. In an early piracy case, the Supreme Court explained why piracy, which it had earlier described as “only a sea term for robbery,”<sup>16</sup> is forbidden by the law of nations, while robbery is not.<sup>17</sup> The Court noted: “A pirate is deemed, and properly deemed, *hostis humani generis*. But why is he so deemed? Because he commits hostilities upon the subjects and property of any or all nations, without any regard to right or duty, or any pretence of public authority.”<sup>18</sup> Whereas foreign states developed responses to piracy through

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11. See SEYMOUR GATES POND, TRUE ADVENTURES OF PIRATES 5–7 (1954); see also 1 TERROR ON THE HIGH SEAS, *supra* note 1, at 9.

12. POND, *supra* note 11, at 15.

13. See Terence Fokas, Comment, *The Barbary Coast Revisited: The Resurgence of International Maritime Piracy*, 9 U.S.F. MAR. L.J. 427, 427–28 (1997).

14. See generally Robert F. Turner, *State Responsibility and the War on Terror: The Legacy of Thomas Jefferson and the Barbary Pirates*, 4 CHI. J. INT’L L. 121, 122–24 (2003) (chronicling the history of the Barbary Wars and drawing a parallel to the modern American war against terrorism).

15. See *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820) (recognizing that piratical offenses depend upon the law of nations rather than any municipal code).

16. *Id.*

17. *Harmony v. United States*, 43 U.S. (2 How.) 210, 232 (1844).

18. *Id.*

both international and domestic mechanisms over many centuries, the fledgling American republic addressed piracy only after a robust body of international law existed. As a result, the United States was presented with both a challenge and an opportunity: how to mix existing international law with developing domestic law in the effort to combat piracy.

This Article traces the role of piracy in American jurisprudence to identify how the unique characteristics of piracy have helped to shape the intersection of domestic law and international law. Piracy has been addressed in all of the major mechanisms of American lawmaking. Indeed, piracy was explicitly addressed in the Constitution, which authorizes Congress “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”<sup>19</sup>

Part I of this Article explores legislation at the national and state levels in the decade-plus between the signing of the Declaration of Independence and the Judiciary Act of 1789, identifying several important developments in American law triggered by the need to address piracy as a special body of law. Part II focuses on the judiciary, analyzing early cases at the federal and state levels to see how the courts implemented legislative mandates regarding piracy. During this early period of American history, courts actively relied on international law in framing their decisions on piracy, and this reliance lies at the heart of the relationship between domestic law and international law in the United States. This Part explores how those early cases have influenced modern American law in several specific areas. The Article concludes that piracy played a pivotal role in establishing the place (and indeed the importance) of international law in applying domestic law to a category of cases that otherwise defied solutions—crimes on the high seas. The role of piracy has been obscured by the passage of time, but it endures through a robust body of law in the human rights arena that has grown in perhaps unexpected and certainly unnoticed directions out of legislation and case law designed to effectively define and punish piracy.

#### I. PIRACY AND LEGAL REFORM LEADING UP TO THE JUDICIARY ACT

In order to understand the role of piracy in shaping American law, one must go back to the earliest efforts of the fledgling Republic to address the issue. In the years immediately following independence, several states adopted their own laws on piracy. For instance, in 1776, South Carolina passed:

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19. U.S. CONST. art. I, § 8, cl. 10. For an excellent discussion of the scope and role of this clause, see generally Eugene Kontorovich, *The “Define and Punish” Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 149 (2009).

An Act to empower the Court of Admiralty to have Jurisdiction in all Cases of Capture of the Ships and other Vessels of the Inhabitants of *Great Britain, Ireland, the British West Indies, Nova Scotia, and East and West Florida*; to establish the Trial by Jury in the Court of Admiralty in Cases of Capture, and for the other Purposes therein mentioned.<sup>20</sup>

Likewise, in 1779, Connecticut passed “An Act, empowering [sic] the Superior Court, to try and determine Piracies, Felonies and Robberies committed on the High-Seas, &c.”<sup>21</sup> The Act provided that “all Piracies, Felonies and Robberies committed in or upon the Sea, or in any Place within the Admiralty Jurisdiction,” should be tried in Superior Court in any County in the State “in the same Manner as in Case of Felonies committed on the Land, within the Jurisdiction of this State.”<sup>22</sup> Thus, the Connecticut Act of 1779 treated piracy as a crime comparable to domestic felonies and authorized its state courts to proceed against pirates for crimes on the high seas as if they had been committed on land in Connecticut.

In Rhode Island, the legislature passed a law in September 1779, entitled “An Act empowering the Superior Court of Judicature . . . to take Cognizance of all Acts of Piracy and Felony committed upon the high Sea.”<sup>23</sup> The Rhode Island legislature explained the need for its immediate and unilateral action as follows: “[w]hereas Acts of Piracy and Felony have, of late, been frequently perpetrated; and since this State hath become independent of the Kingdom of *Great-Britain*, no Court hath been appointed and authorized to take Cognizance thereof.”<sup>24</sup> The Act provided that “all Acts of Piracy and Felony committed upon the high Sea, where the Offenders shall come or be brought within this State, shall be cognizable before the Superior Court of Judicature, Court of Assize and General Gaol-Delivery, at any of their stated Terms, in any County within this State.”<sup>25</sup>

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20. Act of April 11, 1776, *microformed on* SESSION LAWS OF THE AMERICAN STATES AND TERRITORIES, South Carolina 1776–1899, Fiche 1 (Redgrave Info. Res. Corp.). South Carolina’s early and continued efforts to enact laws on piracy may reflect the importance of maritime trade to the State and the State’s willingness to engage in privateering as authorized by the Constitution. *See* *Fifield v. Ins. Co. of the State of Pennsylvania*, 47 Pa. 166 (1864) (affirming the lower court judgment dismissing petitioner’s claim against the insurance company because the insured ship was not taken by “pirates,” but by privateers, which was not a covered loss under the policy). In fact, John Adams wrote that “South Carolina Seems to display, a Spirit of Enterprize in Trade, Superiour to any other State . . . They have some Privateers, and have made several Prizes.” Letter from John Adams to James Warren (Apr. 6, 1777), *in* 5 PAPERS OF JOHN ADAMS 145 (Robert J. Taylor ed., 1983).

21. CONNECTICUT PUBLIC STATUTE LAWS 537, *microformed on* SESSION LAWS OF THE AMERICAN STATES AND TERRITORIES 1775–1899, Connecticut, Fiche 2 (Redgrave Info. Res. Corp.).

22. *Id.*

23. RHODE ISLAND STATUTE LAWS 16, *microformed on* SESSION LAWS OF THE AMERICAN STATES AND TERRITORIES 1775–1899, Rhode Island, Fiche 11 (Redgrave Info. Res. Corp.).

24. *Id.*

25. *Id.*



Piracy trials were to have the same course of proceedings as “Trials, at common Law, for Felonies, high Crimes and Misdemeanors.”<sup>26</sup> The Rhode Island statute provided an interesting caveat that “no Sentence of Death shall be executed, until the Case be laid before the General Assembly; which shall be done at the next succeeding Session after Trial.”<sup>27</sup>

Similarly, a Pennsylvania statute for “regulating and establishing Admiralty Jurisdiction” from 1780 provided that:

[I]n all cases of prize, capture or re-capture upon the water from enemies, or by way of reprisal, or from pirates, the same shall be tried, adjudged and determined . . . by the Law of Nations and the Acts and Ordinances of the Honorable the Congress of the United States of America.<sup>28</sup>

The statute went on to describe the specifics of trials for pirates, which were substantially similar to the provisions adopted by Congress the following year. The Pennsylvania Act states that:

[A]ll traitors, pirates, felons and criminals, who shall offend upon the sea or within the Admiralty jurisdiction, shall be . . . tried and judged . . . according to the course of the common Law, in like manner as if the treason, felony or crime were committed within one of the counties of this State.<sup>29</sup>

The Act underscores the severity of the crime of piracy in its description of the appropriate punishment for a commander or master of a ship who turns pirate or yields his ship up voluntarily to a pirate or enemy: “he shall be adjudged to be a pirate, felon and robber; and being convicted thereof . . . shall have and suffer such pains of death, loss of lands, goods and chattels, as pirates, felons and robbers upon the seas ought to have and suffer.”<sup>30</sup>

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26. *Id.*

27. *Id.*

28. Act for Regulating and Establishing Admiralty Jurisdiction, ch. CLII, in THE ACTS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA 313–14 (Dunlap ed., 1776), *microformed on* SESSION LAWS OF THE AMERICAN STATES AND TERRITORIES 1775–1899, Pennsylvania Commonwealth, Fiche 5 (Redgrave Res. Info. Corp.).

29. *Id.* at 317. New Jersey adopted a statute one year later that mirrored almost verbatim the Pennsylvania statute. Act for Regulating and Establishing Admiralty Jurisdiction, ch. VII, in ACTS OF THE SIXTH GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY 13, 19–20 (Isaac Collins ed., 1782), *microformed on* SESSION LAWS OF THE AMERICAN STATES AND TERRITORIES 1775–1899, New Jersey, Fiche 7 (Redgrave Info. Res. Corp.).

30. A Supplement to the Act entitled, “An ACT for regulating and establishing Admiralty Jurisdiction,” ch. CLXXX, in THE ACTS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, *supra* note 28, at 386. The New Jersey statute included provisions for “the Trial of Pirates and other Sea Felons” in sections 15 through 18 of the Act. Act for regulating and establishing Admiralty Jurisdiction, *supra* note 29, at 19–20. Section 15 provides a brief history of how piracy cases were tried before the Act was passed, noting especially that pirates were not tried by juries during the colonial period. *Id.* at 19. By contrast, the Act instituted trial by jury in piracy cases. *Id.* The language in

Even as several states were enacting their own legislation on piracy, the federal legislature was trying to develop a unified national plan for combating piracy. Article 9, section 1 of the Articles of Confederation, approved for ratification in 1777 and officially ratified by the states in 1781, provided that Congress was to “have the sole and exclusive right . . . [and] States shall be restrained from . . . appointing courts for the trial of piracies and felonies committed on the high seas; and establishing courts for receiving and determining finally appeals in all cases of captures.”<sup>31</sup>

Per Article 9, on March 17, 1781, a congressional “committee [was] appointed to devise the mode of appointing courts for the trial of piracies and felonies committed on the high seas.”<sup>32</sup> On April 5, 1781, the committee presented a draft of a bill for establishing courts for the trial of piracy and Congress agreed to an ordinance outlining the procedures for creating such courts.<sup>33</sup> The ordinance declared that persons committing piracy or felony on the high seas should be tried according to common law courts as if the piracy or felony had been committed on land.<sup>34</sup> The ordinance provided that these cases were to be judged by “the justices of the supreme or superior courts of judicature, and judge of the Court of Admiralty of the . . . states.”<sup>35</sup>

This ordinance outlines the delicate federal-state balance of the immediate post-independence period.<sup>36</sup> The ordinance also details the ways in which the early Republic grappled with how to combat piracy and how (and whether) to adopt international legal norms into domestic law.<sup>37</sup> The ordinance called on the states to use their own common law for the substantive crimes and causes of action to be brought against those accused of piracy.<sup>38</sup> However, the states were encouraged to create special courts to handle these cases, recognizing the unique nature of piracy and thus opening the door for a separate body of law to develop for piracy cases.<sup>39</sup>

A letter dated April 10, 1781, from James Lovell to Elbridge Gerry explained the arrangement of judges for the piracy courts and stated that:

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sections 15 through 18 of this Act resembles the language used in sections 18 and 20 of the March 8, 1780, Pennsylvania Act and sections 2 through 4 of the September 22, 1780, Pennsylvania Act, suggesting that New Jersey borrowed its language from its neighbor.

