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Piracy Prosecutions in National Courts

Maggie Gardner*

Abstract

At least for the time being, the international community must rely on national courts to prosecute modern-day pirates. The first wave of domestic piracy prosecutions suggests, however, that domestic courts have yet to achieve the necessary consistency and expertise in resolving key questions of international law in these cases. This article evaluates how courts trying modern-day pirates have addressed common questions of international law regarding the exercise of universal jurisdiction, the elements of the crime of piracy, and the principle of nullum crimen sine lege. In doing so, it evaluates five decisions issued in 2010 by courts in Kenya, the Netherlands, the Seychelles and the United States, and it proposes some clear answers to these recurrent questions of international law in domestic piracy prosecutions.

1. Introduction

Much attention has recently been paid, by popular media and serious scholars alike, to the intriguing problem of how to prosecute modern-day pirates. Despite the enthusiasm (at least from some quarters) for trying pirates in international or internationalized courts, however, the prosecution of pirates by national courts exercising universal jurisdiction remains the most efficient, and currently the most practical, solution.¹

If the burden of prosecution is to fall on domestic courts, it is important that those courts apply the relevant international law correctly and consistently. This has not been the case so far. Now that the first set of modern-day piracy prosecutions have concluded, judges in national courts should pause to assess

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1 See D. Guilfoyle, 'Prosecuting Somali Pirates: A Critical Evaluation of the Options', in this issue of the *Journal*.

how their peers in other jurisdictions have analysed similar legal questions. Applying lessons learned to future cases will help resolve criticisms that domestic courts lack the experience and expertise to handle these cases,² and that differences in the domestic application of international law will lead to unfairly disparate treatment of piracy defendants.³

This article aims to further that process of reflection and consolidation by evaluating five piracy decisions issued in 2010 by courts in Kenya, the Netherlands, the Seychelles and the United States. In doing so, it attempts to answer clearly the recurrent questions of international law that arise in domestic piracy prosecutions regarding the scope of universal jurisdiction over piracy, the elements and customary status of the international crime of piracy, and whether that crime is defined with adequate specificity to satisfy the principle of legality (*nullum crimen sine lege*).

The article addresses these questions from the perspective of international law. It does not attempt to dictate how domestic courts should apply international law within the context of their national legal systems, a process of incorporation that may depend on domestic statutes or implicate fundamental constitutional principles. Given the margin of appreciation states have in choosing how to implement international law within their national systems,⁴ some differences in the domestic application of the international law of piracy will inevitably remain. This article is concerned about minimizing those differences by ensuring that domestic courts start from a correct understanding of international law before applying it within the bounds of their legal systems.

Similarly, this article is concerned with piracy solely as an international crime. As the subsequent discussion will clarify, states may outlaw additional conduct as ‘piracy’, but only under their domestic law and subject to their domestic jurisdiction.⁵ This domestic crime of piracy is often termed ‘municipal piracy’ or, more confusingly, ‘armed robbery at sea’⁶ to differentiate it from the international crime under discussion here. In this article, ‘piracy’ will refer solely to the international crime over which domestic courts may exercise universal jurisdiction.

Before analysing the contours of that international crime, we start with a brief description of the 2010 piracy decisions.

2 See e.g. M. Arsanjani and W.M. Reisman, ‘East African Piracy and the Defense of World Public Order’, in H. Hestermeyer et al. (eds), *Law of the Sea in Dialogue* (Springer, 2011) 137–159, at 155.

3 See e.g. J. Goodwin, ‘Universal Jurisdiction and the Pirate: Time for an Old Couple to Part’, 39 *Vanderbilt Journal of Transnational Law* (2006) 973, at 1000, 1004–1005; cf. R. Collins and D. Hassan, ‘Applications and Shortcomings of the Law of the Sea in Combating Piracy’, 40 *Journal of Maritime Law & Commerce* (2009) 89, at 102–103.

4 See e.g. W. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (T.M.C. Asser Press, 2006), at 132.

5 See discussion in Section 3.C, *infra*.

6 The label is potentially misleading because, as explained below, an intent to rob is not a component of the international crime of piracy. See Section 4.A, *infra*.

2. The 2010 Piracy Decisions

The five published piracy decisions of 2010 all involved Somali nationals captured after unsuccessful attacks on ships sailing on the high seas. From similar factual circumstances, the courts reached different conclusions regarding the elements of the crime of piracy and the ability of the domestic court to try the defendants. Thus, three sets of defendants were convicted, while the charges against the other two groups were dismissed.

A. *The Netherlands: The 'Cygnus' Case*⁷

On 2 January 2010, five Somali men in a small skiff attacked the *MS Samanyolu*, a ship registered in the Netherlands Antilles and sailing in the Gulf of Aden. The Danish Navy intervened and seized the defendants. On 15 January 2010, the Dutch authorities agreed to prosecute the suspects for piracy, but the transfer of custody was not achieved until 10 February 2010. The next day, the suspects were brought before an investigating magistrate and assigned a lawyer.

