MARAUDERS IN THE COURTS: WHY THE FEDERAL COURTS HAVE GOT THE PROBLEM OF MARITIME PIRACY (PARTLY) WRONG

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Strangers, who are you? Whence do you sail over the watery ways? Is it on some business, or do you wander at random over the sea, as pirates do, who wander hazarding their lives and bringing evil to men of other lands?[††]

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INTRODUCTION

In December 2004, Los Angeles couple Jean and Scott Adam embarked on a round-the-world voyage on their yacht, the s/v Quest.[1] They hoped to spend their retirement on the seas, engaging in, as they put it, "friendship evangelism—that is, finding homes for thousands of Bibles, which have been donated through grants and gifts, as we travel from place to place."[2] In February 2011, their vessel was boarded by Somali pirates almost 200 nautical miles off the coast of Oman.[3] The U.S. Navy responded immediately, sending an aircraft carrier, a guided-

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†† HOMER, ODYSSEY 3.71-74, 85 (A.T. Murray trans., Loeb Classical Library 2d ed. 1995).

1. Jean Adam, *Welcome to s/v Quest Adventure Log*, S/V QUEST, http://www.svquest.com (last updated Dec. 21, 2010).

2. *Id.*

3. *Department of Defense News Briefing with Vice Admiral Fox via Telephone from Bahrain on Somali Piracy Aboard the S/V Quest*, U.S. DEP'T OF DEF. (Feb. 22, 2011), *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4774.

missile cruiser, and two guided-missile destroyers to the Quest's rescue.[4] The Navy made contact with the pirates by bridge-to-bridge radio, and two pirates boarded the U.S.S. Sterett to engage in direct negotiations for the hostages' release.[5] But at 8 AM on February 23rd, a rocket-propelled grenade was fired from the Quest at the Sterett and gunfire erupted aboard the yacht.[6] A Special Forces Team arrived moments later to find all four members of the Quest's crew shot by their captors.[7] All four perished.[8] Fourteen of the Quest's assailants—thirteen Somalis and one Yemeni—were transferred to federal custody and brought to Norfolk, Virginia, where federal criminal proceedings were initiated against them.[9]

The pirating of the Quest was but one of a record 163 attacks by Somali pirates in the first six months of 2011;[10] yet it captured the nation's attention unlike any of the others.[11] The human drama that unfolded during the four-day standoff was the stuff of Hollywood movies. But a courtroom drama is about to unfold in the wake of the Quest that might well prove a tragicomedy. Notwithstanding the ubiquity of maritime piracy as a fixture of popular culture and the antiquity of piracy as an international and municipal legal offense, a debate is presently underway over what, exactly, piracy means.

The District Court of the Eastern District of Virginia offered two

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. U.S. DEPARTMENT OF DEF., *supra* note 3.

9. Indictment, United States v. Salad, Case 2:11-cr-00034-MSD-DEM (E.D. Va. Mar. 8, 2011), *available at* http://www.haguejusticeportal.net/Docs/NLP/US/Saladndictment.pdf. Two of the defendants pled guilty to charges of piracy under the law of nations and hostage-taking resulting in death. One pled guilty to having fired the rocket-propelled grenade launcher at the U.S.S. Sterett. *Three Somalis Plead Guilty to Charges Relating to Piracy of Quest*, NEWSROOM MAG. (May 20, 2011, 6:00 AM), http://newsroom-magazine.com/2011/executive-branch/justice-department/fbi/three-somalis-plead-guilty-to-sv-quest-piracy/.

10. *Pirate attacks at sea getting bigger and bolder, says IMB report*, INT'L CHAMBER OF COMMERCE COMMERCIAL CRIME SERVICES (July 14, 2011, 7:00 AM), http://www.icc-ccs.org/news/450-pirate-attacks-at-sea-getting-bigger-and-bolder-says-imb-report.

11. *See, e.g.*, *Americans slain by captors on hijacked yacht; pirates killed, arrested*, CNNWORLD (Feb. 22, 2011), http://articles.cnn.com/2011-02-22/world/somalia.us.yacht_1_maersk-alabama-somali-coast-somali-pirates?_s=PM:WORLD; *Four Americans Killed on Yacht Hijacked by Somali Pirates*, FOXNEWS.COM (Feb. 22, 2011), http://www.foxnews.com/world/2011/02/22/americans-aboard-yacht-captured-pirates-reportedly-killed/; *Four American hostages killed by Somali pirates*, MSNBC.COM (Feb. 22, 2011, 3:15:02 PM), http://www.msnbc.msn.com/id/41715530/ns/world_news-africa/t/four-american-hostages-killed-somali-pirates/.

conflicting definitions of piracy in as many months. In *United States v. Said*, Judge Raymond A. Jackson held that robbery is an essential element of piracy.[12] Judge Mark Davis adopted a far more expansive definition of piracy in *United States v. Hasan*.[13] Under the *Said* decision, the attack on the Quest would not likely qualify as a pirating, a proposition that calls to mind a 1934 ruling of the House of Lords:

> When it is sought to be contended . . . that armed men sailing the seas on board a vessel, without any commission from any State, could attack and kill everybody on board another vessel, sailing under a national flag, without committing the crime of piracy unless they stole, say, an article worth sixpence, their Lordships are almost tempted to say that a little common sense is a valuable quality in the interpretation of international law.[14]

This article yields to the temptation of common sense in demonstrating, with scholarly rigor, that the *Said* court got its definition of piracy terribly wrong. Part I offers an account of the dual nature of maritime piracy as both an offense under customary international law and an offense under the municipal law of the United States. It shows how these two legal approaches to maritime piracy have been integrated over time through successive acts of Congress, and also explains the jurisdictional implications of early American piracy cases. Part II examines the *Said* and *Hasan* cases as part of that juridical tradition. It argues that the *Said* ruling was predicated on a myopic view of the treatment of maritime piracy by U.S. law and policy, and must therefore be rejected. The article concludes with an assessment of the implications of the Somali piracy cases from the standpoint of judicial policy, both domestic and international.

I. DEFINING PIRACY: LEAVE IT TO THE LAW OF NATIONS

Piracy has aptly been described as "the original [universal jurisdiction] crime."[15] It belongs to a small category of international

12. 757 F. Supp. 2d 554, 560 (E.D. Va. 2010) (citing United States v. Madera-Lopez, 190 Fed. Appx. 832, 836 (11th Cir. 2006)).

13. *See generally* 747 F. Supp. 2d 642 (E.D. Va. 2010).

14. *In re* Piracy Jure Gentium, [1934] A.C. 586 (P.C.) 594 (U.K.).