31. ARTICLES OF CONFEDERATION art. 9, § 1.

32. 19 JOURNALS OF THE CONTINENTAL CONGRESS 274 (Gaillard Hunt ed., Gov’t Printing Office 1912) (1781).

33. *Id.* at 354–56.

34. *Id.* at 354.

35. *Id.* at 355.

36. *See id.* at 354–55 (granting Congress the sole and exclusive power of appointing courts to try piracies but allowing states to apply their own common law).

37. *Id.*

38. *Id.*

39. *Id.* at 354 (encouraging states to speedily create piracy courts).

Congress have determined that the superior Judges in each State with *the* Judge of Admiralty (or such one of the Judges of Admiralty where there are several as the Executive shall chuse [sic] to commissionate) shall be Judges for trying Piracies on the high Seas; any two or more to be a Quorum. The Tryals [sic] were to be under all the Forms of prosecuting such Crimes on Land by grand & petit Juries.<sup>40</sup>

After a report to Congress on February 4, 1783, explaining that the Legislature of Pennsylvania found the piracy courts ordinance to be so obscure “that they were at a loss to adapt their laws to it,” a committee was appointed to amend the ordinance.<sup>41</sup> The ordinance was subsequently amended on March 4, 1783, to clarify which judges were to preside over the court.<sup>42</sup>

It appears that there were continued imperfections with Congress’ approach to mandating that the states try piracy under their common law. On September 6, 1785, South Carolina delegate Charles Pinckney<sup>43</sup> made a motion before Congress expressing the opinion that “similar crimes should be punished in a similar manner,” and that the “Ordinance of April, 1781, respecting the punishment of piracies and felonies has a different operation in some of the States.”<sup>44</sup> Following Pinckney’s recommendation, on September 6, 1785, a resolution was made directing John Jay, the Secretary of the United States for the Department of Foreign Affairs, to institute courts that would punish piracy and felonies committed on the high seas in the same manner in all the states.<sup>45</sup> The motion notes that at that point in time, different states punished piracy differently per their interpretations of the 1781 ordinance.<sup>46</sup> The September 1785 resolution underscored the importance of legislating against piracy, stating that “it has been the policy of all civilized nations to punish crimes so dangerous to the welfare and

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40. Letter from James Lovell to Elbridge Gerry (Apr. 10, 1781), in 17 LETTERS OF DELEGATES TO CONGRESS 141 (Paul H. Smith ed., 1990) (emphasis in original).

41. 25 JOURNALS OF THE CONTINENTAL CONGRESS 888–89 (Gaillard Hunt ed., Gov’t Printing Office 1922) (1783).

42. 24 *id.* at 164. The following language was removed: “[T]he Judge of the Court of Admiralty, or, in case there shall be several judges of the said court in the state where the trials hereafter mentioned are to be had, any one of such judges, to be commissioned for that purpose by the supreme executive power of such State, and the justices of the supreme or superior court of judicature of the several and respective states, or any two, or more, of them, (of whom the said Judge of the Admiralty shall always be one.” *Id.*

43. A committee that included Pinckney drafted Article 19, an amendment to the Articles of Confederation that would have created a federal court to handle cases of treason, mis-prison of treason, and piracy or felony on the high seas, and put it before Congress on August 7, 1786. 31 JOURNALS OF THE CONTINENTAL CONGRESS 497–98 (John C. Fitzpatrick ed., 1934) (1786).

44. *Id.* at 682.

45. *Id.* at 682, 797–806.

46. *Id.* at 682.

destructive to the intercourse and Confidence of Society . . . in an exemplary manner.”<sup>47</sup>

In response to that resolution, the Secretary for Foreign Affairs reported back to the Congress on September 29, 1785.<sup>48</sup> While the Secretary agreed that “Piracy is War against all mankind, which is the highest Violation of the Laws of Nations,” he argued that Congress did not in fact have the power “to declare what is or shall be Felony or Piracy, . . . but merely *to appoint Courts for the Trial of Piracies and Felonies committed on the high Seas.*”<sup>49</sup> Nevertheless, the Secretary reasoned “that Congress would not exceed their Powers by ordaining, the Punishment to be inflicted throughout the United States in Cases of Piracy,” and proceeded to lay out an exceedingly detailed “Ordinance for the Trial of Piracies and Felonies Committed on the High Seas” to replace the 1781 ordinance.<sup>50</sup> Ultimately, Jay’s draft ordinance was not passed, and no action appears to have been taken on the proposed amendment.<sup>51</sup>

Several states followed the Congressional mandate laid out in the Piracy Ordinance. Massachusetts, for one, established piracy courts in 1783 in response to the ordinance.<sup>52</sup> The Massachusetts Act was entitled “An Act for carrying into Execution an Ordinance of Congress for establishing Courts for the Trial of Felonies and Piracies Committed on the High Seas.”<sup>53</sup> The Act describes in detail which judges were to preside over the piracy courts, where the piracy courts were to be held, and the mode for appointing jurors.<sup>54</sup> The Act provided that:

[T]he Justices of the Supreme Judicial Court and the Judge of Admiralty of this Commonwealth, or any two of them, are constituted and appointed Judges for hearing and trying every Person charged with

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47. *Id.*

48. *Id.* at 797.

49. *Id.* (emphasis in original).

50. *Id.* at 798–804.

51. Letter from Charles Thomson to William Samuel Johnson (May 16, 1789), in 25 LETTERS OF DELEGATES TO CONGRESS, *supra* note 40, at 525–26.

52. Act of Feb. 25, 1783, ch. X, *reprinted in* 1782–83 ACTS AND RESOLVES OF MASSACHUSETTS 216–17 (Boston, Wright & Potter 1890), *microformed on* SESSION LAWS OF THE AMERICAN STATES AND TERRITORIES 1775–1899, Massachusetts Commonwealth, Fiche 3 (Redgrave Info. Res. Group). Massachusetts had established its first maritime court as early as 1775 to exercise jurisdiction in prize matters. 2 LEGAL PAPERS OF JOHN ADAMS 353 (L. Kinvin Wroth & Hiller B. Zobel, eds., 1965). Several years after establishing the 1783 court, Massachusetts passed a resolution dealing with the fate of two pirates who had been found guilty of piracy and faced a death sentence. *See* “Resolve on the Petition of Richard Squire and John Matthews, Authorizing the Justices of the Court Appointed for the Trial of Piracies and Felonies on the High Seas, to Sentence Said Convicts to Hard Labour, and not to Pass Sentence of Death,” *reprinted in* ACTS AND RESOLVES OF MASSACHUSETTS, *supra*, at 882–83.

53. *See* ACTS AND RESOLVES OF MASSACHUSETTS, *supra* note 52, at 216.

54. *Id.*

Piracy or Felony upon the High Seas . . . by Grand and Petit Jurors, according to the Course of the Common Law.<sup>55</sup>

The Act further stated that “the Times and Places for holding Courts, for the Trial of Piracies and Felonies committed on the High Seas, shall be . . . held and kept in the said several Counties, and at such other Time and Place in any Maritime Town.”<sup>56</sup>

The South Carolina legislature actively sought solutions to combat piracy. On February 29, 1785, South Carolina Governor William Moultrie, in a message to the General Assembly, transmitted a letter he had received from Don Vincent Emanuel De Lespedes, the Spanish Governor of East Florida, concerning a pirate gang operating along the coast, and included a deposition of a captured pirate named Thomas Bell.<sup>57</sup> The South Carolina House of Representatives offered a reward of fifty guineas to anyone who could apprehend the pirates mentioned in the Spanish governor’s letters, payable upon their conviction.<sup>58</sup> On March 11, 1785, Governor Moultrie notified the South Carolina House of Representatives that one of the pirates had been captured and taken to jail, but South Carolina Justices Henry Pendleton and Aedanus Burke and Admiralty Court Judge and South Carolina Attorney General William Drayton were of the opinion that the Act of Congress made for the Trial of Pirates was inadequate for that purpose.<sup>59</sup> Governor Moultrie provided the South Carolina House with copies of the opinions and asked that measures be taken to remedy the situation in the future.<sup>60</sup> On March 24, 1785, the South Carolina House passed a resolution requesting that Governor Moultrie transmit the papers, including the judges’ opinions, to the South Carolina delegates for them to put before the Continental Congress for a remedy.<sup>61</sup>

In January 1788, the South Carolina House of Representatives appointed a committee “[t]o bring in An Ordinance to carry into effect that part of the Ninth Article of the Confederation and the Act of Congress relative to the Trial of Piracies and other offences therein Specified, Committed on the

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55. *Id.*

56. *Id.*

57. Letter from Don Vincent Emanuel De Lespedes, Gov. of East Florida, to William Moultrie, Gov. of South Carolina, transmitted to South Carolina House of Representatives (Feb. 19, 1785), available at <http://www.archivesindex.sc.gov/onlinearchives/Thumbnails.aspx?recordId=284163>

58. See JOURNALS OF THE HOUSE OF REPRESENTATIVES, 1785–1786, at 134, 144 (Lark Emerson Adams, ed., 1979).

59. See *id.* at 219 (declining to further specify why the Act of Congress was inadequate).

60. See *id.* at 219–20 (“doubt[ing] not” that the House would indeed rectify the problem).

61. *Id.* at 292.