The Rotterdam district court, in a decision issued 17 June 2010, convicted the five men of piracy. The court noted that Dutch law explicitly establishes universal jurisdiction over piracy, and it reasoned that international treaties binding on the Netherlands did not preclude the exercise of such jurisdiction.⁸ Although the Danish and Dutch authorities were justified in detaining the suspects, and although the court acknowledged the practical difficulties when naval ships capture suspected pirates on the high seas, it nonetheless held that the 40-day delay in arraigning the defendants violated Article 5(3) of the European Convention on Human Rights. It also held, however, that the breach of this procedural requirement did not prejudice the defendants. After rejecting additional defence arguments, the court convicted the defendants and sentenced them to five years in prison.

B. *The Seychelles: Republic v. Dahir*⁹

On 6 December 2009, eight Somali men were captured after they fired on a Seychelles Coast Guard patrol vessel, the *Topaz*, within the Exclusive Economic Zone of the Seychelles. The *Topaz* then pursued the 'mother ship' from which the attack had been launched and arrested three additional men. The 11 suspects were prosecuted in the Seychelles for crimes of terrorism and piracy.

7 Rb. Rotterdam 17 juni 2010, Case No. 10/600012-09, reprinted and trans. in 145 *International Law Reports* [ILR] 491. See also Professor Guilfoyle's comment on the case in the same issue.

8 See discussion in Section 3.B, *infra*.

9 [2010] SCSC 81 (26 July 2010), available online at <http://www.saflii.org/sc/cases/SCSC/2010/81.html> (visited 20 June 2012).

In a decision issued on 26 July 2010, the court dismissed the terrorism charges but found all the defendants guilty either of piracy (on the basis of joint criminal liability) or of aiding and abetting piracy. Although the Seychelles has since updated its piracy statute, the law then in force incorporated the English law of piracy as of 1976, when the Seychelles attained independence. The court determined that the crime of piracy *jure gentium* as of 1976 included attempts to rob or seize a ship, as well as attacks on ships that did not result in any harm or injury. Thus, it was no defence that the attack on the *Topaz* had been quickly repelled: the methods and means of attack nonetheless indicated that the defendants' intent was piratical. The court sentenced all 11 defendants to 10 years in prison.¹⁰

C. *The United States: United States v. Said*¹¹ and *United States v. Hasan*¹²

The Somali defendants in both *Hasan* and *Said* (like those in *Dahir*) were apprehended, on 1 April 2010 and 10 April 2010, respectively, after they allegedly fired on United States naval ships but before any attempt to board and rob the targeted ships could have been made. In both cases, the defendants moved to dismiss the charge of piracy because the indictments only alleged they had committed acts of violence, not acts of robbery.

The United States piracy statute (18 U.S.C. § 1651) outlaws 'the crime of piracy as defined by the law of nations',¹³ leaving the United States courts to determine the elements of the crime of piracy by reference to customary international law. In so determining, the *Said* and *Hasan* courts reached opposite conclusions.¹⁴ In a decision issued on 17 August 2010, the *Said* court determined that an act of violence alone could not constitute piracy and dismissed the count. On 29 October 2010, the *Hasan* court determined that such conduct *could* constitute piracy under section 1651. The defendants were subsequently convicted by a jury and sentenced by the court to life in prison.¹⁵ On 23 May 2012, the US Court of Appeals for the Fourth Circuit ruled that the *Hasan* court's analysis was correct; it affirmed the convictions and sentences in *Hasan* but vacated and remanded the *Said* decision for further proceedings consistent with its opinion.¹⁶

10 See *Republic v. Dahir*, [2010] SCSC 86 (26 July 2010), available online at <http://www.saflii.org/sc/cases/SCSC/2010/86.html> (visited 20 June 2012).

11 757 F. Supp. 2d 554 (E.D. Va. 2010).

12 747 F. Supp. 2d 599 (E.D. Va. 2010).

13 18 U.S.C. § 1651 provides in full that '[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life'.

14 See Section 4.B, *infra*.

15 *United States v. Dire*, — F.3d —, 2012 WL 1860992, at *2 (4th Cir. 2012).

16 See *ibid.*; *United States v. Said*, 2012 WL 1868667 (4th Cir. May 23, 2012).

D. Kenya: *In re Hashi*¹⁷

On 3 March 2009, nine armed men allegedly attacked the *MV Courier* in the Gulf of Aden. They were intercepted by the Germany Navy, with air support from the US Navy, and transferred to Kenya 10 days later for trial. Kenya, which had no other jurisdictional nexus to the crime, agreed to prosecute the alleged pirates through the exercise of universal jurisdiction. The suspects were tried before a magistrate court under Kenya's piracy statute then in force, section 69 of the Penal Code, which provided that 'any person who in territorial waters or upon the high seas, commits any act of piracy *jure gentium* is guilty of the offence of Piracy'.¹⁸ After the close of the prosecution case, the defendants sought an Order of Prohibition from the High Court to halt the trial for lack of jurisdiction. The defendants argued that, because the prosecution had clearly established that the incident took place outside of Kenyan territory and that no Kenyan citizens or goods were involved, the magistrate court lacked jurisdiction to proceed with the case.