15. Eugene Kontorovich & Steven Art, *Piracy Prosecution: An Empirical Examination of Universal Jurisdiction for Piracy*, 104 AM. J. INT'L L. 436, 437 (2010). The characterization is apt. *See* United States v. Layton, 509 F. Supp. 212, 223 (N.D. Cal. 1981) ("[Universal] jurisdiction had its origins in the special problems and characteristics of piracy. It is only in recent times that nations have begun to extend this type of jurisdiction to other crimes."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 cmt. 3 (1987) (identifying a robust category of universal jurisdiction offenses, but noting, "[t]he previous

offenses that any state may theoretically prosecute, even absent a territorial nexus with the act or a national nexus with the victim or perpetrator.[16] Under customary international law, any state may assert jurisdiction over a pirate because he is *hostis humani generis*, the enemy of all humankind, a juridical classification that has existed for millennia.[17]

Restatement cited only piracy as an offense subject to universal jurisdiction."); M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 108 (2001) ("Piracy is deemed the basis of universal criminal jurisdiction."). In contemporary international law, the prohibition of piracy is a norm of *jus cogens*, a norm from which no derogation is permitted. Even though the prohibition of piracy is classified as a norm of *jus cogens*, it is not among the *jus cogens* norms enumerated in the Restatement (Third) of Foreign Relations Law. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702. The reason for this omission can only be that the Restatement focuses solely on violations by states, and not individuals, of norms of international law.

16. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at ¶ 168 (Sept. 7) (for discussion of the bases of jurisdiction in international criminal law, *see* ¶¶ 162-71); *see also* ANTONIO CASSESE, INTERNATIONAL LAW 245-65 (2d ed. 2005); WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 353-54 (2d ed. 2009).

17. The Marianna Flora, 24 U.S. (11 Wheat.) 1, 30 (1826) ("Pirates are, indeed, called hostes humani generis; but the use of such metaphorical language is often calculated to mislead, and to confound our ideas of legal rights."); The Antelope, 23 U.S. (10 Wheat.) 66, 84 (1825) (likening slave traders to pirates as *hostes humani generis*); United States v. Smith, 18 U.S. (5 Wheat.) 153, 161 (1820) (describing piracy "as an offence against the universal law of society, a pirate being deemed an enemy of the human race"). The phrase was coined by Sir Edward Coke ("a pirate is *Hostis humani generis*"). 2 SIR EDWARD COKE, THE SELECTED WRITINGS OF SIR EDWARD COKE 965 (Steve Sheppard ed., Liberty Fund, Inc. 2003). But the concept originated with Marcus Tullius Cicero ("*nam pirata non est ex perduellium numero definitus, sed communis hostis omnium* [a pirate is not included in the number of lawful enemies, but is the common foe of all the world]"). CICERO, DE OFFICIIS bk. III, ch. xxix, 107, at 385 (Walter Miller trans., Loeb Classical Library 1928). Jurists since have attempted to define the pirate's enemy status. The Roman Law tradition, to which much of classical international legal thought is heir, distinguished the pirate from enemies in the formal sense. "Enemies," explained the Digest of Justinian, "are those who have publicly declared war on us or on whom we have publicly declared war; others are 'brigands' or 'pirates.'" 4 DIGEST OF JUSTINIAN bk. 50, 16.118 (Theodore Mommsen & Paul Krueger eds., Alan Watson trans., Univ. of Pa. Press 1985). During the early modern period, jurists argued that the pirate forfeited all rights due to a member of human society because he was at war with human society as a whole. Consequently, any member of civil society possessed the right to wage war on the pirate. *See, e.g.*, 2 ALBERICO GENTILI, DE JURE BELLI LIBRI TRES 25 (John C. Rolfe trans., Oxford Univ. Press 1933) (1612) ("He is an enemy who has a state, a senate, a treasury, united and harmonious citizens, and some basis for a treaty of peace, should matters so shape themselves . . . . For the word *hostis*, 'enemy', while it implies equality . . . is sometimes extended to those who are not equal, namely, to pirates, proscribed persons, and rebels; nevertheless it cannot confer the rights due to enemies, properly so called, and the privileges of regular warfare."). Others urged restraint, preferring that war against pirates be waged under the auspices of the state. 2 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 989 (Richard Tuck ed., Liberty Fund, Inc. 2005) (1625) ("[W]e may gather how dangerous it is for any private Christian to punish any Man, tho' never so wicked, especially with Death, either for his own or the publick Good,

Notwithstanding the longstanding universal prohibition of piracy, the federal courts are presently struggling to bring modern juridical tools to bear in dealing with an ancient crime.[18] Because the prohibition of piracy is a norm of customary international law, it is also part of the law of the United States.[19] However, only a statutory enactment can give the prohibition the full force of law in domestic courts.[20] In this sense, the international prohibition of piracy is only as strong as the domestic statutes giving force to it.[21] Thus piracy, as a legal offense,

although it be sometimes permitted by the Law of Nations. . . . Hence it is that Custom of those Nations much to be commended, where the supreme Power grants Commissions to People going to Sea, to attack Pirates wherever they meet them; that they may make use of any Opportunity that serves, not as it were of their own Head, but by the express Order of the Publick."); s*ee also*, HUGO GROTIUS, THE FREE SEA 128-29 (Richard Hakluyt trans., David Armitage ed., Liberty Fund, Inc. 2004). The ancient legal paradigm of piracy has been a compelling analogue in recent years for the problem of terrorism. *See, e.g.*, Joseph P. "Dutch" Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1, 36-49 (2004).

18. As Secretary of State Hillary Rodham Clinton put it, "[w]e may be dealing with a 17th [c]entury crime, but we need to bring 21st [c]entury solutions to bear." *Counter Piracy and Maritime Security*, DEPARTMENT OF ST., http://www.state.gov/t/pm/ppa/piracy/index.htm (last visited Sept. 26, 2011).

19. The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."); The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) (The courts of the United States are "bound by the law of nations which is a part of the law of the land.").

20. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987) reporters' n.1 ("Piracy has sometimes been described as 'an offense against the law of nations'—an international crime. Since there is no international penal tribunal, the punishment of piracy is left to any state that seizes the offender. . . . Although international law is law of the United States (§ 111), a person cannot be tried in the federal courts for an international crime unless Congress adopts a statute to define and punish the offense.").

21. This became painfully clear to the international community as a whole in 2010. The United Nations has, as a matter of policy, opted to delegate the responsibility of prosecuting Horn of Africa pirates to the domestic courts of Kenya and the Seychelles. U.N. Secretary-General, *Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy off the Coast of Somalia, the existing practice in establishing international and mixed tribunals, and the time and resources necessary to achieve and sustain substantive results*, ¶¶ 19-23, U.N. Doc. S/2010/394 (July 26, 2010). Australia, Canada, France, Germany, the United States, and the European Union contributed funds to establish a high-security courtroom in Mombasa, Kenya, for the express purpose of bringing captured pirates to justice. The courtroom opened in June 2010. Five months later, the High Court at Mombasa ruled that, notwithstanding a Kenyan universal jurisdiction statute, the court lacks jurisdiction over piracy cases that do not directly implicate Kenyan territory or nationals. *In re* Mohamud Mohamed Dashi (2010) e.K.L.R. (Kenya), *available*

exists in two forms: piracy *jure gentium* (under the law of nations) and piracy as defined by municipal law.[22]

Article 1 section 8 of the Constitution authorizes Congress "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."[23] In effect, the legislative reach of Congress extends beyond the territorial jurisdiction of the United States as Congress has jurisdiction to proscribe and punish acts committed on the high seas. Under the Constitution, American jurisdiction over pirates could conceivably extend the full breadth of the high seas; but it is also limited by whatever statutory limits Congress prescribes.