High Seas,” based on the 1781 and 1783 ordinances of Congress.<sup>62</sup> The bill was introduced on January 25, 1788 and passed on February 27, 1788.<sup>63</sup> This law established piracy courts in response to Congress mandate and was entitled “An Act to carry into effect the Ordinances of Congress for establishing Courts for Trial of Piracy and Felonies committed on the High Seas.”<sup>64</sup> The South Carolina Act references the ordinances of Congress of April 5, 1781, and the amended version of March 4, 1783, and provides that:

[W]here any person . . . shall hereafter commit any piracy or felony on the high seas . . . and have been or shall be brought into this state for trial, the . . . jurors . . . shall enquire of, try and adjudge every such offender, in such a manner as if the offence had been . . . committed within the said district.<sup>65</sup>

Other states, like Maryland, did not address piracy on the high seas, but did address piracy on navigable waters within the state (behavior that would not constitute piracy in the modern day as it did not occur on the high seas). On November 7, 1785, Maryland’s General Assembly passed:

An ACT to approve, confirm and ratify, the compact made by the commissioners appointed by the general assembly of the commonwealth of Virginia, and the commissioners appointed by this state, to regulate and settle the jurisdiction and navigation of Patowmack and Pocomoke rivers, and that part of Chesapeake bay which lieth within the territory of Virginia.<sup>66</sup>

The tenth provision of the compact between the two states provided for piracies committed along the rivers at certain points and in the Chesapeake Bay to be tried in Virginia and Maryland state courts, depending upon which state had jurisdiction.<sup>67</sup> The method for determining jurisdiction was detailed in the compact.<sup>68</sup>

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62. JOURNALS OF THE HOUSE OF REPRESENTATIVES, 1787–1788, at 317 (Michael E. Stevens, ed. 1981).

63. *Id.* at 356, 498, 512.

64. 1788 S.C. Acts 20, *microformed on* SESSION LAWS OF AMERICAN STATES AND TERRITORIES 1775–1899, South Carolina, Fiche 10 (Redgrave Information Resources Corp.).

65. *Id.* (clarifying that piracy courts were to be considered as serious as other courts by noting that jurors who did not fulfill their duties would be subject to fines and penalties, as they would in other courts).

66. 1785 Md. Laws, ch. 1, *microformed on* SESSION LAWS OF AMERICAN STATES AND TERRITORIES 1775–1899, Maryland, Fiche 14 (Redgrave Information Resources Corp.).

67. *See id.* The acts defined as piracy in the compact between Maryland and Virginia would not be considered piracy today, as they could not occur on the high seas but rather within territorial waters shared by the two states within the territory of the United States.

68. *See id.* (considering water within the territorial bounds of either state to belong to that state, with the Patowmack River being a common highway for both states to utilize).

The Virginia General Assembly passed a similar law in October of that same year, codifying its agreement with Maryland.<sup>69</sup> At its October 1785 session, the Virginia General Assembly also passed “An act to prevent losses by pirates, enemies, and others, on the high seas.”<sup>70</sup> This Act set forth the procedures for admiralty courts to use in determining compensations in cases where officers or seamen were killed or wounded in defense of a ship against pirates or other enemies.<sup>71</sup> The law understood that the admiralty court would have jurisdiction over any cases of piracy occurring on the high seas.<sup>72</sup>

At its October 1786 session, the Virginia General Assembly passed “An act concerning treasons, felonies, and other offences committed out of the jurisdiction of this commonwealth.”<sup>73</sup> This act gave the general courts of Virginia counties the authority to try cases of treason and other felonies “except piracies and felonies on the high seas,” which were committed “by any citizen of this commonwealth, in any place out of the jurisdiction of the courts of common law in this commonwealth, and all felonies committed by citizen against citizen in any such place.”<sup>74</sup> This act, coupled with the 1785 acts of the Virginia legislature, confirmed that cases of piracy on the high seas would fall under the exclusive jurisdiction of admiralty courts.

In 1787, New York enacted legislation to clarify the role of its courts of admiralty.<sup>75</sup> The New York Act was designed to make clear “[t]hat the court of admiralty of this State shall not meddle or hold plea of any thing done within this State, but only of things done upon the sea, as it hath formerly been used,” except in the case of “death of any person and of maihem [sic] done in ships or vessels being and hovering in the main stream of great rivers out of the body of any county, or nigh to the sea, and in none other places of the same rivers . . . .”<sup>76</sup>

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69. See Act of Oct. 10, 1785, 1785 Va. Acts 50, 52–53 (specifying that piracy occurring between two points on the Chesapeake Bay and the Potowmack River against citizens of Virginia, by people who were not citizens of Maryland, would be tried in Virginia).

70. *Id.* at 167.

71. See *id.* at 167–68 (giving courts discretion to levy reasonable fines against the pirates, as long as the killed or wounded seamen actually attempted to defend the ship).

72. See *id.* at 167 (noting masters and seamen submitted petitions to admiralty judges).

73. *Id.* at 330.

74. *Id.* at 330–31.

75. Act to prevent encroachments of the court of admiralty, 1787 N.Y. Laws 394.

76. See *id.* (emphasis in original) (clarifying further that all matters involving both land and water also fell outside the admiralty court’s jurisdiction).

## II. THE ROLE OF THE COURTS IN DEVELOPING LAW THROUGH PIRACY CASES AND THE IMPACT OF THOSE CASES ON MODERN AMERICAN LEGAL DOCTRINES

Although constitutionally the legislature is responsible for laying the ground rules for criminal and civil piracy cases, courts have played the dominant role in shaping the impact of piracy on other areas of the law. Notably, piracy cases were among the first cases to address the relationship between international law and domestic law in the United States, at both the state and federal levels.

### A. *The Early Cases*

The earliest published federal court case involving piracy, *United States v. Tully*,<sup>77</sup> demonstrates the federal courts' codification and expansion of the crime of piracy with reference to the law of nations. In that 1812 Massachusetts case, two American crewmen were charged with piracy after running away with a ship and ending up in St. Lucia.<sup>78</sup> The court discussed whether force was a necessary element of the crime of piracy and reasoned that, according to the law of nations, "[a] pirate is one . . . who, to enrich himself, either by surprise or force, sets upon merchants or other traders, by sea, to spoil them of their goods."<sup>79</sup> In contrast, the court noted that "[p]iracy, by the common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed on shore, would amount to felony there."<sup>80</sup> The court went on to conclude that the statute, while "analogous to the common law description[,] . . . ma[d]e certain other acts piracy, which would not be so at common law," including breach of trust committed "piratically and feloniously."<sup>81</sup> In other words, the court acknowledged that the statute expanded the crime of piracy beyond the common law definition, which corresponded with piracy as understood by the law of nations.

In its first decision addressing piracy, the Supreme Court took a narrow view of piracy and the scope of the 1790 Act for the Punishment of certain Crimes against the United States.<sup>82</sup> In *United States v. Palmer*,<sup>83</sup> Chief Justice Marshall, writing for the Court, stated:

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77. 28 F. Cas. 226 (C.C. Mass. 1812).

78. *Id.* at 228.

79. *Id.* at 229.

80. *Id.*

81. *Id.*

82. *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818); An Act for the Punishment of Certain Crimes against the United States, ch. 9, § 8, 1 Stat. 112 (1790). In this Act by the First Congress, piracy was defined as the commission of certain acts, prohibited by domestic laws, that occur "upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state." *Id.* at 113. These prohibited acts include "murder or robbery, or any other offence which if committed within the body of a county, would by the



[T]he crime of robbery, committed by a person on the high seas, on board of any ship . . . belonging exclusively to subjects of a foreign state . . . is not a piracy within the true intent and meaning of the act for the punishment of certain crimes against the United States.<sup>84</sup>

According to this reasoning, the Court found that because the crime of robbery was not punishable by death on land, robbery committed on the high seas was likewise not punishable by death.<sup>85</sup>

On March 3, 1819, Congress again enacted legislation regarding the prohibition of piracy, but it defined piracy in a different manner.<sup>86</sup> Rather than relating piracy to violations of domestic laws, the 1819 Act explicitly defined piracy with reference to the law of nations:

[I]f 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.<sup>87</sup>

The legislative history for the 1819 Act is sparse, but Edwin Dickinson, writing in the *Harvard Law Review* a century after the Act, opined:

From [*Palmer*] it was only natural to infer that the Supreme Court regarded Section 8 as exclusively a statutory definition of piracy by the municipal law of the United States, not including provisions for the trial and punishment in United States courts of pirates by the law of nations.

Thus interpreted, however, the decision in *United States v. Palmer* would have limited much the scope and efficacy of this section. The decision was not well received. That it left the law with respect to piracy more restricted than it had been supposed to be was made evident when Congress promptly enacted a new statute, the Act of March 3, 1819, to supply the omission which the Supreme Court had discovered.<sup>88</sup>

The 1819 Act to Protect the Commerce of the United States, and Punish the Crime of Piracy set forth that “if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of

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laws of the United States be punishable with death.” *Id.* at 113–14. The Act further lists scenarios that would qualify as piratical acts under the legislation, such as the revolt of seamen against their captain or the voluntary yielding of a vessel to pirates. *See id.* at 114.

83. 16 U.S. (3 Wheat.) 610 (1818).

84. *Id.* at 633–34.

85. *Id.* at 627.

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

87. *See id.* (concluding that convicted offenders could be punished by death).

88. Edwin D. Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334, 345 (1925) (citations omitted).

nations, . . . [they] shall, upon conviction thereof, . . . be punished with death.”<sup>89</sup>

In the most important early piracy case, *United States v. Smith*,<sup>90</sup> the Supreme Court relied extensively on international sources and international law in interpreting a domestic statute.<sup>91</sup> The petitioner in the case, Thomas Smith, had been arrested and charged with piracy under the 1790 Act and the 1819 Act.<sup>92</sup> Smith argued that Congress failed to properly exercise its power to punish piracy as authorized by the Constitution, which describes Congress’ power “to define and punish piracies and felonies committed on the high seas, and offences against the law of nations.”<sup>93</sup> Smith argued that the two pieces of legislation passed by Congress pursuant to Article I, section 8 of the Constitution were overly vague.<sup>94</sup> Specifically, he argued that both Acts failed to define piracy such that he could be successfully prosecuted for any such crimes.<sup>95</sup>

Justice Story, writing for the Court, rejected Smith’s contention that piracy was not sufficiently defined and reasoned that because of the reference to common law in the former Act and the law of nations in the latter Act, piracy was thus defined with reasonable certainty under both Acts.<sup>96</sup> Turning first to the 1790 Act, the Court determined that the Act’s language was wholly appropriate to the extent that it defined piracy by reference to common law terms.<sup>97</sup> The Court held that “the crime is not less clearly ascertained than it would be by using the definitions of these terms as they are found in our treatises of the common law,” and that “[i]n fact, by such a reference, the definitions are necessarily included, as much as if they stood in the text of the act.”<sup>98</sup>

Next, the Court considered the 1819 Act, which defined piracy not by reference to domestic law but rather by reference to the law of nations, or international law.<sup>99</sup> This legislative step itself reflected a willingness by

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89. An Act to Protect the Commerce of the United States, and Punish the Crime of Piracy § 5.