The High Court agreed with the defendants in a decision dated 9 November 2010. The court based its ruling primarily on section 5 of Kenya's Penal Code, which provides that '[t]he jurisdiction of the Courts of Kenya for the purpose of this Code extends to every place within Kenya, including territorial waters'. This general grant, the court concluded, prevented the magistrate courts from exercising jurisdiction over piracy in international waters. As an overarching provision, section 5 overrode any jurisdictional implications one might draw from the references to 'piracy *jure gentium*' and 'the high seas' in section 69 of the same Code.¹⁹ This holding conflicted with the earlier decision of the High Court in *Ahmed v. Republic*, which had held that section 69 empowered all but the lowest magistrate courts of Kenya to exercise universal jurisdiction over piracy *jure gentium*.²⁰

During the *Hashi* trial, section 69 was repealed by the Merchant Shipping Act of 2009, which incorporated the definition of piracy in Article 101 of the UN Convention on the Law of the Sea (UNCLOS).²¹ The High Court determined that the old and new statute covered substantively different crimes; as a result, the new statute, with its presumably clearer grant of universal jurisdiction,²² could not be applied to save the prosecution. The judge therefore granted the Order of Prohibition and further ordered the immediate release of the defendants. The Kenyan government appealed the decision, and the Court

17 [2010] eKLR (H.C.K.), available online at <http://kenyalaw.org/CaseSearch/view.preview1.php?link=72291501978571352546601> (visited 20 June 2012).

18 See *ibid.*, at 13 (quoting section 69(1) of the Penal Code).

19 See Section 3.A, *infra*.

20 [2010] eKLR (H.C.K.), available online at <http://kenyalaw.org/CaseSearch/view.preview1.php?link=54268508962227700682468> (visited 20 June 2012).

21 United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 3 (hereafter 'UNCLOS').

22 See Merchant Shipping Act of 2009, available online at <http://www.kenyalaw.org/Downloads/Acts/TheMerchantShippingAct.2009.pdf> (visited 20 June 2012).

of Appeals has now recommended that a special bench of five judges be empanelled to resolve the conflicting piracy decisions.²³

The different outcomes of these cases reflect in part variations in national legal systems. But they also reflect some misapprehensions about the content and application of international law. The following sections further explore the reasoning of the courts in light of three recurrent themes: jurisdiction, elements of the offence and due process.

3. Universal Jurisdiction

It is beyond debate that the international crime of piracy is subject to universal jurisdiction.²⁴ State practice suggests that there are, however, three basic requirements that must be satisfied before domestic courts may exercise universal jurisdiction: the domestic law must grant the court universal jurisdiction over piracy, the court must have custody of the defendant and the exercise of universal jurisdiction must be limited to conduct that falls within the definition of the *international* crime of piracy.

A. Domestic Grants of Jurisdiction over the Crime of Piracy

Domestic courts derive their jurisdiction from domestic law.²⁵ Thus, while international law permits the exercise of universal jurisdiction over piracy, it is up to states to decide whether or not (and to what extent) its courts may use that power.²⁶ Given the long-standing and well-established existence of universal jurisdiction over piracy, courts may presume that lawmakers wrote domestic piracy statutes with awareness of that jurisdictional right. For this reason, even if a piracy statute only refers in general terms to ‘piracy under the law of nations’ or ‘piracy on the high seas’, a court might nonetheless discern a legislative intent to exert universal jurisdiction over piracy to the full extent permissible under international law.

This appears to have been the argument of the public prosecutor in *Hashi*.²⁷ Similarly, in another Kenyan piracy case, ‘[t]he Court took the opinion that

23 M. Mudi, ‘Kenya: Five-Judge Bench to Handle Piracy Case’, *Nairobi Star*, 21 July 2011.

24 As the US Supreme Court summarized in 1820, there is a ‘general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offence [piracy] against any persons whatsoever’. *United States v. Smith*, 18 U.S. 153, 162 (1820). See also, e.g. *The Case of the S.S. Lotus*, 1927 PCIJ Series A, No. 2, at 70 (Moore, J., dissenting); Harvard Research on International Law, ‘Jurisdiction with Respect to Crime’, 26 *American Journal of International Law (AJIL)*, Supplement: Codification of International Law (1932) 435, 563 (hereafter ‘Harvard Draft (Jurisdiction)’); A. Cassese et al., *International Criminal Law* (Oxford University Press, 2011), 312.

25 See e.g. *Lotus*, *supra* note 24, at 68.

26 See e.g. Harvard Research on International Law, ‘Piracy’, 26 *AJIL*, Supplement: Codification of International Law (1932) 743, at 760 (hereafter ‘Harvard Draft (Piracy)’).

27 See *Hashi*, [2010] eKLR, at 7–8.

when Parliament legislated against piracy, it must have been fully aware that the offence is normally committed in the high seas [and that] the words “*jure gentium*” in the municipal description of the offence implied intention to be bound by international law’.²⁸ This line of reasoning is further bolstered by the Kenyan Parliament’s direction that the High Court and most magistrate courts may exercise jurisdiction over crimes falling under section 69 of the Penal Code.²⁹ The High Court in *Hashi*, however, rejected this argument, concluding instead that the general grant of jurisdiction under section 5 of the Kenyan Penal Code, which provides Kenyan courts with territorial jurisdiction only, prevented the magistrate courts from exercising jurisdiction over piracy committed beyond Kenya’s territorial waters.³⁰ This question of domestic law will have to be resolved by Kenya’s Court of Appeals, but it appears that the High Court in *Hashi* undervalued the international legal context within which Kenya’s Parliament originally adopted section 69.³¹

B. Custody of the Defendant and the Question of the ‘Seizing State’

Perhaps underlying the *Hashi* court’s cautious approach to jurisdiction was a concern that Kenya lacked any nexus to the crime, including that of the capture of the pirates. Some scholars have questioned whether a third state without any traditional nexus to the piratical conduct may prosecute suspected pirates if it did not itself seize them.³² Although no published judicial decision has yet addressed this issue at length, it is of great practical import as most of the Somali defendants on trial for piracy in Kenya were captured on the high seas by other states.³³

28 O. Ambani, ‘Prosecuting Piracy in the Horn of Africa: The Case of Kenya’, in C. Murungu and J. Biegon (eds), *Prosecuting International Crimes in Africa* (Pretoria University Law Press, 2011) 233–246, at 242–243 (describing *Republic v. Kheyre*, Case No. 791 of 2009).