Congress first attempted to define piracy as a municipal offense in an Act of April 30, 1790, which stipulated:

> That if any person or persons shall commit upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence which if committed within the body of a county, would by the laws of the United States be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his

at http://kenyalaw.org/Downloads_FreeCases/78571.pdf. For further discussion of Kenyan piracy prosecutions, *see* Matteo Taussig Rubbo, *Pirate Trials, the International Criminal Court and Mob Justice: Reflections on Postcolonial Sovereignty in Kenya*, 2 HUMAN. 51 (2011); *see also* James Thuo Gathii, *Kenya's Piracy Prosecutions*, 104 AM. J. INT'L L. 416 (2010).

22. United States v. Hasan, 747 F. Supp. 2d 599, 606 (E.D. Va. 2010).

23. U.S. CONST. art. I, § 8; *see also* United States v. Smith, 18 U.S. (5 Wheat.) 153, 159 (1820). The Articles of Confederation did not provide the national government with authority to define and punish piracy. THE FEDERALIST NO. 42, at 203-04 (James Madison) (Terence Ball ed., 2003). Art. 1 § 8 was therefore heralded as a means of preventing the states from embroiling the confederacy in foreign intrigues. *Id.* Recent cases have focused on the three distinct categories of offense identified by Art. 1 § 8: piracies, felonies on the high seas, and offenses against the law of nations. *Smith*, 18 U.S. at 158-59; United States v. Shi, 525 F.3d 709, 720-21 (9th Cir. 2008). Eugene Kontorovich has noted that the apparent redundancy inherent in these categories is precisely that: apparent. Eugene Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 149, 163-64 (2009) [hereinafter Kontorovich, *Define and Punish*]. Piracy was and remains a "subspecies" of felony unique from other felonies in that it alone is a universal jurisdiction crime. *Id*. Furthermore, "[w]ith respect to felonies, while piracy was at one time distinguishable from felonies, because piracies were originally only triable under the civil law of admiralty, whereas felonies were cognizable only in common law courts, this distinction had long since ceased to exist by the Eighteenth Century." *Hasan*, 747 F. Supp. 2d at 604 (E. D. Va. 2010) (citing Kontorovich, *Define and Punish*, at 160-61).

> trust, or shall make a revolt in the ship; every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death . . . .[24]

The act singles out murder, robbery, and mutiny aboard a vessel beyond the territorial waters of the state as acts of municipal piracy.[25] By applying to "any person or persons" acting on the high seas, the statute also gestures toward universal jurisdiction over piracy cases on the part of the federal courts.[26]

The Supreme Court rejected such an expansive claim to jurisdiction in *United States v. Palmer*, a case that set the stage for Congress's second attempt to legislate a definition of municipal piracy.[27] The defendants included both American citizens and foreign nationals accused of having forcibly boarded a ship on the high seas, assaulting its Spanish crew, and stealing valuable cargo.[28] The majority did not take issue with the definition of piracy under the 1790 Act, but rather with the proposition that it allowed for universal jurisdiction over all incidents of piracy.[29] However, Justice Johnson, in his dissenting opinion, challenged the very constitutionality of the 1790 Act. He wrote:

> Congress can inflict punishment on offences committed on board the vessels of the United States, or by citizens of the United States, any where; but [C]ongress cannot make that piracy which is not piracy by the law of nations, in order to give jurisdiction to its own courts over such offences.[30]

Apparently, Congress agreed with Justice Johnson because it responded by passing the Act of March 3, 1819, which stipulated:

> That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such

24. Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 112, 113-15.

25. For drafting history of the statute, *see* ALFRED P. RUBIN, THE LAW OF PIRACY 128-37 (1988).

26. *Id.*

27. 16 U.S. (3 Wheat.) 610 (1818).

28. *See id.*

29. *Id.* at 630-31 ("The constitution having conferred on congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States. The only question is, has the legislature enacted such a law? Do the words of the act authorize the courts of the union to inflict its penalties on persons who are not citizens of the United States, nor sailing under their flag nor offending particularly against them?").

30. *Id.* at 641-42.

> offender or offenders, shall afterwards be brought into or found in the United States, every such offender or offenders shall upon conviction thereof . . . be punishable with death.[31]

With a stroke of the pen, Congress merged the municipal offense of piracy with piracy *jure gentium*, defining the former in accordance with the latter. The formulation is deceptively simple, possibly taking its cue from the founders, who believed that "[t]he definition of piracies might perhaps without inconveniency, be left to the law of nations[.]"[32]

To an eighteenth- or early nineteenth-century jurist, the definition of piracy under the law of nations may have been patently clear.[33] In *United States v. Smith*, a piracy case turning on the "law of nations" formulation of the Act of 1819, the Supreme Court effectively ruled that "by incorporating the definition of piracy under the law of nations, Congress had defined piracy as clearly as if it had penned the elements of the offense itself."[34] But to a twenty-first century court just beginning to hear piracy cases again after more than a century,[35] the definition opens a Pandora's box of legal questions. What *is* piracy under the law of nations? Have accepted norms of the law of nations changed since the 1800's? And how should they be given effect under

31. Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513-14. The statute was modified by a subsequent act, which added engagement in the slave trade to the crime of piracy, as defined by the law of nations. Act of May 15, 1820, ch. 117, § 5, 3 Stat. 600, 601 (1856); *see also* The Antelope, 23 U.S. (10 Wheat.) 66, 84-85 (1825) (appending a report of the House Committee on the Suppression of the Slave Trade of May 8, 1820: "[slave traders] should be regarded as hostes humani generis. . . . May it not be believed, that when the whole civilized world shall have denounced the slave trade as piracy, it will become as unfrequent as any other species of that offence against the law of nations?").

32. THE FEDERALIST NO. 42, at 212 (James Madison) (Garry Wills ed., 1982).

33. Justice Story undertook "[t]o show that piracy is defined by the law of nations" with an encyclopedic footnote spanning seventeen pages, which cited Latin, French, Spanish, and English language sources on international law. United States v. Smith, 18 U.S. (5 Wheat.) 153, 163 n.8 (1820); s*ee also* Kontorovich, *Define and Punish*, *supra* note 23, at 166-68 (at the time of the founding, "piracy had a uniform technical meaning as an international law offense. At the same time, nations could and did attach the term 'piracy' to a variety of different maritime crimes.").

34. United States v. Hasan, 747 F. Supp. 2d 599, 616 (E.D. Va. 2010) (describing the Supreme Court's ruling in *Smith*, 18 U.S. (5 Wheat) 153); s*ee also* Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980) ("In *Smith*, a statute proscribing 'the crime of piracy [on the high seas] as defined by the law of nations' . . . was held sufficiently determinate in meaning to afford the basis for a death sentence. The *Smith* Court discovered among the works of Lord Bacon, Grotius, Bochard and other commentators a genuine consensus that rendered the crime 'sufficiently and constitutionally defined.'" (quoting *Smith*, 18 U.S. (5 Wheat) at 162)).

35. *Hasan*, 747 F. Supp. 2d at 603 n.3 (noting between 1885 and 2008, there was only one piracy prosecution in the United States in United States v. The Ambrose Light, 25 F. 408 (S.D.N.Y. 1885)).

domestic law?