90. 18 U.S. (5 Wheat.) 153 (1820).

91. *Id.*

92. *Id.* at 154–55.

93. *Id.* at 158 (citing U.S. CONST. art. I, § 8, cl. 10).

94. *Id.*

95. *See id.* (restating the argument that Congress should not leave the definition of piracy to judicial interpretation).

96. *Id.* at 159–61.

97. *See id.* at 160 (noting that “robbery” and “murder” have well-understood common law meanings that carry over into the 1790 Act).

98. *Id.*

99. *See id.* at 160–62 (noting that the vast majority of scholars who wrote on the law of nations considered piracy a defined crime). By contrast, in *Palmer*, perhaps because only the domestically focused 1790 Act had been passed, the Court did not begin to look at the relationship between the law of nations and domestic law or turn to external sources of law to interpret the nature of piracy. *See United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 626–27 (1818) (focusing only on the plain words of the 1790 Act).

American lawmakers to incorporate international law into domestic law.<sup>100</sup> By enacting legislation that specifically turned to international law to define piracy, Congress had opened the door for courts to rely on international law in piracy cases.<sup>101</sup>

To determine whether the crime of piracy was defined by the law of nations with reasonable certainty, the Court in *Smith* also presented its first extensive discussion of the appropriate sources of international law.<sup>102</sup> The Court relied heavily on international scholars to reach its final decision, noting the importance of these leading scholars as sources of applicable international law.<sup>103</sup> The Court cited at length to Hugo Grotius, often considered the father of international law, and quoted directly from Grotius's work in several pages of its original Latin.<sup>104</sup> The Court also cited Italian jurist Domenico Alberto Azuni's description of piracy as "justly regarded as a crime against the universal laws of society, and . . . every where punished with death" and cited Azuni's proclamation that "every nation has a right to pursue, and exterminate them, without any declaration of war."<sup>105</sup> Finally, the Court cited Sir Leoline Jenkins for the guiding principle that pirates "are in the law *hostes humani generis*, enemies, not of one nation, or of one sort of people only, but of all mankind."<sup>106</sup> The Court concluded that all of these sources demonstrated that under the law of nations, the "true definition" of piracy is "robbery upon the sea."<sup>107</sup> That clear definition refuted Smith's primary argument to the Court.<sup>108</sup>

Having used international sources to identify a concrete definition of piracy, the Court returned to Smith's arguments about the 1790 Act and

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100. The importance of the law of nations was recognized by many of the Founding Fathers. Thomas Jefferson recognized that "[t]he Law of Nations, by which [a] question is to be determined, is composed of three branches. 1. the Moral law of our nature. 2. the Usages of nations. 3. their special Conventions." 25 THE PAPERS OF THOMAS JEFFERSON 609 (John Catanzariti, ed., 1992). In a letter to Thomas Jefferson, Edmund Randolph stated that "[t]he law of nations, tho' not specially adapted by the constitution, or any municipal act, is essentially a part of the law of the land." 24 *id.* at 127.

101. See *Smith*, 18 U.S. (5 Wheat.) at 160–61 (referencing the law of nations as support for the Court's holding).

102. See *id.* at 160–61 (stating that consulting "the general usage and practice of nations" was helpful to interpret the law of nations, and drawing comparisons to England's piracy law).

103. See *id.* at 161–63 (emphasizing that virtually all scholars agreed that piracy was a defined crime).

104. See *id.* at 163–66 n.a (stressing that although Grotius did not expressly define piracy at any point in his writing, there was "no doubt" about how he construed the crime).

105. *Id.* at 167 n.a (quoting 2 M.D.A. AZUNI, THE MARITIME LAW OF EUROPE 361 (William Johnson trans., 1806)).

106. *Id.* at 174 n.a (citing SIR LEOLINE JENKINS, 1 ADMIRALTY SESSIONS 86 (1668)).

107. *Id.* at 162 (asserting that the Court would have come to the same conclusion regardless of whether it had looked to common law, maritime, or law of nations scholars).

108. See *id.* (concluding with "no hesitation" that piracy was sufficiently defined).

noted that the law of nations is part of the common law<sup>109</sup> and that, as a result, the common law definition of piracy incorporated the international law understanding of piracy “as an offence against the universal law of society, a pirate being deemed an enemy of the human race.”<sup>110</sup>

The manner in which modern courts determine what constitutes international law can be directly traced to the Supreme Court’s analysis in *Smith*<sup>111</sup> and its efforts to define piracy under the law of nations.<sup>112</sup> The *Smith* Court reasoned that “[w]hat the law of nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law.”<sup>113</sup> That statement of the sources of international law incorporates three of the primary sources of international law recognized by tribunals worldwide today as codified in the Statute of the International Court of Justice.<sup>114</sup>

In *United States v. Furlong*,<sup>115</sup> a case decided less than one week after *Smith*, the Supreme Court considered several indictments from the circuit courts of Georgia and South Carolina involving prisoners of various nationalities and aboard ships cruising under flags both domestic and foreign, convicted for acts of piracy.<sup>116</sup> The Court construed the 1790 Act to establish the principle that regardless of the nationality of the accused or the national character of the ship involved, piratical acts were punishable under the Act.<sup>117</sup> The Court reasoned that “[r]obbery on the seas is considered as an offence within the criminal jurisdiction of all nations. It is against all, and punished by all.”<sup>118</sup> The Court went on to explain that “a vessel, by assuming a piratical character, is no longer included in the

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109. See *id.* at 161 (recognizing, though, that the common law punishes piracy offenders as offenders against the law of nations).

110. *Id.* The Court also noted that Blackstone considered the common law definition of piracy indistinguishable from the law of nations definition. *Id.* at 162 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*73).

111. *Id.* at 160–61.

112. See, e.g., *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 239 (2d Cir. 2003); *Doe I v. Unocal Corp.*, 395 F.3d 932, 948 (9th Cir. 2002), *rehearing dismissed*, 403 F.3d 708 (9th Cir. 2005); *Kadic v. Karadžić*, 70 F.3d 232, 238–39 (2d Cir. 1995); *Filartiga v. Peña-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (explaining that the *Smith* court articulated three different types of international law, including scholarly writings, general practices of nations, and judicial decision enforcing a law).

113. *Smith*, 18 U.S. (5 Wheat.) at 160–61.

114. See Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055 (codifying four sources of international law: (1) international conventions, (2) international custom, (3) general principles of law recognized by nations, and (4) judicial decisions and scholarly writings).

115. 18 U.S. (5 Wheat.) 184 (1820).

116. *Id.* at 184.

117. See *Id.* at 193 (rejecting petitioners’ argument that section 5 of the 1819 Act essentially repealed section 8 of the 1790 Act and holding that both Acts remained applicable).

118. *Id.* at 197.

description of a foreign vessel.”<sup>119</sup> The Court found that the crew in the case “assumed the character of pirates, whereby they lost all claim to national character or protection.”<sup>120</sup>

Almost twenty-five years later, in *Harmony v. United States*,<sup>121</sup> shipowners appealed the seizure of their vessel in response to their alleged violations of the 1819 Act to punish the crime of piracy.<sup>122</sup> Among their defenses, the shipowners argued that the “aggressions, restraints, and depredations” alleged were not “piratical” within the language of the Act.<sup>123</sup> They also argued that, in order to establish piracy, the Act required the express intent to steal for the sake of gain and for no other purpose.<sup>124</sup> The Supreme Court ruled that such a narrow reading of the Act would defeat the purpose of the legislation, which it believed to be “designed to carry into effect the general law of nations on the same subject in a just and appropriate manner.”<sup>125</sup> The Court interpreted “piratical” in this context to be general, including any aggression belonging to a class of behavior commonly attributed to pirates, regardless of their motives.<sup>126</sup> Reaffirming the views expressed in *Smith and Furlong*, the Court noted that “a pirate is deemed, and properly deemed, *hostis humani generis*. But why is he so deemed? Because he commits hostilities upon the subjects and property of any or all nations, without any regard to right or duty, or any pretence of public authority.”<sup>127</sup>

### B. Universal Jurisdiction

Piracy cases reached their apex towards the end of the nineteenth century. In the century that followed, federal courts decided only a handful of cases dealing with piracy.<sup>128</sup> But the influence of the early piracy cases translated into important decisions in cases of a nonmaritime nature. The

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119. *Id.* at 198.

120. *Id.* at 205.

121. 43 U.S. (2 How.) 210 (1844).

122. *Id.* at 231–33.

123. *Id.* at 230.

124. *Id.* at 232.

125. *Id.*

126. *Id.*

127. *Id.*

128. See, e.g., *United States v. Shi*, 525 F.3d 709, 721 (9th Cir. 2008) (describing charged offenses as piracy), *cert. denied*, 129 S. Ct. 324 (2008); *Miller v. United States*, 88 F.2d 102, 103 (9th Cir. 1937) (noting that the defendants were charged with piracy); *The Schooner “Experiment”*, 49 Ct. Cl. 392 (1914) (relating to piracy in 1798); *Ship Asia v. United States*, 47 Ct. Cl. 189 (1912) (involving piracy in 1778); *The Schooner Endeavor*, 44 Ct. Cl. 242 (1909) (involving privateering in 1798); *In re African-Am. Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1042 (N.D. Ill. 2004) (listing charges against defendants to include piracy).

primary vehicle for this influence has been the Alien Tort Statute (ATS),<sup>129</sup> which has been modified several times since the first Congress passed its original version as part of the Judiciary Act of 1789.<sup>130</sup> Many of the modern ATS cases have directly analogized other crimes to piracy in order to persuade courts to assert jurisdiction over disputes with no connection to the United States.