29 Section 4 of Kenya’s Criminal Procedure Code provides that ‘an offence under the Penal Code may be tried by the High Court, or by a subordinate court by which the offence is shown in ... the First Schedule to this Code to be triable’. The First Schedule to the Code specifies that crimes under section 69 may be tried by most magistrates. See Criminal Procedure Code (2009), available online at <http://www.kenyalaw.org/Downloads/GreyBook/9.%20The%20Criminal%20Procedure%20Code.%20.pdf> (visited 20 June 2012).

30 *Hashi*, [2010] eKLR, at 17–18.

31 For further discussion, see J. Gathii, ‘Jurisdiction to Prosecute Non-National Pirates Captured by Third States under Kenyan and International Law’, 31 *Loyola of Los Angeles International and Comparative Law Review* (2009) 363, at 367–368, 372–374 (arguing that section 69 implicitly extends jurisdiction to extraterritorial acts of piracy).

32 See e.g. Ambani, *supra* note 28, at 238, 243; Arsanjani and Reisman, *supra* note 2, at 155; Gathii, *supra* note 31, at 364, 378–379, 385–386; E. Kontorovich, ‘*United States v. Shi*’, 103 *AJIL* (2009) 734, at 739; J. Isanga, ‘Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes’, 59 *American University Law Review* (2010) 1267, at 1279.

33 As of April 2011, Kenya had undertaken 15 prosecutions of piracy involving 130 defendants captured off the coast of Somalia by other countries. See Filing of Annexes of Materials to the Application of the Government of Kenya pursuant to Article 19 of the Rome Statute, *Muthaura et al.* (ICC-01/09-02/11), 21 April 2011, annex 15.

The confusion stems from the text of Article 105 of UNCLOS. While Article 101 of UNCLOS authoritatively defines piracy under international law,³⁴ the other piracy-related provisions of UNCLOS do not clearly establish the scope of universal jurisdiction over that crime. Instead, Article 100 broadly states that '[a]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or any other place outside the jurisdiction of any State.' Article 105 further provides:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. *The courts of the State which carried out the seizure may decide upon the penalties to be imposed*, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.³⁵

Although Article 105 does introduce some ambiguity, it primarily serves to delimit the scope of *enforcement* jurisdiction, or the right of a state to visit and search any ship on the high seas suspected of piracy.³⁶ For several reasons, it should not be read as precluding the exercise of universal *judicial* jurisdiction by states other than the capturing state, at least as long as the prosecuting state has physical custody of the defendants.³⁷

First, Article 105 cannot be read as granting *exclusive* jurisdiction to the seizing state. To do so would ignore the rights of states with nationality, passive personality, or flag-state jurisdiction over the pirate attack, as well as the jurisdictional provisions of other treaties, like the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention),³⁸ that may apply to the same conduct. Similarly, there is no reason to presume Article 105 excludes the exercise of universal jurisdiction allowed under pre-existing customary international law.

34 See e.g. Arsanjani and Reisman, *supra* note 2, at 142; R. Jennings and A. Watts (eds), *Oppenheim's International Law*, Vol. 1 (9th edn., Oxford University Press, 1999), at 747 (hereafter 'Oppenheim'); M. Paparinskis, 'Piracy', in A. Cassese et al. (eds), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009) 455, 455. The customary status of the Art. 101 definition is discussed in Section 4.B, *infra*.

35 UNCLOS, *supra* note 21, Art. 105 (emphasis added).

36 On the distinction between executive and judicial jurisdiction in the context of Art. 105, see A. Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case', 13 *European Journal of International Law (EJIL)* (2002) 853–875, at 858.

37 The argument that Art. 105 does not restrict the traditional scope of universal jurisdiction over piracy has been most thoroughly articulated in J.A. Roach, 'Countering Piracy off Somalia: International Law and International Institutions', 104 *AJIL* (2010) 397, at 404–405. See also D. Guilfoyle, 'The Legal Challenges in Fighting Piracy', in B. van Ginkel and F.-P. van der Putten (eds), *The International Response to Somali Piracy: Challenges and Opportunities* (Martinus Nijhoff, 2010) 127–152, at 129–130; T. Treves, 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia', 20 *EJIL* (2009) 399, at 402.

38 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 10 March 1988, entered into force 1 March 1992. The Convention had 158 states parties as of 29 February 2012.