These questions are all the more pressing in light of the fact that the substance of the 1819 definition of piracy applies to this day with only a few modifications. 18 U.S.C. § 1651 stipulates, "[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life."[36] As the District Court for the Eastern District of Virginia recently explained, the statute

> is nearly identical to its precursor, [Section] 5 of the Act of 1819. The only significant difference between 18 U.S.C. § 1651 and [Section] 5 of the Act of 1819 is the penalty prescribed: the former substitutes mandatory life imprisonment for death, the mandatory penalty prescribed by the latter (citation omitted). In addition, Chapter 81 proscribes piracy in the "municipal" sense by dubbing various acts as piracy even though they may not necessarily fall within the definition of general piracy recognized by the international community.[37]

The acts that now constitute municipal piracy include: (1) murder, robbery, or any act of hostility by a United States citizen against the United States or a citizen thereof on the high seas under the color of a foreign commission or by the authority of any person;[38] (2) commission of piracy against the United States, its property, or its citizens, contrary to a treaty between the United States and the state of which the offender is a citizen, "when by such treaty such acts are declared to be piracy";[39] and (3) acts of plunder on the high seas or within the admiralty and maritime jurisdiction of the United States.[40] With the exception of these three specific acts of piracy, the law of nations or, more appropriately, customary international law provides the substantive content of the municipal offense.

In recent decades, federal courts have equated the historic category of the "law of nations" with customary international law. They have done this primarily in the context of litigation arising from the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350.[41] Since the Supreme

36. 18 U.S.C. § 1651 (2006).

37. *Hasan*, 747 F. Supp. 2d at 614 (citing 18 U.S.C. § 1651).

38. 18 U.S.C. § 1652.

39. *Id.* § 1653.

40. *Id.* § 1659.

41. Flores v. S. Peru Copper Corp., 343 F.3d 140, 153-54 (2d Cir. 2003) ("The ATCA permits an alien to assert a cause of action in tort for violations of a treaty of the United States and for violations of 'the law of nations,' which, as used in this statute, refers to the body of law known as customary international law."); Kadic v. Karadzic, 70 F.3d 232, 238-39 (2d Cir. 1995) (identifying "the law of nations" as referred to in the ATCA as customary international law); Filartiga v. Pena-Irala, 630 F.2d 876, 877 ("Upon ratification of the

Court's early treatment of piracy provided the foundation upon which federal courts built the modern jurisprudence of customary international law, the identification of the law of nations with customary international law in the context of piracy is especially apt.[42] The challenge now before the courts is to discern what, exactly, the definition of piracy is under customary international law.

II. PIRATES ON OUR SHORES

Consider the following scenarios:

> In the early hours of April 1, 2010, on the high seas west of the Seychelles, five men aboard a seafaring vessel spotted what was apparently a large, unarmed commercial ship.[43] Armed with a rocket propelled grenade launcher and two AK-47s, three of the men boarded a skiff, approached the ship, and opened fire.[44] To their surprise, the ship fired back.[45] It was not a commercial vessel, but rather the U.S.S. Nicholas, a U.S. Navy frigate.[46] The assailants were taken into custody by the Nicholas and transferred to Norfolk, Virginia,[47] where they were indicted in the District Court for the Eastern District of Virginia on charges of piracy in violation of 18 U.S.C. § 1651 and lesser offenses.[48] The defendants filed a motion to dismiss the charge of piracy on the ground that the alleged attack on the Nicholas did not amount to piracy as defined by the law of nations.[49] Judge Mark S.

Constitution, the thirteen former colonies were fused into a single nation, one which, in its relations with foreign states, is bound both to observe and construe the accepted norms of international law, formerly known as the law of nations.").

42. *Kadic*, 70 F.3d at 239 (citing United States v. Smith, 18 U.S. (5 Wheat.) 153, 161 (1820); United States v. Furlong, 18 U.S. (5 Wheat.) 184, 196-97 (1820); The Brig Malek Adhel, 43 U.S. (2 How.) 210, 232, (1844)); s*ee also* Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 120 (2004); Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 208-09 (2004); Joel H. Samuels, *How Piracy Has Shaped the Relationship Between American Law and International Law*, 59 AM. U. L. REV. 1231, 1249-62 (2010).

43. Michael Lewis, *USS Nicholas Captures Suspected Pirates*, U.S. NAVY (Apr. 1, 2010, 9:21 AM), http://www.navy.mil/search/display.asp?story_id=52335.

44. Press Release, United States Attorney's Office, E.D. Va., Alleged Somali Pirates Indicted for Attacks on Navy Ships (Apr. 23, 2010), *available at* http://www.fbi.gov/norfolk/press-releases/2010/nf042310.htm.

45. Lewis, *supra* note 43.

46. *Id.*

47. Press Release, *supra* note 44.

48. Indictment at 2-3, United States v. Hasan, 747 F. Supp. 2d 642 (E.D. Va. 2010) (No. 2:10-cr-00056-MSD-FBS), *available at* http://www.haguejusticeportal.net/Docs/NLP/US/Modin_Hasan_et_al_Indictment_20-04-2010.pdf (last visited Aug. 26, 2011).

49. *Hasan*, 747 F. Supp. 2d at 654.

> Davis denied the motion.[50]
>
> On April 10, 2010, little more than a week after the attack on the U.S.S. Nicholas, a skiff carrying six men approached what appeared to be a large, unarmed commercial vessel approximately 330 nautical miles from Djibouti.[51] Armed with at least one AK-47 style firearm, the skiff's crew opened fire on the ship.[52] But to the surprise of the assailants, the ship fired back.[53] It was not a commercial vessel, but the U.S.S. Ashland, an amphibious dock landing ship.[54] The assailants were taken into custody by the Nicholas and transferred to Norfolk, Virginia,[55] where they were indicted in the District Court for the Eastern District of Virginia on charges of piracy in violation of 18 U.S.C. § 1651 and lesser offenses.[56] The defendants filed a motion to dismiss the charge of piracy on the ground that the alleged conduct did not amount to piracy as defined by the law of nations.[57] Judge Raymond A. Jackson granted the motion.[58]

The outcomes could not seem more contradictory: two judges on the same court came to diametrically opposite conclusions in cases whose underlying facts were essentially the same. This section accounts for the difference between the two rulings, attributing it to a fundamental misunderstanding by the *Said* court (scenario number two above) of the nature of piracy under customary international law.

The *Said* and *Hasan* holdings present two rival views of the definition of piracy under customary international law. Under *Said*, piracy is limited to acts of robbery on the high seas.[59] Under *Hasan*, any act of violence or aggression, unauthorized by a state and committed on the high seas is piracy. The *Said* court dismissed the piracy charge on the ground that the attack on the U.S.S. Ashland failed to contain the fundamental elements of piracy, namely, acts of robbery or depredation.[60] The *Said* court employed two interpretive approaches in formulating its piracy-as-robbery holding. First, it looked to previous

50. *Id.* at 704.

51. *USS Ashland Captures Pirates*, U.S. NAVY (Apr. 10, 2010, 11:44 AM) http://www.navy.mil/search/display.asp?story_id=52519); *USS Ashland*, U.S. NAVY, http://www.ashland.navy.mil (last visited Sept. 26, 2011).

52. *USS Ashland Captures Pirates*, supra note 51.

53. *Id.*

54. *Id.*

55. *See* Press Release, *supra* note 44.

56. Indictment at 2-3, United States v. Said, 757 F. Supp. 2d 554 (E.D. Va. 2010) (No. 2:10-cr-00057-RAJ-FBS).

57. *Said*, 757 F. Supp. 2d at 557.