One of the first federal court cases to invoke the ATS involved an instance of alleged piracy.<sup>131</sup> In *Bolchos v. Darrel*,<sup>132</sup> a French privateer seized a Spanish slave ship that was mortgaged to a British mortgagee.<sup>133</sup> The court discussed the applicable law of nations principle that would require that neutral property be restored to its neutral owner.<sup>134</sup> Ultimately, the court determined that a treaty with France required that “property of friends found on board the vessels of an enemy shall be forfeited” and accordingly, held that the slaves or money from their sale be returned to the French boat.<sup>135</sup> Nevertheless, this case demonstrates the importance of piracy as a vehicle for the discussion and incorporation of international law principles in United States federal courts. The case that revived the ATS as a mechanism to prosecute human rights violations, *Filartiga v. Peña-Irala*,<sup>136</sup> involved a lawsuit filed by the Filartigas, Paraguayan citizens, against Norberto Peña-Irala, another Paraguayan citizen in the United States on a visitor’s visa, for alleged torture and killing that took place entirely in Paraguay.<sup>137</sup> The claim alleged that when the parties were living as neighbors in Paraguay, the defendant, a Paraguayan police official,

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129. See 28 U.S.C. § 1350 (1948) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

130. See Judiciary Act, ch. 20, § 9, 1 Stat. 76, 77 (1789) (citation omitted) (providing that the new federal district courts “shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”).

131. *Bolchos v. Darrel*, 3 F. Cas. 810, 810–11 (D.S.C. 1795). Though described as a piracy case, *Bolchos* in fact involved privateering rather than piracy. See ANGUS KONSTAM, PRIVATEERS AND PIRATES 1730–1830, at 3 (2001) (describing privateering as “a form of nationally sponsored piracy which reached its peak in the late 18th and early 19th centuries.”). Privateers receive letters of marque and reprisal, essentially licenses from their government to engage in what would otherwise be considered piracy. See Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L.J. 183, 211 (2004). In the United States, the right to grant letters of marque and reprisal is granted to Congress in the Constitution. *Id.* The abundant privateering cases in federal courts in the eighteenth century addressed many issues. Most important for purposes of this Article, a handful of those cases addressed whether the entity that had issued the letter of marque and reprisal was a nation or otherwise empowered to issue such letters.

132. 3 F. Cas. 810 (D.S.C. 1795).

133. *Id.* at 810–11.

134. *Id.*

135. *Id.* at 811.

136. 630 F.2d 876 (2d Cir. 1980).

137. See *id.* at 878 (filing suit while in the United States on a visitor’s visa).

kidnapped and tortured the *Filartigas*'s seventeen-year-old son in retaliation for his father's outspoken opposition to the Paraguayan presidential regime.<sup>138</sup> In finding jurisdiction under the ATS, the Second Circuit ruled that torture is universally regarded as repugnant, and therefore that the acts alleged would be violations of international law.<sup>139</sup> The court concluded that "for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."<sup>140</sup>

Since *Filartiga*, several cases have applied the analogy of human rights violators as *hostis humani generis*, similar to pirates, to justify the concept of universal jurisdiction in American jurisprudence.<sup>141</sup> Universal jurisdiction allows a state to exercise jurisdiction over acts involving nationals of any nation that take place anywhere in the world, where those acts are sufficiently heinous.<sup>142</sup>

The Second Circuit more clearly stated the application of universal jurisdiction beyond piracy in *United States v. Yousef*.<sup>143</sup> In *Yousef*, the appellants appealed their convictions relating to a conspiracy to bomb U.S. commercial airliners in Southeast Asia and for their involvement in the February 1993 bombing of the World Trade Center in New York City.<sup>144</sup> The appellants argued that the district court erred in holding that the universality principle provided jurisdiction over the bombing of a Philippine Airlines flight, flying between destinations outside of the United

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138. See *id.* at 876–79 (seeking ten million dollars in damages for wrongful death by torture in violation of international law, claiming jurisdiction under the general federal question provision and under the ATS).

139. *Id.* at 881–85.

140. *Id.* at 890.

141. See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) ("The reference [in *Filartiga*] to piracy and slave-trading is not fortuitous. Historically these offenses held a special place in the law of nations: their perpetrators, dubbed enemies of all mankind, were susceptible to prosecution by any nation capturing them."). But see *Kontorovich*, *supra* note 131, at 183 (arguing that use of piracy as an analogy to justify universal jurisdiction for universally heinous offenses, such as human rights violations, is ill-conceived and historically flawed). The discussion of the merits of drawing justification for the assertion of universal jurisdiction from piracy cases is beyond the scope of this Article.

142. See *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 304–05 (2d Cir. 2007) (emphasizing that universal jurisdiction "recognize[s] that international law permits any state to apply its laws to punish certain offenses although the state has no links of territory with the offense, or of nationality with the offender (or even the victim)" (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 cmt. A (1987))); *Kontorovich*, *supra* note 131, at 183 (suggesting that the doctrine allows any nation to prosecute universal offenses based solely on the "extraordinary heinousness" of the alleged human rights offense); see also Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 323–24 (2001) (asserting that though there may be debate over what offenses are subject to universal jurisdiction, it generally extends to slave trade, genocide, war crimes, and torture).

143. 327 F.3d 56 (2d Cir. 2003).

144. *Id.* at 77–78.

States, with no evidence that any United States citizens were aboard or were targets of the bombing.<sup>145</sup> The appellants argued that jurisdiction under the universality principle would be improper because terrorism is not universally condemned and, therefore, not subject to universal jurisdiction.<sup>146</sup> Beginning its discussion of this issue, the court suggested that the concept of universal jurisdiction originated with piracy, which has been acknowledged as a crime for at least five hundred years.<sup>147</sup> The court then discussed the limited situations to which the principle of universal jurisdiction had been applied, noting that its application to violations of international law other than piracy—specifically to crimes against humanity, war crimes, and genocide—was a relatively new phenomenon of the post-World War II era.<sup>148</sup> The court concluded that the historical restriction of universal jurisdiction to piracy, war crimes, and crimes against humanity illustrates that customary international law allows for universal jurisdiction “only where crimes (1) are universally condemned by the community of nations, and (2) by their nature occur either outside of a State or where there is no State capable of punishing, or competent to punish, the crime (as in a time of war).”<sup>149</sup>

The repeated analogy between piracy and universal jurisdiction, though not always successful, offers a reminder of the currency piracy has had in legal thought even during periods where crimes on the high seas were not making headlines. More recently, in *United States v. Shi*,<sup>150</sup> the Ninth Circuit affirmed the conviction of a Chinese crew member who had seized

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145. *See id.* at 97 (noting that the jurisdictional issue was complicated because the airplane that was bombed was flying outside of the United States and no United States citizens were aboard the flight or targeted).

146. *Id.*

147. *See id.* at 104–05 (citing *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 163 n.a. (1820)) (highlighting that it is recognized as a crime against all nations “both because of the threat that piracy poses to orderly transport and commerce between nations and because the crime occurs statelessly on the high seas”).

148. *See id.* at 105 (citing *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985), *vacated*, 10 F.3d 338 (6th Cir. 1993)) (noting specifically crimes against humanity, war crimes, and genocide); *see also* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT’L L. 554, 572 (1995) (noting that until relatively recently, questions were raised about even the legality of applying universal jurisdiction in cases of war crimes).

149. *Yousef*, 327 F.3d at 105. In agreeing with the appellants that no common consensus on the definition of terrorism exists, the court held that the application of universal jurisdiction was in error but found that other international bases of jurisdiction could be used to assert the court’s power over the appellants. *See id.* at 106–10 (“We regrettably are no closer now than eighteen years ago to an international consensus on the definition of terrorism or even its proscription; the mere existence of the phrase ‘state-sponsored terrorism’ proves the absence of agreement on basic terms among a large number of States that terrorism violates public international law. Moreover, there continues to be strenuous disagreement among States about what actions do or do not constitute terrorism, nor have we shaken ourselves free of the cliché that ‘one man’s terrorist is another man’s freedom fighter.’” (footnote omitted)).

150. 525 F.3d 709 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 324 (2008).



control of a Taiwanese ship in international waters off the coast of Hawaii.<sup>151</sup> The court evaluated the statute that codified the United States' obligations under the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and found that the statute was constitutional and applicable outside United States territory.<sup>152</sup> The statute at issue required that the accused be found in the United States, and the court held that this requirement was met even though the defendant was brought into the country against his will.<sup>153</sup>

The court explained that “[p]rosecuting piracy was the original rationale for creating universal jurisdiction.”<sup>154</sup> The holding reaffirmed the notion that any state may generally prosecute a pirate,<sup>155</sup> and in addressing the defendant's constitutional arguments, the court explained that “[d]ue process does not require a nexus between such an offender and the United States because the universal condemnation of the offender's conduct puts him on notice that his acts will be prosecuted by any state where he is found.”<sup>156</sup>

### C. State Action

*Kadic v. Karadžić*<sup>157</sup> illustrates another way in which the early piracy cases influenced modern understandings of international law concepts. Specifically, the Second Circuit's holdings in *Kadic* highlight two ways in which piracy cases influenced modern American legal doctrines concerning the requirement of state action in order to find a violation of the law of nations.<sup>158</sup>

In *Kadic*, Croat and Muslim victims from Bosnia-Herzegovina filed claims in the Southern District of New York against Radovan Karadžić, the leader of the Serbian entity known as Republika Srpska during the civil war in Yugoslavia, for violations of international law under the ATS and the Torture Victim Protection Act (TVPA).<sup>159</sup> The plaintiffs' alleged that

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151. *Id.* at 718.

152. *Id.* at 719–22.

153. *Id.* at 725. When the ship's parent company did not hear from the ship for several days, it contacted the U.S. Coast Guard, and the Coast Guard intercepted the ship. *Id.* at 718. Subsequently, F.B.I. agents boarded the ship, arrested Shi, and transported him to the federal building in Honolulu. *Id.* at 719.

154. *Id.* at 723.

155. *See id.* (stating that the trial of pirates by any state is a historically accepted practice in federal courts).

156. *Id.*

157. 70 F.3d 232 (2d Cir. 1995).

158. *See id.* at 236 (holding that the leader of insurgent Bosnian-Serb forces is not immune from service of process and may be tried in a U.S. District Court in Manhattan, highlighting his crimes of genocide, war crimes, and crimes against humanity).