Second, the permissive language of Article 105 (that the 'courts of the State which carried out the seizure *may* decide upon the penalties to be imposed') suggests that provision does not displace other grounds for exercising jurisdiction, but only provides the capturing state with a clear right to exercise jurisdiction if it so chooses. The use of the permissive 'may' in Article 105 contrasts with the overarching directive of Article 100 that '[a]ll States *shall* cooperate' to repress piracy — a directive that would also be undermined if Article 105 were read as restricting the exercise of universal jurisdiction to just the seizing state.³⁹

Third, the 'drafting history' of Article 105 does not reflect an intention to limit universal jurisdiction over piracy. Article 105 is derived from Article 15 of the 1958 Convention on the High Seas (High Seas Convention),⁴⁰ which in turn reflected the efforts of the International Law Commission (ILC) to codify the customary international law of the sea. In its 1956 report to the UN General Assembly regarding draft articles for the High Seas Convention, the ILC explained that the text of Article 15 'gives any State the right to seize pirate ships (and ships seized by pirates) and to have them adjudicated upon by its courts. *This right cannot be exercised at a place under the jurisdiction of another State.*'⁴¹ Some scholars have pointed to this statement as evidence that the capturing state cannot transfer a suspect to a third state to be prosecuted,⁴² but the comment only references a restriction on *where* a state can exercise the described right, not *which* states may do so. That is, the ILC comment makes the uncontroversial point that a state has no right to seize a pirate or to exercise its *own* adjudicatory powers within the territory of another state.⁴³

In preparing the 1958 High Seas Convention, the ILC relied heavily on a draft piracy convention compiled by legal scholars in the 1930s under the auspices of the Harvard research group (the Harvard Draft).⁴⁴ Drawing from state practice and scholarly writings, the Harvard Draft concluded that '[a] state which has lawful custody of a person suspected of piracy may prosecute and punish that person.'⁴⁵ Similarly, in the draft convention on jurisdiction under international law prepared as part of the same project, the Harvard research group concluded that states may exercise universal jurisdiction over piracy, with 'the competence to prosecute and punish founded simply upon a lawful custody of the person charged with the offense'.⁴⁶ That the relevant jurisdictional fact is

39 See Roach, *supra* note 37, at 404.

40 Convention on the High Seas, 29 April 1958, 450 U.N.T.S. 11 (hereafter 'High Seas Convention').

41 *Report of the ILC to the General Assembly*, UN Doc. A/3159, 1956 *UN Yearbook of the ILC* 253, 283 (emphasis added) (hereafter 'ILC Report').

42 See e.g. E. Kontorovich, 'International Legal Responses to Piracy off the Coast of Somalia', 13 *ASIL Insights* (2009) Issue 2; Isanga, *supra* note 32, at 1275–1276.

43 See D. Guilloyle, 'Counter-Piracy Law Enforcement and Human Rights', 59 *International and Comparative Law Quarterly* (2010) 141, at 145–146.

44 See ILC Report, *supra* note 41, at 282.

45 Harvard Draft (Piracy), *supra* note 26, at 745.

46 Harvard Draft (Jurisdiction), *supra* note 24, at 563–564. The Harvard Drafts continued the work of the League of Nations' Committee of Experts. Regarding piracy, that Committee suggested

the physical custody of the alleged pirate and not the nationality of the seizing ship also coincides with Judge Moore's opinion in the *Lotus* case that 'the person charged with the offence [of piracy] may be tried and punished by any nation *into whose jurisdiction he may come*'.⁴⁷ In sum, universal jurisdiction over piracy is of the more narrow *forum deprehensionis* variety that requires physical custody of the accused⁴⁸ — but it matters not how that custody was attained.

Historically and for practical reasons, the state that seized pirates on the high seas was typically the sole custodial state, as the captain of the seizing ship would try and execute the captured pirates before returning to land.⁴⁹ There was thus no need to distinguish between the state of seizure and the state of custody. The concept of transferring captured pirates to third states for prosecution did not receive close attention until the modern era, when technology combined with heightened concerns for due process made full judicial proceedings on land both feasible and requisite.⁵⁰ Thus one purpose of Article 105's language ('[t]he courts of the state which carried out the seizure may decide upon the penalty to be imposed') may be to clarify that the seizing state must prosecute the detained persons, if it chooses to do so, in a court of law.⁵¹

The more likely purpose of the Article 105 language, however, is to clarify that the capturing state has a *prerogative* to prosecute the suspected pirates, an interpretation that matches current state practice.⁵² It is, for example, the approach taken by the Djibouti Code of Conduct, an agreement among the

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that a ship having seized pirates could bring them 'into the port of *some country* [not necessarily its own] to be judged by a competent tribunal'. League of Nations, Committee of Experts on the Progressive Codification of International Law, 'Piracy', 20 *AJIL*, Special Supplement (1926) 222–229, at 225 (emphasis added) (hereafter 'League of Nations'). Although the Committee also proposed that '[j]urisdiction in piracy belongs to the State of the ship making the capture', *ibid.*, at 229, in context this provision appears to protect the *prerogative* of the seizing state to prosecute, with room for other states to assert jurisdiction (including universal jurisdiction) if the seizing state declines to exercise that prerogative. See e.g. *ibid.*, at 225–226: 'The State which seizes the pirate vessel and arrests the crew is the obvious judge of the validity of the capture and the guilt of the parties concerned. It should *by preference* be accorded the right to investigate and to pass judgment in the case ....' (emphasis added).

47 *Lotus*, *supra* note 24, at 70 (emphasis added).