58. *Id* at 567.

59. *Id.* at 560.

60. *Id*. at 567.

federal case law, particularly the Supreme Court's holding in *Smith*, for a received definition of the offense of piracy.[61] Second, it looked to contemporary international law for a prevailing definition of the offense.[62]

Judge Jackson described *Smith* as "the only case to ever directly examine the definition of piracy under § 1651"[63] to date and "the only clear, undisputed precedent that interprets the statute at issue."[64] The case, he wrote, held "that piracy, under the law of nations, was robbery on the sea and that it was sufficiently and constitutionally defined."[65] However, a close reading of *Smith* shows that this conclusion is only partly accurate. If anything, *Smith* stands for the proposition that piracy under the law of nations includes, but is not limited to, robbery on the high seas. Justice Story explained,

> What 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. There is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature; and whatever may be the diversity of definitions, in other respects, all writers concur, in holding, that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy.[66]

Given the facts before the court, it is only logical that Justice Story should have focused on the issue of robbery. The opinion turned on Smith's conviction for "proceed[ing] to sea on a cruize, without any documents or commission whatever; and . . . on the high seas, committ[ing] the offence charged in the indictment, by the plunder and robbery of [a] Spanish vessel."[67]

Thus the question before the Supreme Court in *Smith* was simply whether the specific crime committed rose to the level of piracy. Any attempt to provide an exhaustive definition of piracy would have gone well beyond the pleadings before the Court.[68] Indeed, the prosecution

61. *Id.* at 559-63.
62. *Said*, 757 F. Supp. 2d at 563-67.
63. *Id.* at 559.
64. *Id.* at 564.
65. *Id.* at 559.
66. United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820).
67. *Id.* at 154.
68. The pleadings in *Smith* could not have been left to more capable counsel. Chief Justice Marshall appointed Daniel Webster as counsel for the defendants, and Attorney General William Wirt represented the United States. MAURICE GLEN BAXTER, DANIEL WEBSTER & THE SUPREME COURT 40-42 (1966).

in *Said* advanced this argument, but the Court expressly rejected it, finding "that the discernable definition of piracy as 'robbery or forcible depredations committed on the high seas' under § 1651 has remained consistent and has reached a level of concrete consensus in United States law since its pronouncement in 1820." [69]

Judge Jackson went on to cite seven cases in support of the proposition, but none of them support the Court's narrow reading of the statute.[70] *Taveras v. Taveraz*[71] does not stand for the proposition that robbery is a fundamental element of piracy, but that when maritime robbery occurs, it must occur *on the high seas* in order to constitute an act of piracy.[72] *United States v. Madera-Lopez* is a drug trafficking case that cites *Smith* not for its definition of piracy, but for its discussion of the powers of Congress to define municipal offenses by reference to international law.[73] *United States v. Barnhart*[74] does not purport to offer a definition of piracy. Rather, it mentions piracy in passing during a discussion of rival jurisdictional claims arising from a single offense.[75] *United States v. Baker* actually stands for the proposition that

69. *Said*, 757 F. Supp. 2d at 560.

70. *Id.*

71. The *Said* ruling incorrectly cites the case as *Taveras v. Taveras*. *Id.*

72. 477 F.3d 767, 772 n.2 (6th Cir. 2007).

73. 190 Fed. Appx. 832, 836 (11th Cir. 2006).

74. 22 F. 285, 288 (C.C.D. Or. 1884).

75. *Id. Barnhart* cites *United States v. Pirates*, a case whose rationale one leading scholar terms "strange." United States v. Furlong (United States v. Pirates), 18 U.S. (5 Wheat.) 184 (1820); RUBIN, *supra* note 25, at 147. The characterization is fitting. The court wrote of the Piracy Act of 1790:

It is obvious that the penman who drafted the section under consideration, acted from an indistinct view of the divisions of his subject. He has blended all crimes punishable under the admiralty jurisdiction in the general term of piracy. But there exist well-known distinctions between the crimes of piracy and murder, both as to constituents and incidents. Robbery on the seas is considered as an offence within the criminal jurisdiction of all nations. It is against all, and punished by all; and there can be no doubt that the plea of autre fois acquit would be good in any civilized State, though resting on a prosecution instituted in the Courts of any other civilized State. Not so with the crime of murder. It is an offence too abhorrent to the feelings of man, to have made it necessary that it also should have been brought within this universal jurisdiction.

Pirates, 18 U.S. at 196-97. The reasoning is perverse to say the least. Instead of offering a legal justification for the distinction between murder and robbery on the high seas, it offered an affective one. That is to say, murder is different from robbery because it is so abhorrent that states are not willing to leave its prosecution to the realm of universal jurisdiction. It is worth noting that Rubin's reading of the case is somewhat different than the author's. While we agree that *United States v. Pirates* is indeed strange, Rubin understands the rationale differently. He writes, "why 'robbery' is to be considered more horrible than 'murder,' and how revulsion at the substance of the crime translates into rules of jurisdiction which must be resolved before any court erected by any municipal system can hear the substance of any accusation, is unexplained." RUBIN, *supra* note 25, at 147.

the definition of piracy under the law of nations is more expansive than piracy under the Act of 1790.[76] Similarly, *United States v. Furlong* engages in close word-by-word construction of the Act of 1790, but has nothing to do with the definition of piracy under customary international law.[77] Like *Smith*, *Davison v. Seal-Skins* necessarily focuses on robbery as a form of piracy because it is a salvage case arising from the theft of goods.[78]

Perhaps most injurious of the cases cited by the *Said* court is *United States v. The Schooner Amistad*,[79] which cites *Smith* in addressing the argument, advanced by the libellants, that the slaves who mutinied on the Amistad were pirates who effectively stole themselves and the slave ship carrying them. The Supreme Court rejected this argument, reasoning:

> If then, these negroes are not slaves, but are kidnapped Africans, who, by the laws of Spain itself, are entitled to their freedom, and were kidnapped and illegally carried to Cuba, and illegally detained and restrained on board of the Amistad; there is no pretence to say, that they are pirates or robbers. We may lament the dreadful acts, by which they asserted their liberty, and took possession of the Amistad, and endeavoured to regain their native country; but they cannot be deemed pirates or robbers in the sense of the law of nations, or the treaty with Spain, or the laws of Spain itself; at least so far as those laws have been brought to our knowledge.[80]

It is worth noting that the Court repeatedly uses the terms "pirates" and "robbers" in the alternative, suggesting that there is no absolute equivalency between the terms. That is to say, all robbers on the high seas acting without state authorization may be pirates, but not all pirates are robbers. Thus, like *Smith*, *The Schooner Amistad* does not support the notion that robbery is an essential element of piracy, but rather that

76. 24 F. Cas. 962, 965 (C.C. S.D.N.Y. 1861) (No. 14,501). The Civil War-era case required that a jury determine whether a Confederate privateer was in fact a pirate ship since the Confederate government was not a sovereign state. *Id.* at 965-66. The court instructed the jury, "[n]ow, if you are satisfied, upon the evidence, that the prisoners have been guilty of this statute offence of robbery upon the high seas, it is your duty to convict them, though it may fall short of the offence as known to the law of nations." *Id.* at 965. The case resulted in a hung jury. *Id.* at 967.