159. *See id.* (noting that Karadžić was the leader of the “self-proclaimed Bosnian-Serb republic of ‘Srpska’” during the break-up of the former Yugoslavia). The ATS is also known as the Alien Tort Claims Act (ATCA) and is so described in the *Kadic* opinions.

during the break-up of the former Yugoslavia, Karadžić was responsible for “genocide, rape, forced prostitution and impregnation, torture and other cruel, inhuman, and degrading treatment, assault and battery, sex and ethnic inequality, summary execution, and wrongful death.”<sup>160</sup>

The district court dismissed the lawsuit for lack of subject matter jurisdiction under the ATS, concluding that “acts committed by non-state actors do not violate the law of nations.”<sup>161</sup> In reaching that conclusion, the district court found that, because Republika Srpska did not constitute a recognized state, Karadžić and his followers did not act under the color of any recognized state law.<sup>162</sup>

On appeal, relying primarily on early piracy cases, the Second Circuit disagreed with the district court, finding instead that non-state actors can violate the law of nations.<sup>163</sup> To support the conclusion that non-state actors can be held responsible for violations of the law of nations, the court referred to the early Supreme Court cases involving the prosecution of pirates<sup>164</sup> as well as later prohibitions on the slave trade and certain war crimes.<sup>165</sup> Having concluded that certain violations of international law do not require state action, the Second Circuit held that Karadžić could be tried as a private individual under the ATS for the alleged crimes of genocide,<sup>166</sup> war crimes,<sup>167</sup> and other instances of inflicting death, torture, and degrading treatment, so long as these alleged acts were in furtherance of genocide or war crimes.<sup>168</sup>

Piracy also influenced a second part of the Second Circuit opinion. Despite holding that the law of nations could apply to non-state actors, the

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160. *Id.* at 237.

161. *Id.* (quoting *Doe v. Karadžić*, 866 F. Supp. 734, 739 (S.D.N.Y. 1994), *rev'd sub nom. Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995)).

162. *See id.* at 237–38 (citing *Doe*, 866 F. Supp. at 741). Similarly, under the TVPA, the district court held that the absence of state action precluded the victims’ claims because the Act expressly requires that individual defendants act “under actual or apparent authority, or color of law, of any foreign nation.” *Id.* (quoting Torture Victim Protection Act of 1991, Pub. L. No. 102-256, §2(a), 106 Stat. 73, 73 (1992)).

163. *See id.* at 239 (disagreeing with the notion that the “law of nations . . . confines its reach to state action” and instead holding that “certain forms of conduct,” regardless of whether it is private or state action, will violate the law of nations and citing piracy convictions as an “early example” of private action falling under this category).

164. *Id.* (citing *Harmony v. United States*, 43 U.S. (2 How.) 210, 232 (1844); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820); *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 197 (1820)).

165. *Id.* (citing M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 193 (1992); Jordan Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51 (1992)).

166. *See id.* at 241–42 (emphasizing that state action is not necessary to hold a party in violation of genocide).

167. *See id.* at 242–43 (asserting that private individuals have been liable for war crimes since World War I).

168. *See id.* at 244, 251 (reversing the lower court dismissals and remanding for further proceedings consistent with these findings).

court went on to consider whether Republika Srpska qualified as a state for purposes of international law.<sup>169</sup> Answering in the affirmative, the court found that the warring faction headed by Karadžić satisfied the definition of a state, reasoning:

The definition of a state is well established in international law: “Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.”<sup>170</sup>

The way in which this modern definition of a state under international law connects to piracy is not immediately apparent, but the basis for this understanding actually dates back to early piracy cases. To determine whether Republika Srpska qualified as a State, the court looked to both international law and domestic law. In its domestic law citations, the court lists *Ford v. Surget*,<sup>171</sup> an 1878 Supreme Court case, whose facts do not involve piratical acts, but whose legal conclusions were influenced by prior cases that involved piracy and privateering.<sup>172</sup>

*Ford* involved litigation over the capture or destruction of vessels during the Spanish civil war with its colonies and the U.S. Civil War.<sup>173</sup> The case called on the Court to decide whether the acts were piratical, a question which in turn depended on whether the alleged wrongdoers were acting under the authority or commission of a *de facto* government.<sup>174</sup>

*Ford* was a trespass action brought by one Mississippi resident against another in which Ford claimed that Surget unlawfully burned two hundred bales of his cotton.<sup>175</sup> Surget argued that he was ordered to destroy the cotton by military commanders of the Confederate army in order to keep the cotton from falling into the hands of the Union army, and that he was therefore not liable for his actions.<sup>176</sup> The Court held that Surget could not be held liable for the damage to Ford’s cotton.<sup>177</sup> The Court emphasized the illegitimacy of the Confederate government and stated that “[t]here was no legislation of the Confederate congress which this court can recognize as having any validity against the United States.”<sup>178</sup> However, the Court reasoned that “the Confederate army was . . . in the interest of humanity,

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169. *See id.* at 244 (noting that appellants sought to prove that Republika Srpska qualifies as a “state” and, in the alternative, that Karadžić acted in concert with Serbia).

170. *Id.* (citations omitted).

171. 97 U.S. 594 (1878).

172. *Id.* at 620.

173. *Id.*

174. *Id.*

175. *Id.* at 595.

176. *Id.* at 596.

177. *Id.*

178. *Id.* at 604.

and to prevent the cruelties of reprisals and retaliation, [entitled to] such belligerent rights as belonged under the laws of nations to the armies of independent governments engaged in war against each other.”<sup>179</sup>

The majority opinion in *Ford* focuses on the rights of belligerent entities without conceding that the Confederacy was a State in the international law sense of the term.<sup>180</sup> However, more important to later developments in American law than the majority opinion in *Ford* is Justice Clifford’s concurrence in the case.<sup>181</sup> Justice Clifford’s concurrence relied on previous privateering cases to explain the concepts of *de facto* government and belligerent rights.<sup>182</sup> Justice Clifford used this analysis of belligerent rights to conclude that the Confederacy was a *de facto* government.<sup>183</sup> Justice Clifford explained that “[u]nless the Confederate States may be regarded as having constituted a *de facto* government for the time . . . , then the officers and seamen of their privateers and the officers and soldiers of their army were mere pirates and insurgents . . . .”<sup>184</sup> Justice Clifford explained the undesirable implications of such a piracy designation and described that “every officer, seaman, or soldier who killed a Federal officer or soldier in battle, whether on land or the high seas, [would be] liable to indictment, conviction, and sentence for the crime of murder . . . .”<sup>185</sup> He stated that despite the Confederacy’s “violation of the Constitution and the acts of Congress . . . it cannot be denied . . . [that] a government in fact was erected.”<sup>186</sup>

Justice Clifford’s concurrence draws heavily on a series of cases that arose in the early nineteenth century in which courts had occasion to consider issues involving the nature of belligerent states.<sup>187</sup> Five cases

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179. *Id.*

180. *Id.*

181. Later cases addressing issues of statehood and the Act of State doctrine rely upon Justice Clifford’s concurrence. See *Underhill v. Hernandez*, 65 F. 577 (2d Cir. 1895), *aff’d* 168 U.S. 250 (1897). *Underhill* is widely regarded as the entry of the Act of State doctrine in U.S. jurisprudence. The Court extended the doctrine beyond the sovereign state, stating:

Upon principle, it cannot be important whether the acts of military authorities, when called in question, are done by the authority of a *de jure* or titular, or of a *de facto*, government. In either case, if they are done in the legitimate exercise of belligerent powers, they are not ordinarily attended with civil responsibility. This principle has been recognized by the supreme court of the United States in cases in which the civil liability of Confederate soldiers for acts done, as members of the insurgent forces, during the Rebellion, was under consideration.

*Id.* at 582 (citing *Freeland v. Williams*, 131 U.S. 405 (1889); *Ford*, 97 U.S. at 594).

182. *Ford*, 97 U.S. at 608–23 (Clifford, J., concurring).

183. *Id.*

184. *Id.* at 623.

185. *Id.*

186. *Id.* at 616.

187. See, e.g., *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 643–44 (1820) (“[W]hen a civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the Union must view such newly-constituted government as it is viewed by the legislative and

referenced in Justice Clifford's concurrence—three from the U.S. Supreme Court and two cases issued by the highest courts of Maine and Pennsylvania, respectively—merit particular attention.

In *The Nuestra Senora de la Caridad*,<sup>188</sup> the Supreme Court settled an issue arising from the War of 1812, when a United States privateer captured cargo believed to be British and returned to North Carolina to institute prize claims.<sup>189</sup> However, the cargo had in fact been taken from a vessel commissioned by the Province of Carthagen, a Spanish colony at war with Spain, which had captured the cargo as prize from a Spanish vessel.<sup>190</sup>

In deciding the fate of the cargo, the court considered the validity of the commission granted by Carthagen.<sup>191</sup> Recognizing that the war between Spain and its colonies was acknowledged by the U.S. government and that Carthagen had its own organized government, the court held it is the duty of the courts in the United States:

where a capture is made by either of the belligerent parties, without any violation of our neutrality, and the captured prize is brought innocently with our jurisdiction, to leave things in the same state they find them; or to restore them to the state from which they have been forcibly removed by the act of our own citizens.<sup>192</sup>

Similarly, in *The Santissima Trinidad*,<sup>193</sup> the Supreme Court considered a libel claim filed by the consul of Spain on behalf of Spanish shipowners in the District Court of Virginia for the loss of cargo captured by vessels belonging to the government of the United Provinces of Rio de la Plata (modern-day Argentina).<sup>194</sup> The suit alleged, in part, that the capturing

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executive departments of the government of the United States. If the government of the Union remains neutral, but recognises the existence of a civil war, the courts of the Union cannot consider as criminal, those acts of hostility, which war authorizes, and which the new government may direct against its enemy.”); *United States v. Klinton*, 18 U.S. (5 Wheat.) 144, 149 (1820) (holding that a purported commission from an unrecognized territory of the Mexican Republic was invalid and thus robbery of a Danish vessel was piratical, and stating, “[s]o far as this Court can take any cognizance of that fact, [the purported Brigadier of the Mexican Republic] can have no power, either as Brigadier of the Mexican Republic, a republic of whose existence we know nothing, or as Generalissimo of the Floridas, a province in the possession of Spain, to issue commissions to authorize private or public vessels to make captures at sea”); *see also* *Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822) (analyzing the difference between piracy and privateering in the context of commissions granted by belligerent Spanish colonies during the Spanish civil war with its colonies); *The Nueva Anna*, 19 U.S. (6 Wheat.) 193 (1821) (same); *The Josefa Segunda*, 18 U.S. (5 Wheat.) 338 (1820) (same); *The Divina Pastora*, 17 U.S. (4 Wheat.) 52 (1819) (same); *The Nuestra Senora de la Caridad*, 17 U.S. (4 Wheat.) 497 (1819) (same).