48 See A. Cassese, *International Law* (2nd edn., Oxford University Press, 2005), at 451–452; see also Cassese, 'When May Senior State Officials Be Tried for International Crimes?' *supra* note 36, at 857–858.

49 Harvard Draft (Piracy), *supra* note 26, at 853–856 (collecting international sources).

50 Cf. *ibid.*, at 853 (rejecting the right of a ship commander to try pirates while at sea as 'old tradition which is inconsistent with the spirit of modern jurisprudence'). The Harvard Draft, while noting older authorities also allowed for summary execution of pirates, emphasized that such treatment would be contrary to modern notions of justice, which require 'a formal fair trial ... however clear the evidence of guilt of piracy may be'. *Ibid.*

51 See E. Kontorovich, 'A Guantanamo on the Sea': The Difficulty of Prosecuting Pirates and Terrorists', 98 *California Law Review* (2010) 243, at 257, 271.

52 See also note 46, *supra*. Such an approach has the benefit of avoiding positive conflicts of jurisdiction. See Cassese, 'When May Senior State Officials Be Tried for International Crimes?' *supra* note 36, at 857–858.

regional states regarding the repression of piracy around the Horn of Africa.⁵³ The Code of Conduct employs language very similar to Article 105 in recognizing the right of the capturing state to prosecute the suspected pirates, but it then notes that the capturing state may, 'in consultation with other interested entities, waive its *primary right* to exercise jurisdiction and authorize any other Participant to enforce its laws against the ship and/or persons on board'.⁵⁴ In its *Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships*, the International Maritime Organization (IMO) has further encouraged states to take the necessary steps 'to be able to receive, prosecute or extradite any pirates ... arrested by warships or military aircraft' — in other words, to prosecute suspected pirates regardless of which state has captured them.⁵⁵ Of course, the right to exercise universal jurisdiction is separate from the legal process of transferring custody between states, an issue that has led to transfer agreements between states patrolling the Gulf of Aden, such as the United States and the UK, and coastal states willing to prosecute pirates, like Kenya and the Seychelles.⁵⁶ These transfer agreements nonetheless reflect an assumption that the receiving state has the legal right to exercise universal jurisdiction over pirates in its custody whom it did not itself capture.⁵⁷

It must be anticipated that some suspects transferred in this manner to Kenya or other third states will raise Article 105 as a defence. The reasoning of the Rotterdam court in *The 'Cygnus' Case* provides a useful model for analyzing such arguments.⁵⁸ That court first determined that the Dutch Criminal Code explicitly grants universal jurisdiction over the crime of piracy and then considered whether this domestic grant conflicts with UNCLOS or the SUA Convention. It acknowledged the 'seizing state' language of Article 105 of UNCLOS but concluded that the language did not, either explicitly or implicitly, vest *exclusive* jurisdiction in the seizing state (Denmark) so as to preclude the exercise of universal jurisdiction by another country (the Netherlands). While the court acknowledged that the Netherlands had a traditional interest in the prosecution because the victim ship was registered in the Netherlands Antilles, it took care to emphasize that such considerations were relevant only to the question of the expediency of exercising jurisdiction, not to the fact of jurisdiction itself.

53 Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, 29 January 2009, annexed to IMO Doc. C 102/4 (hereafter 'Djibouti Code of Conduct').

54 *Ibid.*, at Art. 4(6)–4(7) (emphasis added).

55 International Maritime Organization (IMO), Res. A.1025(26), 18 January 2010, Annex (*Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships*), § 3.1 (hereafter 'IMO Code of Practice').

56 See e.g. Guilfoyle, 'Prosecuting Somali Pirates', *supra* note 1, at 773; Guilfoyle, 'The Legal Challenges in Fighting Piracy', *supra* note 37, at 130.

57 See Kontorovich, 'A Guantanamo on the Sea', *supra* note 51, at 271.

58 See 145 ILR 491.

Generalizing from the approach of *The 'Cygnus' Case*, a court might analyse a defence based on Article 105 by first identifying the scope of jurisdiction under domestic law (which, it has been argued here, should be interpreted in light of the legislature's presumed awareness of universal jurisdiction over piracy *jure gentium*). If the court has jurisdiction as a matter of national law, it might then note that Article 105 does not preclude prosecution by a state other than the capturing state, while customary international law affirmatively allows for it. Finally, the court might evaluate whether other factors, particularly requests by other states to prosecute the defendants, nonetheless bear on the *choice* to exercise jurisdiction in a particular case.

C. Limits of Universal Jurisdiction

There are, however, important limits to the exercise of universal jurisdiction over piracy.

As the US court in *Hasan* correctly emphasized, 'a state's ability to invoke universal jurisdiction is inextricably intertwined with, and thus limited by, the substantive elements of the crime as defined by the consensus of the international community'.⁵⁹ That is, a domestic court may only exercise universal jurisdiction over conduct falling within the crime of piracy as defined by international law.⁶⁰ Indeed, the very point of defining the crime of piracy under international law is, in many respects, to define and therefore circumscribe the extent to which states may exercise universal jurisdiction over the citizens and ships of other countries.⁶¹ It must be remembered that, in the context of piracy, the reach of universal *judicial* jurisdiction goes hand-in-hand with the right to exercise universal *enforcement* jurisdiction — a power of much greater concern to flag states and which has been carefully restricted under both customary and treaty law.⁶²

Thus courts must be careful to distinguish clearly between the crime of piracy proper and that of 'municipal piracy', over which universal jurisdiction does not extend. We turn, then, to consider the content of the crime of piracy under customary international law.