77. United States v. Furlong, 18 U.S. 184, 196-97 (1820) ("It is obvious that the penman who drafted the section under consideration, acted from an indistinct view of the divisions of his subject.").

78. Davison v. Seal-Skins, 7 F. Cas. 192, 193-94 (C.C.D. Conn. 1835) (No. 3661).

79. United States v. Said, 757 F. Supp. 2d 554, 560 (E.D. Va. 2010) (citing United States v. The Schooner Amistad (The Amistad), 40 U.S. 518, 586 (1841) (citing United States v. Smith, 18 U.S. (5 Wheat.) 153, 161 (1820))).

80. *The Amistad*, 40 U.S. at 593-94.

it is an offense sufficient to support a charge of piracy.

The *Said* court also attempts to minimize the precedential value of *The Brig Malek Adhel*,[81] which held:

> 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. If he wilfully sinks or destroys an innocent merchant ship, without any other object than to gratify his lawless appetite for mischief, it is just as much a piratical aggression, in the sense of the law of nations, and of the act of Congress, as if he did it solely and exclusively for the sake of plunder, *lucri causa*. The law looks to it as an act of hostility, and being committed by a vessel not commissioned and engaged in lawful warfare, it treats it as the act of a pirate, and of one who is emphatically *hostis humani generis*.[82]

Said correctly notes that *The Brig Malek Adhel* "rejected the idea that in order for actions to be considered 'piratical,' it [sic] must be done with intent to steal or plunder,"[83] but then attempts to distinguish the case by noting that it "was a *civil forfeiture* action under section 4 of the Piracy Act of 1819 as opposed to a *criminal sanction* under section 5 of the Act."[84] This, however, is a distinction without a difference. Section 4 of the Act stipulates:

> *And be it further enacted*, That whenever any vessel or boat, from which any piratical aggression, search, restraint, depredation or seizure shall have been first attempted or made, shall be captured and brought into any port of the United States, the same shall and may be adjudged and condemned to their use, and that of the captors, after due process and trial, in any court having admiralty jurisdiction, and which shall be holden for the district into which such captured vessel shall be brought; and the same court shall thereupon order a sale and distribution thereof accordingly, and at their discretion.[85]

Not only does Section 4 expressly identify "aggression, search, restraint, depredation or seizure" as potentially piratical, but it also encompasses *any* such piratical act.[86] Section 4 can therefore be understood to include the piratical acts specified by Section 5, which

81. *Said*, 757 F. Supp. 2d at 560 (citing The Brig Malek Adhel, 43 U.S. (2 How.) 210 (1844)).

82. *The Brig Malek Adhel*, 43 U.S. (2 How.) at 248-49.

83. *Said*, 757 F. Supp. 2d at 560 (citing *The Brig Malek Adhel*, 43 U.S. (2 How.) at 232).

84. *Id.*

85. Act of Mar. 3, 1819, ch. 77, § 4, 3 Stat. 510, 513 (1856).

86. *Id.*

imposes a criminal sanction on pirates.[87]

The *Said* court further posited that "'piracy' has a much narrower meaning than 'piratical' acts,"[88] with "piratical" acts constituting a broader category of offenses than piracy.[89] However, even according to the cases *Said* cites in support of this proposition, there is no material difference between acts of piracy and piratical acts. Rather, the difference lies in the nature of the liability imputed by each. That is, a vessel might be condemned for its involvement in piratical acts under Section 5 of the 1819 Act even though its crew might not be convicted of piracy under Section 4. In the *Ambrose Light*, the District Court for the Southern District of New York provided a few examples in which this might be the case:

> If an owner should forge a commission from a lawful belligerent, and send his vessel out as a privateer under officers and crew who acted in good faith, supposing her commission to be genuine, the vessel should be condemned, though the officers and crew might be acquitted. So if mere usurpers, knowing that they have no recognized authority, should commission their own ships as vessels of war to blockade loyal ports and to threaten the lawful commerce of all nations, and foreign merchantmen were captured or sunk by them during such a blockade, it is possible that the officers and crew might have accepted the commission upon such a reasonable supposition of its coming from an authorized belligerent as to furnish a just defense upon a criminal indictment, though none the less should the vessel and those who commissioned her be held engaged in an illegal and piratical expedition.[90]

Justice Story similarly explained in *The Marianna Flora* that:

> [E]very hostile attack, in a time of peace, is not necessarily piratical. It may be by mistake, or in necessary self-defence, or to repel a supposed meditated attack by pirates. It may be justifiable, and then no blame attaches to the act; or, it may be without just excuse, and then it carries responsibility in damages. If it proceed farther, if it be

87. Section 5 stipulates:

> And be it further enacted, That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders, shall afterwards be brought into or found in the United States, every such offender or offenders shall, upon conviction 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.

Id. § 5, at 513-14.

88. *Said*, 757 F. Supp. 2d at 560.

89. *Id.* (quoting *The Brig Malek Adhel*, 43 U.S. (2 How.) at 210).

90. 25 F. 408, 415 (S.D.N.Y. 1885) (citing United States v. Gilbert, 25 F. Cas. 1287 (C.C.D. Mass. 1834) (No. 15,205)).

> an attack from revenge and malignity, from gross abuse of power, and a settled purpose of mischief, it then assumes the character of a private unauthorized war, and may be punished by all the penalties which the law of nations can properly administer.[91]

It is here worth revisiting *United States v. Smith* in order to better understand its approach to piracy. As explained above, *Smith's* preoccupation with robbery as a piratical act necessarily stems from the facts of the case: an act of high-seas robbery.[92] The same is true of *U.S. v. Palmer*, *U.S. v. Pirates, The Brig Malek Adhel*, and even *Davidson v. Seal-Skins*. This is not because the federal courts are infatuated with the idea of maritime robbery; rather, it is a product of brute fact. Sociopaths rarely roam the high seas committing criminal mischief for its own sake. Piracy is, as a United Nations report recently demonstrated, a very expensive undertaking.[93] It is a business. And as

91. The Marianna Flora, 24 U.S. (11 Wheat.) 1, 41 (1825). The case was a forfeiture proceeding stemming from an attack by the Portuguese-flagged Marianna Flora on the U.S. warship, the Alligator. *Id.* at 3. A series of misunderstandings led the Alligator to believe that the Marianna Flora was a slave-trading (and thus pirate) ship, and the Marianna Flora to believe the Alligator to be a pirate ship out on the attack. *Id.* at 4-6. The Court held:

> In considering the circumstances, the Court has no difficulty in deciding, that this is not a case of a piratical aggression, in the sense of the act of Congress. The Portuguese ship, though armed, was so for a purely defensive mercantile purpose. She was bound homewards with a valuable cargo on board, and could have no motive to engage in any piratical act or enterprise. It is true, that she made a meditated, and, in a sense, a hostile attack, upon the Alligator, with the avowed intention of repelling her approach, or of crippling or destroying her. But, there is no reason to doubt, that this attack was not made with a piratical or felonious intent, or for the purpose of wanton plunder, or malicious destruction of property. It was done upon a mistake of the facts, under the notion of just self-defence, against what the master very imprudently deemed a piratical cruizer. The combat was, therefore, a combat on mutual misapprehension; and it ended without any of those calamitous consequences to life which might have brought very painful considerations before the Court.