188. 17 U.S. (4 Wheat.) 497 (1819).

189. *Id.* at 499.

190. *Id.*

191. *Id.* at 501–02.

192. *Id.* at 497.

193. 20 U.S. (7 Wheat.) 283 (1822).

194. *Id.* at 284–85.

vessels did not deserve the privileges and immunities afforded to public ships of sovereign states because the government of the United Provinces of Rio de la Plata had not yet been recognized as a sovereign government by either the executive or legislative branches of the United States.<sup>195</sup> To this claim, the Court replied:

We have, in former cases, had occasion to express our opinion on this point. The government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed a determination to remain neutral between the parties, and to allow to each the same rights of asylum and hospitality and intercourse. Each party is, therefore, deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war, and entitled to be respected in the exercise of those rights. We cannot interfere to the prejudice of either belligerent without making ourselves a party to the contest, and departing from the posture of neutrality.<sup>196</sup>

In *Mauran v. Ins. Co.*,<sup>197</sup> the Supreme Court analyzed whether naval forces of the Confederate states that seized a vessel near the mouth of the Mississippi River were to be considered pirates for purposes of the vessel's insurance policy.<sup>198</sup> The policy covered capture by pirates and thieves.<sup>199</sup> Like the majority opinion in *Ford*, the Court in *Mauran* emphasized that the actions of the Confederate states were "unlawful and unconstitutional."<sup>200</sup> Nonetheless, the Court held that the "so-called Confederate States were in the possession of many of the highest attributes of government, sufficiently so to be regarded as the ruling or supreme power of the country."<sup>201</sup> Thus, the Court held that the capture was not piratical and therefore not covered by the insurance policy.<sup>202</sup>

Justice Clifford's concurrence also cites two relevant state court opinions. In *Dole v. Merchants' Mutual Marine Insurance Co.*,<sup>203</sup> involving a ship commissioned by the Confederacy, the Supreme Court of Maine explained that "every forcible contest between two governments, *de facto*, or *de jure*, is war. War is an existing *fact*, and not a legislative

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195. *Id.* at 337.

196. *Id.*

197. 73 U.S. (5 Wall.) 1 (1867).

198. *Id.* at 1. The Court in *Mauran* also relied on Spanish-American cases for the proposition that "if the captors represented a *de facto* authority recognized by the Executive of the United States, they were not pirates by the law of nations." *Id.* at 5 (emphasis in original) (citing *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822); *The Nueva Anna*, 19 U.S. (6 Wheat.) 193 (1821); *The Josefa Segunda*, 18 U.S. (5 Wheat.) 338 (1820); *The Divina Pastora*, 17 U.S. (4 Wheat.) 52 (1819); *Nuestra Senora de la Caridad*, 17 U.S. (4 Wheat.) 497 (1819); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 634 (1818)).

199. *See id.*

200. *Id.* at 14.

201. *Id.*

202. *Id.*

203. 51 Me. 465 (1863).

decree.”<sup>204</sup> The court went on to reason that in this instance “[h]ostile forces, each representing a *de facto* government, were arrayed against each other, in actual conflict. Its existence would not have been more palpable or *real*, if it had been recognized by any legislative action.”<sup>205</sup>

Finally, in *Fifield v. Insurance Co. of the State of Pennsylvania*,<sup>206</sup> the Supreme Court of Pennsylvania addressed a claim filed by shipowners to recover losses incurred when their ship was captured by a privateer commissioned by the Confederate states.<sup>207</sup> The policy insured the ship and its cargo against losses from “pirates, rovers, and assailing thieves” but excluded losses from capture.<sup>208</sup> The court reasoned that the Confederate States were recognized by the “history of the times” as a *de facto* government, and the capture made by the Confederate vessel was not piratical but rather a capture under the laws of war.<sup>209</sup>

These confederate-era insurance claim cases rely on early nineteenth century cases that differentiated between piracy and privateering.<sup>210</sup> As the Supreme Court of Pennsylvania described it, the distinction between privateering and piracy is that privateering involves “captures *jure belli* under colour of governmental authority and for the benefit of a political power organized as a government *de jure* or *de facto*,” while piracy is “mere robbery on the high seas committed from motives of personal gain, like theft or robbery on land.”<sup>211</sup> Privateering had “been claimed and

204. *Id.* at 470 (emphasis in original).

205. *Id.* at 478.

206. 47 Pa. 166 (1864).

207. *Id.*

208. *Id.* at 174.

209. *Id.* at 170–74.

210. See generally *Harmony v. United States*, 43 U.S. (2 How.) 210, 223 (1844) (discussing the different liability implications for each).

211. *Fifield*, 47 Pa. at 169. Privateering was officially abolished by the “principal maritime powers of Europe” at the Congress of Paris in 1856. *Id.* The United States did not accede to the declaration, and “[a]s late as . . . March 1863, Congress authorized the President to issue letters of marque and reprisal ‘in all domestic and foreign wars.’” *Id.*; see also *An Act Concerning Letters of Marque, Prizes, and Prize Goods*, 12 Stat. 758 (1863). The United States’ failure to accede to the declaration is interesting given that it had pushed for abolishing privateering in prior decades. In 1785, Benjamin Franklin said,

It is high time for the sake of Humanity that a Stop be put to this Enormity. The United States of America, tho’ better situated than any European Nation to make Profit by Privateering . . . are, as far as in them lies, endeavouring to abolish the Practice . . . This will be a happy Improvement of the Law of Nations.

Letter from Benjamin Franklin to Benjamin Vaughan (Mar. 1, 1785), available at <http://www.franklinpapers.org/franklin/framedVolumes.jsp> (follow “1784–85” hyperlink; then follow “To Benjamin Vaughan (unpublished)” hyperlink). In 1823, John Quincy Adams cited Franklin’s letter and stated that “[p]rivate war, banished by the tacit and general consent of Christian nations from their territories, has taken its last refuge upon the ocean, and there continues to disgrace and afflict them by a system of licensed robbery, bearing all the most atrocious characters of piracy.” Letter of Mr. Adams to Mr. Rush (July 28, 1823), in *PRESIDENT MONROE’S INSTRUCTIONS*, H.R. Doc. No. 33-111, at 6 (1854). The U.S. Constitution, however, provides that “Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of

defended as lawful warfare on public enemies. It is the substitute for enormous naval establishments.”<sup>212</sup>

One additional case also used piracy as defined by the law of nations to address and resolve disputes over seizures of ships during times of war. In 1885, *United States v. The Ambrose Light*<sup>213</sup> presented the question of whether hostile insurgents who had captured a ship were actually at war with the nation of Colombia. In that case, the ship’s capturers claimed to have been commissioned by the insurgent group, while Colombia argued that the insurgent group was not recognized by any nation, and was therefore without a valid commission and engaging in piratical acts.<sup>214</sup> The court relied on international law and reasoned that “depredating on the high seas without being authorized by any sovereign state” is piracy by the law of nations.<sup>215</sup> The court noted that according to the general principles of international law, “[r]ebels who have never obtained recognition from any other power are clearly not a sovereign state in the eye of international law, and their vessels sent out to commit violence on the high seas are therefore piratical.”<sup>216</sup> The court then went on to state:

From these principles it necessarily follows that in the absence of recognition by any government of their belligerent rights, . . . that in blockading ports which all nations are entitled to enter, they attack the rights of all mankind, and menace with destruction the lives and property of all who resist their unlawful acts . . . .<sup>217</sup>

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Nations; To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.” U.S. CONST. art. I, § 8. Despite this explicit constitutional language granting Congress the right to issue letters of marque, and therefore to commission privateers, the Government gave another reason for its refusal to accede to the Declaration of Paris in 1856. Then Secretary of State, Mr. Marcy, explained that “[t]he right of a commercial State, when unhappily involved in war, to employ its mercantile marine for defence and aggression, has heretofore proved to be an essential aid in checking the domination of a belligerent possessed of a powerful navy.” Letter from Mr. Marcy to Mr. Siebels (July 14, 1856), in MESSAGE OF THE PRESIDENT OF THE UNITED STATES, S. Doc. No. 34-104 (1856). By way of demonstration of the United States’ continued refusal to sign on to the Declaration of Paris during the Civil War era, in an 1861 letter from the U.S. Secretary of State to the European powers, the Secretary explains that the United States wanted an “amendment which should exempt the private property of individuals, though belonging to belligerent States, from seizure or confiscation by national vessels in maritime war.” Letter from Mr. Seward to the European Powers (April 24, 1861), in LIST OF PAPERS RELATING TO FOREIGN AFFAIRS, S. Doc. No. 37-1/2, at 34–36 (1861).

212. *Fifield*, 47 Pa. at 169. The use of privateering was especially important to the United States in its early history because the Continental Navy developed slowly. 2 LEGAL PAPERS OF JOHN ADAMS 353 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) (“[P]ivateers, vessels fitted out at private expense and commissioned by Congress or a colony to sail against enemy shipping, were the substitute upon which the colonists chiefly had to rely.”).

213. 25 F. 408, 410–11 (S.D.N.Y. 1885).

214. *Id.* at 412.

215. *Id.* (quoting Dana’s *Wheat. Int. Law*, § 122).

216. *Id.*

217. *Id.* at 412–13.



The court then concluded that the insurgents were in fact recognized belligerents and that their acts were therefore not piratical.<sup>218</sup>

The piracy and privateering cases of the nineteenth century helped to develop federal law on state action, while taking account of international law along the way. Courts expanded their understanding of the legal status of *de facto* states and clarified the definition of state actors through analogy to piracy cases, applying the reasoning in these cases to an entirely different context more than a century later.

#### CONCLUSION

Every century or so, it seems that the world is surprised when piracy rears its head; and so, accordingly, the recent wave of piracy off the coast of Somalia, in the Straits of Malacca and elsewhere has been treated as a novel event.<sup>219</sup> Interestingly, some eighty-five years ago, writing in the *Harvard Law Review*, Edwin Dickinson, a leading international law scholar of his generation, noted:

A few years ago it might have been surmised that in America . . . piracy had passed from the law in reserve into the law in history. The important cases were nearly all one hundred years old or more. It was commonly supposed that the seas were policed effectively. . . . [R]ecent events, however, . . . challenge the assumption that the law of piracy is chiefly of historical significance.<sup>220</sup>

Dickinson's observation serves as a stark reminder that piracy knows no boundaries of time or space.