59 747 F. Supp. 2d at 608.

60 See e.g. *Lotus*, *supra* note 24, at 70; Harvard Draft (Jurisdiction), *supra* note 24, at 566; P. Campbell, 'A Modern History of the International Legal Definition of Piracy', in B.A. Elleman, A. Forbes and D. Rosenberg (eds), *Piracy and Maritime Crime: Historical and Modern Case Studies* (Naval War College Press, 2010) 19–32, at 21; I. Shearer, 'Piracy', in *Max Planck Encyclopedia of Public International Law* (updated October 2010), at § 4.

61 See Harvard Draft (Piracy), *supra* note 26, at 757, 782.

62 See e.g. *Lotus*, *supra* note 24, at 71; R. Wolfrum, 'Fighting Terrorism at Sea: Options and Limitations under International Law', in M. Nordquist et al., *Legal Challenges in Maritime Security* (Nijhoff, 2008) 3–40, at 27. Indeed, Art. 105 of UNCLOS is primarily addressed to circumscribing this enforcement right, with the subsequent two articles limiting which ships are entitled to exercise the right of enforcement (only 'warships or military aircraft') and establishing liability when the right is exercised without adequate grounds. See UNCLOS, *supra* note 21, Arts 106–107.

4. The International Crime of Piracy

From the perspective of international law, the crime of piracy is authoritatively defined by Article 101 of UNCLOS:

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).

This Part clarifies the elements of this definition before building the case that Article 101 represents customary international law. It concludes with a brief consideration of the problem of intertemporal law when states incorporate customary international law into domestic law by general reference.

A. Elements of the Crime of Piracy

The crime prohibited by Article 101(a) consists of five elements:

- (1) any illegal act of violence or detention, or any act of depredation;
- (2) committed for private ends;
- (3) on the high seas or a place outside the jurisdiction of any state;
- (4) by the crew or the passengers of a private ship or a private aircraft; and
- (5) (if at sea) directed against another ship or aircraft, or against persons or property on board such ship or aircraft.

The first element makes clear that piracy is not co-extensive with ‘armed robbery at sea’: what is required is *either* ‘illegal acts of violence or detention’ or ‘any act of depredation’. Even before the codification of Article 101, the customary international law of piracy no longer required an intent to rob (*animus furandi*).⁶³ But if there is an intent to rob, it may be that no violence is necessary for the conduct to be considered piratical.⁶⁴

63 See e.g. ILC Report, *supra* note 41, at 282 (‘Acts of piracy may be prompted by feelings of hatred or revenge, and not merely by the desire for gain.’); League of Nations, *supra* note 46, at 224, 228; Harvard Draft (Piracy), *supra* note 26, at 786–787; Oppenheim, *supra* note 34, at 752.

64 This at least was the conclusion of the Harvard Draft. Harvard Draft (Piracy), *supra* note 26, at 786. ‘Depredation’ as a legal term, however, arguably connotes violent conduct (plunder, pillage).

The third element, that piracy *jure gentium* must occur outside the sovereign territory of any state, is a critical component of the definition as it excludes territorial waters from the reach of universal jurisdiction.⁶⁵ Under UNCLOS, territorial waters extend up to 12 nautical miles from the state's shoreline.⁶⁶ While UNCLOS also allows states to claim limited sovereign interests in an additional 200-nautical mile stretch of water, this 'exclusive economic zone' (EEZ) counts as international waters for the purposes of Article 101.⁶⁷ Thus, for example, the Seychelles court in *Dahir* correctly concluded that individuals could be guilty of piracy proper (rather than municipal piracy) for conduct that occurred within the country's EEZ.⁶⁸

The second, fourth and fifth elements have together elicited the most debate. By their terms, they exclude from the definition of piracy mutinies, hijackings and official state acts. Such acts may nonetheless give rise to the state responsibility⁶⁹ or be governed by treaties like the SUA Convention and its many Protocols,⁷⁰ established specifically to reach violent conduct like terrorist hijackings that may not otherwise fall under the customary definition of piracy.⁷¹ But what about a private ship attacking another ship on the high seas (thus meeting elements four and five), where the aggressors' motivation is political — that is, can a terrorist attack in international waters also constitute piracy under Article 101?

65 Some commentators have argued that the crime of piracy should extend to territorial waters, specifically to address the inability of failed states to police their own waters. See e.g. M. Madden, 'Trading the Shield of Sovereignty for the Scales of Justice: A Proposal for Reform of International Sea Piracy Laws', 21 *University of San Francisco Maritime Law Journal* (2008) 139, 145–146; B. Dubner, 'On the Definition of the Crime of Sea Piracy Revisited: Customary vs. Treaty Law and the Jurisdictional Implications Thereof', 42 *Journal of Maritime Law and Commerce* (2011) 71; see also Collins and Hassan, *supra* note 3, at 97–98. Such an approach conflicts, however, with the rationale for universal jurisdiction as based (at least in part) on the lack of any state's territorial jurisdiction over piracy. It is also unnecessary: in cases like that of Somalia, ad hoc solutions are both possible and preferable, as the Harvard research group recognized in the 1930s. See Harvard Draft (Piracy), *supra* note 26, at 789–790: 'In some parts of the world where it is peculiarly difficult to suppress violence and depredations against commerce in territorial waters, special agreements providing for concurrent police jurisdiction may be needed. ... These special cases, of course, cannot be covered by a draft convention designed for general adoption.' States also continue to reject such an expansion of universal jurisdiction; in permitting the limited pursuit of pirates within Somalia's territorial waters, the Security Council emphasized that this authorization has a narrow temporal and geographic scope and affirmatively does *not* establish customary international law. See e.g. SC Res. 1816 (2008), §§ 7, 9; SC Res. 1846 (2008), §§ 10–11; SC Res. 1851 (2008), §§ 6, 10; see also Guilfoyle, 'Counter-Piracy Law Enforcement and Human Rights', *supra* note 43, at 148.