Id. at 39.

92. *See supra* text accompanying notes 34-42. The defendants in Smith had been convicted by a jury of violently seizing the *Irresistible*, a privateer ship commissioned by the revolutionary government of José Artigas, and setting sail on the high seas without documents or commission. There, the defendants forcibly plundered and robbed a Spanish-flagged ship. *See generally* United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820).

93. U.N. Security Council, Letter dated Mar. 10, 2010 from the Chairman of the Security Council Committee pursuant to Resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea addressed to the President of the Security Council, U.N. Doc. S/2010/91 (Mar. 10, 2010) ("The typical piracy 'business model' has evolved since the Monitoring Group's December 2008 report . . . . A basic piracy operation requires a minimum eight to twelve militia prepared to stay at sea for extended periods of time, in the hopes of hijacking a passing vessel. Each team requires a minimum of two attack skiffs, weapons, equipment, provisions, fuel and preferably a supply boat. The costs of the operation are usually borne by investors, some of whom may also be pirates. To be eligible for employment as a pirate, a volunteer should already possess a firearm for use in the

businessmen, pirates seek to profit from their efforts.[94]

In recent history, robbery has been the revenue-raiser of choice for pirates, and it is for this reason that most piracy litigation in the United States has focused on robbery as a constituent element of the offense. But hostage-taking is another revenue-raising enterprise in which pirates have historically engaged.[95] Whereas the blockades and black markets of the eighteenth century made robbery and the resale of cargo lucrative to pirates,[96] massive cargo vessels, oil tankers, and, above all, insurance policies make hostage-taking and ransom the enterprise of choice for pirates today.

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operation. For this 'contribution', he receives a 'class A' share of any profit. Pirates who provide a skiff or a heavier firearm, like an RPG or a general purpose machine gun, may be entitled to an additional A-share. The first pirate to board a vessel may also be entitled to an extra A-share. At least twelve other volunteers are recruited as militiamen to provide protection on land if a ship is hijacked . . . . Militiamen must possess their own weapon, and receive a 'class B' share–usually a fixed amount equivalent to approximately US $15,000. If a ship is successfully hijacked and brought to anchor, the pirates and the militiamen require food, drink, qaad [a narcotic], fresh clothes, cell phones, air time, etc. The captured crew must also be cared for. In most cases, these services are provided by one or more suppliers, who advance the costs in anticipation of reimbursement, with a significant margin of profit, when ransom is eventually paid.").

94. An informal "stock market" has sprung up in Somalia which allows investors to invest in joint stock companies supporting pirate militias. Mohamed Ahmed, *Somali Sea Gangs Lure Investors at Pirate Lair*, REUTERS (Dec. 1, 2009), http://www.reuters.com/article/2009/12/01/us-somalia-piracy-investors-idUSTRE5B01Z920091201?sp=true.

95. The captivity of Julius Caesar at the hands of pirates near the island of Pharmacussa is one such celebrated incident. According to Suetonius,

He remained in their custody for nearly forty days in a state of intense vexation, attended only by a single physician and two body-servants; for he had sent off his travelling companions and the rest of his attendants at the outset, to raise money for his ransom. Once he was set on shore on payment of fifty talents, he did not delay then and there to launch a fleet and pursue the departing pirates, and the moment they were in his power to inflict on them the punishment which he had often threatened when joking with him.

I SUETONIUS, LIVES OF THE CAESARS bk. I, at 41 (G.P. Goold ed., J.C. Rolfe trans., Loeb Classical Library 1998). The Mediterranean of classical antiquity was rife with hostage piracy, as described in numerous classical sources. *See, e.g.*, HERODOTUS, THE LANDMARK HERODOTUS: THE HISTORIES 432-33 (Robert B. Strassler ed., Andrea L. Purvis trans., First Anchor Books 2007); THUCYDIDES, THE PELOPONNESIAN WAR 5-8, 422 (Richard Crawley trans., 1974).

96. *See, e.g.*, JEREMY BLACK, THE BRITISH SEABORNE EMPIRE 79 (2004) (piracy as a manifestation of "the cruel 'anarchy of the global market'"); J.H. ELLIOTT, EMPIRES OF THE ATLANTIC WORLD: BRITAIN AND SPAIN IN AMERICA 1492-1830 224 (Yale Univ. Press 2007) ("Trade and piracy were liable to be synonymous in this lawless Caribbean world of the later seventeenth and early eighteenth centuries, and buccaneers, merchants and planters became fickle accomplices in the enterprise of stripping the Spanish empire of its assets. New England merchants seized control of the export trade in central American logwood (for dye-making) from the Gulf of Campeche, and fortunes were made in Rhode Island by Newport merchants who happily combined commerce with attacks on Spanish shipping.").

The recent surge of piracy off the Horn of Africa does not mark the first time the United States has had to confront hostage-piracy head on. On the contrary, even at the time the Constitution was framed, a conflict with the Barbary Pirates loomed on the horizon.[97] The difference, though, between the United States' approach to hostage-piracy at the turn of the eighteenth century and at the beginning of the twenty-first is that two hundred years ago the United States dealt with pirates by going to war with them. Today we take them to court. The strategic shift from prosecution on the waves to prosecution in federal court accounts for the apparent novelty of the piracy cases presently before the federal courts. But piracy, as defined by customary international, remains very much the same.

The Geneva Convention on the High Seas ("High Seas Convention"), to which the United States is a party, represented the first attempt by the international community to codify a definition of piracy under international law.[98] Article 15 stipulates that:

> Piracy consists of any of the following acts:
>
> (1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
>
> (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
>
> (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
>
> (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
>
> (3) Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article.[99]

The Convention's definition of piracy offers little new to the federal

97. For centuries, European trading states entered into treaties with Tripoli, Algiers, and Tunis under which their foreign-flagged ships were offered immunity from pirate attack in exchange for tribute payments to local Ottoman deys. The young American Republic was no exception, especially since it lacked a national navy. In 1815, when the young American Republic fell into arrears on its tribute payments, President James Madison secured an authorization from Congress to declare war on Tripoli for the release of the hostage crew of *The Edwin.* FREDERICK C. LEINER, THE END OF BARBARY TERROR: AMERICA'S 1815 WAR AGAINST THE PIRATES OF NORTH AFRICA 46-47 (Oxford Univ. Press 2006).

98. U.N. Convention on the High Seas, *opened for signature* Apr. 29, 1958, 13 U.S.T. 2313, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962).

99. *Id*. at 2317, 450 U.N.T.S. at 90.

courts' historic view of piracy under customary international law.[100] Indeed, this is consistent with the Convention's purported aim of codifying existing rules of customary international law relating to the high seas.[101]

With only minimal stylistic changes, Article 101 of the United Nations Convention on the Law of the Sea (UNCLOS)[102] is identical to Article 15 of the High Seas Convention, stipulating:

> Piracy consists of any of the following acts:
>
> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
>
> (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
>
> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
>
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
>
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).[103]

While the United States is not a party to UNCLOS, it does accept that it is an authoritative codification of the "traditional uses" of the oceans.[104]

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100. *Compare id*. *with* definition of piracy in The Brig Malek Adhel, 43 U.S. (2 How.) 210, 232 (1844); *compare also* U.N. Convention on the High Seas, *supra* note 98, 13 U.S.T. at 2317, 450 U.N.T.S. at 90, *with* personal defenses to piracy in The Ambrose Light, 25 F. 408, 415 (S.D.N.Y 1885). The only "new" addition, and it can only be termed such because the federal courts had not yet had occasion to adjudicate any such cases circa 1958, is the explicit extension of the provisions concerning maritime piracy to aviation piracy.