Moreover, the influence of piracy on American law offers additional currency to a discussion of its modern-day relevance. Undoubtedly, neither Norberto Peña-Irala nor Radovan Karadžić considered himself a pirate. Peña-Irala was inspector general of police in Asuncion, Paraguay when he oversaw the torture of Joelito Filartiga.<sup>221</sup> Karadžić was the leader of the Bosnian Serbs from 1992 to 1995 during the break-up of the former

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218. *See id.* at 446.

219. *See Fokas, supra* note 13, at 428 (1997) ("Recent events belie the notion that maritime piracy is limited to historical interest. A new breed of buccaneers is emerging to threaten the passage of ships across the world's oceans."); Eric Ellen, *Governments Should Act Against Maritime Pirates*, N.Y. TIMES, Sept. 22, 1995, available at <http://www.nytimes.com/1995/09/22/opinion/22iht-ederic.t.html?scp=10&sq=resurgence%20piracy&st=cse> (issuing the warning: "The age-old scourge of piracy threatens shipping in Southeast Asian waters. All vessels, including large cargo ships, should be on the alert.").

220. Dickinson, *supra* note 88, at 334.

221. Nora Boustany, *For a Sister, Court Fight Stirs Memories of Paraguay*, WASH. POST, Apr. 2, 2004, at A22.

Yugoslavia when troops under his command engaged in mass rape, torture and ethnic cleansing.<sup>222</sup>

Years after the alleged crimes, each man faced civil trials in the United States for his actions.<sup>223</sup> The law of piracy did not feature prominently in either trial. Nevertheless, the cases hinged on a body of American law that had been profoundly affected by legislative and judicial efforts to combat piracy more than a century earlier.

Those who have followed closely the cases against Peña-Irala and Karadžić might have expected to learn from this Article that the two cases were linked to piracy through the ATS, which provided the legal basis for the civil claims made against the defendants in U.S. courts. After all, piracy is one of the three enumerated bases for jurisdiction under the ATS as recognized by the Supreme Court.<sup>224</sup>

However, the legislative history of the ATS seems to demonstrate that piracy was not a significant consideration animating the drafters of the Judiciary Act of 1789. Instead, the drafters seemed motivated by scandals involving foreign government officials.<sup>225</sup> In *Sosa v. Alvarez-Machain*,<sup>226</sup>

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222. John Sullivan, *Bosnian Woman, Describing War Ordeal, Faints in U.S. Court*, N.Y. TIMES, Aug. 2, 2000, at A3.

223. In the *Karadžić* action, the Doe Plaintiffs filed their complaint on February 11, 1993, and the Kadic Plaintiffs filed their complaint on March 2, 1993. *Doe v. Karadžić*, 866 F.Supp. 734, 735–36 (S.D.N.Y. 1994), *rev'd sub nom. Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995). Peña-Irala was served with a complaint on April 6, 1979, while he was being held at the Brooklyn Navy Yard awaiting deportation after the Plaintiff alerted the INS that he was present in New York and his visa had expired. Appellant's Brief at 3, *Filartiga v. Peña-Irala*, No. 79-6090 (2d Cir. Jul. 25, 1979); Defendant-Appellee Brief in Support of Judgment of Dismissal at 1, *Filartiga v. Peña-Irala*, No. 79-6090 (2d Cir. Sep. 19, 1979).

224. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 697–99 (2004). In light of an increasing number of international human rights cases relying on the Alien Tort Statute, in 2004 the Supreme Court attempted to clarify the purpose and scope of that statute. In *Sosa*, the Supreme Court addressed the question of the viability of the statute in an era of expanding international law. Specifically, the Court faced the question of whether an allegedly wrongful arrest and detention amounted to a tort in violation of international law, ultimately concluding that “although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.” *Id.* at 724. This conclusion was based on two inferences the Court made after reviewing the historic context in which the ATS was originally drafted. First, the Court adopted the proposition that the first Congress did not pass the ATS as a “jurisdictional convenience” awaiting future causes of action to be created by Congress or state legislatures for the benefit of foreigners in light of the historic record. *Id.* at 719. Second, the Court drew the inference “that Congress intended the ATS to furnish jurisdiction for” a small “set of actions alleging violations of the law of nations” that were definite and actionable at the time of the drafting of the ATS in 1789. *Id.* at 720. The Court concluded that Congress had focused primarily on offenses against ambassadors, while violations of safe conduct and individual actions arising out of prize captures may have also been contemplated. *See id.*

225. Most frequently discussed is a well-publicized event involving threats and an assault on Francis Barbe Marbois, the Consul General of France to the United States

the Court adopted the majority view of modern scholars that the ATS grew out of events that occurred in the years prior to the passage of the Judiciary Act, which exposed the inability of the federal government to vindicate violations of the law of nations.<sup>227</sup>

The Framers of the Constitution responded to these deficiencies in the system by vesting original jurisdiction in the Supreme Court over “all Cases affecting Ambassadors, other public ministers and Consuls.”<sup>228</sup> The

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residing in Philadelphia, by another Frenchman, De Longchamps. See William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 492 n.142 (1986) (listing many prominent political figures who discussed this affair in their correspondence to emphasize its notoriety at time when the Judiciary Act was being discussed in Congress). Facing international scrutiny, Congress only had the power to offer a reward for the apprehension of De Longchamps and was later limited to passing a resolution approving his trial in a Pennsylvania court. See *id.* at 491–93. Although De Longchamps was eventually convicted “of a crime against the whole world,” in a Pennsylvania court, the affair raised serious foreign relations concerns to Congressional lawmakers that the federal government lacked the ability to provide redress for certain violations of the law of nations. *Respublica v. De Longchamps*, 1 U.S. 111, 116 (1784). De Longchamps was fined 100 French crowns and sentenced to just over two years in prison. *Id.* at 118; see also Casto, *supra*, at 493 n.146 (quoting Letter from Thomas Jefferson to James Madison (May 25, 1784), in 7 THE PAPERS OF THOMAS JEFFERSON 288, 289 (J. Boyd ed., 1953) (“[T]he . . . state is so indecisive . . . . They have not yet declared what they can or will do. . . . The affair is represented to Congress who will have the will but not the power to interpose. It will probably go next to France and bring on serious consequences . . . .”).

Several years later, during the ratification process following the Constitutional Convention, a similar international affair occurred involving the infringement of the rights of Dutch Ambassador Van Berckel in New York, where a constable entered his home to arrest one of his servants. Despite a call for action by the Ambassador, the national government was wholly unable to provide a remedy for the incident. Eventually, a state court in New York brought the constable to trial and found him guilty for a violation of the law of nations as adopted by the common law. See Casto, *supra*, at 494 n.152 (quoting Report of Secretary for Foreign Affairs on complaint of Minister of United Netherlands (Mar. 25, 1788), reprinted in 34 JOURNAL OF THE CONTINENTAL CONGRESS 109, 111 (1788) (“[T]hat the federal Government does not appear . . . to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases. . . .”).

226. 542 U.S. 692 (2004).

227. See Casto, *supra* note 225, at 492 n.142 (relying heavily upon the Supreme Court in framing its views of the ATS and providing exhaustive study of historic origins of the ATS to determine both its purpose and roots). The scholarly debate on the roots of the ATS has provoked an active literature, in large measure because legislative history of the ATS is sparse, leaving scholars ample berth to dissect contemporaneous events and statements in search of inferences that may prove impossible to definitely prove. William Dodge, for example, argued that the original intent of the ATS was to provide a “broad civil remedy for violations of the law of nations that the Continental Congress had sought since 1781,” by creating jurisdiction in district courts over tort actions, already cognizable in the common law, in violation of either the law of nations or a treaty to which the United States was bound. William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists”*, 19 HASTINGS INT’L & COMP. L. REV. 221, 237 (1996). But cf. Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT’L & COMP. L. REV. 445, 446 (1995) (arguing that the bonding of the words “tort” and “only” in ATS in reference to violations of law of nations, as well as a study of eighteenth century maritime prize law, demonstrates that the ATS was designed to provide jurisdiction over a subcategory of prize cases and only in instances where the legality of prize was not at issue).

228. U.S. CONST. art. III, § 2, cl. 1.

First Congress under the Constitution subsequently drafted the Judiciary Act of 1789, which established the ATS, reinforced the Supreme Court's original jurisdiction over suits brought by diplomats, and created alienage jurisdiction.<sup>229</sup> The inclusion of piracy on the list may simply be attributable to the fact that William Blackstone listed piracy as one of three co-equal offenses against the law of nations that were eventually included in the ATS.<sup>230</sup>

Even if the ATS could be more clearly linked to piracy, the connection between piracy and these modern civil cases is far stronger and more pervasive than any single statute. Piracy has been the basis for the adoption of both sources and principles of international law. Legal doctrines on universal jurisdiction and state action developed both directly and indirectly from cases involving piracy. Moreover, through *Smith*, the Supreme Court recognized that international sources, such as the teachings of foreign scholars, could be used in American courts to determine the meaning of American laws.<sup>231</sup>

Much like the case law of the nineteenth century, the eighteenth century legislation of the states demonstrates the unique role that piracy played in the development of the legal system in the new Republic. From creating special courts to try pirates to enacting laws to differentiate among maritime crimes, state legislatures, like Congress, sought to create systems of laws to resolve the unique problems posed by piracy. Those efforts led not only to the ATS in the Judiciary Act of 1789 but also to the Act of 1790—early efforts to address piracy at the federal level. Only when courts and the legislature turned to the law of nations did the American legal system pick up the tailwind that eventually led to expansion of legal doctrines as varied as the power of courts over foreign nationals and the legitimacy of self-proclaimed states and state actors.

Though obscured by passage of time and dearth of cases, American jurisprudence relating to piracy has played a significant role in the

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229. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 717 (2004) (citing Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U.J. INT'L L. & POL. 1, 15–21 (1985)); see also Dodge, *supra* note 227, at 237 (noting that Congress intended to provide federal remedies for such violation in order to “protect against the vagaries of state law, the hostility of state courts, and differences in their interpretations of the law of nations, sparing the new nation the sort of embarrassment that had attended the Marbois affair.”).

230. Although the Court acknowledged that it was unsure of Congress' intent in including piracy and violations of safe conduct in the ATS, it noted that in the leading treatise of the time, Blackstone listed all three offenses as co-equal torts in violation of the law of nations. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*68 (“The principal offenses against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds: 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy.”).

231. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61 (1820).

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development of American legal doctrines on all of these issues. So, even as the rise in piracy cases presents modern problems, it also serves as an important reminder of the role that piracy has already played in the development of law in the United States—and can play in developing new legal doctrines.