101. U.N. Convention on the High Seas, *supra* note 98, 13 U.S.T. at 2314, 450 U.N.T.S. at 82.

102. U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).

103. *Id*. at 436.

104. The U.S. position on UNCLOS is best encapsulated in the 2001 statement of Ambassador Sichan Siv, U.S. Representative on the U.N. Economic and Social Council, to the U.N. General Assembly:

> The United States has long accepted the UN Convention on the Law of the Sea as embodying international law concerning traditional uses of the oceans. The United States played an important role in negotiating the Convention, as well as the 1994 Agreement that remedied the flaws in Part XI of the Convention on deep seabed mining. Because the rules of the Convention meet U.S. national security, economic, and environmental interests, I am pleased to inform you that the Administration of President George W. Bush supports accession of the United States to the Convention.

MAJORIE ANN BROWNE, CONG. RESEARCH SERV., IB95010, THE LAW OF THE SEA CONVENTION AND U.S. POLICY 2 (2006). The Obama administration has continued to support U.S. accession to the treaty. *See, e.g.*, *Law of the Sea Convention*, U.S.

These formulations of piracy encapsulate centuries of jurisprudence concerning the pirate's status as *hostis humani generis*. The appellation, for all of its antiquity, is no empty platitude, notwithstanding the *Said* Court's attempt to render it such by defining piracy as mere robbery on the high seas. And while the *Hasan* court ably rejected that approach, it declined to go so far as "conclusively [to] determine the exact contours of the [*Smith*] opinion"[105] upon which *Said* so heavily relied. However, even a cursory examination of those contours will demonstrate how wildly the *Said* precedent deviates from the definition of piracy under customary international law, both as received at the time *Smith* was decided and as received today.

Justice Story's "epic"[106] seventeen-page footnote in *Smith* provides evidence of the content of the customary international norm prohibiting piracy circa 1820. According to the authorities Story cites, pirates are those who wage an undeclared war against humankind, robbing, kidnapping, and committing acts of violence on the high seas.[107] Not

DEPARTMENT OF ST., http://www.state.gov/g/oes/ocns/opa/convention/ (last visited Sept. 26, 2011).

105. United States v. Hasan, 747 F. Supp. 2d 599, 623 (E.D. Va. 2010).

106. Douglas Guilfoyle, *Prosecuting pirates in national courts: US v. Said and piracy under US law*, EJIL: TALK! (Aug. 23, 2010), http://www.ejiltalk.org/prosecuting-pirates-in-national-courts-us-v-said-and-piracy-under-us-law/.

107. United States v. Smith, 18 U.S. (5 Wheat.) 153, 183 n.8 (quoting Grotius, RIGHTS OF WAR AND PEACE, III.3.1) ("According to Roman jurists, enemies are those who declare war against us publicly. All the rest are brigands or pirates . . . [therefore] those who are captured by pirates or brigands remain free." (Author's translation)). That is to say, because the pirate is an outlaw, he cannot effect a change in the legal status of his victims. The free man is not rendered a slave in the eyes of the law simply because he has been captured by a pirate. *See supra* text accompanying note 80. Story goes on to quote another passage in which Grotius similarly argues, "[t]here is no need for postliminy proceedings [for the recovery of] that which pirates or brigands have stolen from us . . . because the law of nations did not authorize them to change the right of the owner." (Author's translation). *Id.* Story cites Bynkershoek ("[i]t is important to know what pirates and brigands are, because the things which they capture do not change ownership, nor do they require postliminy proceedings."), Azuni ("Pirates having no right to make conquests, cannot, therefore, acquire any lawful property in what they take; for the law of nations does not authorize them to deprive the true owner of his property"), and numerous other writers on international law to the same effect. Notwithstanding the emphasis on robbery as a piratical offense throughout the footnote, which is understandable in light of the subject matter of the case, a common thread runs through all the international jurists cited: the notion that the pirate, by his unauthorized and undifferentiated acts of violence, is an enemy of all humankind. *Id.* (quoting Azuni ("as pirates are the enemies of the human race, piracy is justly regarded as a crime against the universal laws of society, and is every where punished with death. As they form no national body, as they have no right to arm, nor make war, and on account of their indiscriminate plunder of all vessels are considered only as public robbers, every nation has a right to pursue, and exterminate them, without any declaration of war.")); Burlamaqui (pirates are "persons whose acts of violence are manifestly unjust,

just any act of violence on the high seas would constitute piracy by this definition. It would have to be tantamount to an act of private war. Thus, the prosecutor in *Said* could not have been more wrong when he conceded to Judge Jackson that a slingshot, rock, or bow and arrow fired by one ship onto another on the high seas would indeed constitute piracy.[108]

CONCLUSION

In 2010, pirates off the Horn of Africa took 1090 seafarers hostage. More than half reported having been abused by their captors and/or used as human shields.[109] The average cash ransom paid to pirates rose to a reported $5.4 million, while the cost to maritime trade worldwide rose to between $7 billion and $12 billion.[110] Current trends suggest that 2011's figures will eclipse all previous years. Not only does the scourge of piracy destabilize the security of international commerce, it also destabilizes the growth of stable and secure governance in the Horn of Africa. Whereas in the nineteenth century the United States met the challenge of hostage-piracy on the waves with gunboats and cannon, today the United States prefers to prosecute it with the rule of law. The approach is commendable. Its actual execution, however, has been lamentable.

The notion that those responsible for the massacre aboard the s/v Quest could well be acquitted of piracy charges should be of great concern to any international lawyer. If a norm as ancient and unambiguous as the prohibition of piracy could be so quickly and clumsily eviscerated as it was in *Said*, the efficacy of domestic judicial institutions as a means of dealing with international criminal offenses is undermined. The District Court of the Eastern District of Virginia has an opportunity to set things right in *United States v. Salad.* Only the coming months will tell whether the Court will rise to the challenge.

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which authorizes all nations to treat them as enemies"); Valin (pirates are "the sworn enemies of society, the violators of public faith and the law of nations, the raiders of the public by arms and open force." (Author's translation)).

108. Keith Johnson, *Who's a Pirate? In Court, A Duel Over Definitions*, WALL STREET J. ONLINE, Aug. 20, 2010, at W1, *available at* http://online.wsj.com/article/SB10001424052748703988304575413470900570834.html.

109. Kaija Hurlburt, *The Human Cost of Somali Piracy*, OCEANS BEYOND PIRACY 1, 8 (2011), http://oceansbeyondpiracy.org/sites/default/files/human_cost_of_somali_piracy.pdf.

110. Robert Wright, *Sharp Rise in Pirate Ransom Costs*, FIN. TIMES (Jan. 16, 2011, 10:39 PM), http://www.ft.com/intl/cms/s/0/658138a6-219b-11e0-9e3b-00144feab49a.html#axzz1WCyEZ5ux.