66 UNCLOS, *supra* note 21, Art. 3.

67 *Ibid.*, at Arts 57 and 58(2).

68 See *Dahir*, [2010] SCSC 81 at § 57.

69 Paparinskis, *supra* note 34, at 456; Oppenheim, *supra* note 34, at 748.

70 Regarding the possible application of other conventions in the efforts to repress Somali piracy, see Roach, *supra* note 37, at 406–408.

71 See H. Tuerk, 'Combating Terrorism at Sea: The Suppression of Unlawful Acts Against the Safety of Maritime Navigation', in Nordquist, *supra* note 62, 41–78, at 47–48 (describing the development of the SUA Convention after the *Achille Lauro* hijacking in 1985).

The Seychelles court in *Dahir* rejected the conflation of these criminal categories, reasoning that the requirement that piracy be committed for 'private ends' conflicts with the politically motivated nature of terrorism.⁷² The court chastised the prosecution for pursuing piracy and terrorism charges for the same criminal conduct instead of charging them in the alternative.⁷³ The *Dahir* court was wise to distinguish clearly between terrorism and piracy, two labels that are used loosely in common rhetoric but which should be restricted in a criminal context to their more precise legal definitions.⁷⁴ Just as '[n]ot every use or firing of [rifles] is taken as terrorism,'⁷⁵ not every act of violence on the high seas is piracy.⁷⁶

It is true that terrorism under international law requires an intent to coerce a government authority or to terrorize a population, which typically implies a political or ideological motivation.⁷⁷ While many assume (like the *Dahir* court) that the 'private ends' requirement therefore excludes all terrorist acts from the ambit of piracy,⁷⁸ this conclusion might be too hasty.⁷⁹ The commentary to the Harvard Draft suggests the 'private ends' requirement was originally intended to exclude from the definition of piracy only the acts of belligerents and rebels who do not have the standing of states under international law, but who nonetheless operate within the context of the laws of war or of state responsibility and whose acts might therefore be considered 'public'.⁸⁰ Under this perspective, the opposite of 'private' would not be 'political' but 'public'. Terrorists might act with a proclaimed political motivation, but they are not typically public actors in this sense. This was the reasoning of the Belgian Court of Cassation in *Castle John v. NV Mabeco*, which found that members of the environmental group Greenpeace engaged in piracy when they boarded,

72 Although the *Dahir* court did not apply Art. 101, but rather customary international law as of 1976, these are equivalent. See Section 4.B, *infra*.

73 *Dahir*, [2010] SCSC 81 at §§ 37, 47.

74 See e.g. H. Tuerk, 'The Resurgence of Piracy: A Phenomenon of Modern Times', 17 *University of Miami International and Comparative Law Review* (2009) 1, at 26–27, 32.

75 *Dahir*, [2010] SCSC 81 at § 43.

76 See e.g. T. Mensah, 'Piracy at Sea – a New Approach to an Old Menace', in Hestermeyer et al. (eds), *supra* note 2, 161–177, at 163; Wolfrum, *supra* note 62, at 4, 8.

77 See e.g. Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, *In re Hariri* (STL-11-01/1), Appeals Chamber, 16 February 2011, § 106 (collecting sources).

78 E.g. I. Bantekas and S. Nash, *International Criminal Law* (3rd edn., Routledge Cavendish, 2007), at 179; Collins and Hassan, *supra* note 3, at 98–100; IMO Secretariat, *Uniform and Consistent Application of the Provisions of International Conventions Relating to Piracy*, IMO Doc. LEG 98/8, 18 February 2011, §§ 14–16.

79 See Ambani, *supra* note 28, at 237; M. Bahar, 'Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations', 40 *Vanderbilt Journal of Transnational Law* (2007) 1, 26–37; Guilfoyle, 'Counter-Piracy Law Enforcement and Human Rights', *supra* note 43, at 143; M. Halberstam, 'Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety', 82 *AJIL* (1988) 269, 277–284.

80 See Halberstam, *ibid.*, at 277–284; see also Harvard Draft (Piracy), *supra* note 26, at 786, 798; League of Nations, *supra* note 46, at 224. But see Tuerk, 'Combating Terrorism at Sea', *supra* note 71, at 47–48; Wolfrum, *supra* note 62, at 8.

occupied and caused damage to other vessels on the high seas that were discharging polluting waste.⁸¹ The defendants' motivation, according to the court, was a personal point of view, even though it related to a political issue; because the acts were not committed in the interest or to the detriment of a state, they were properly characterized as 'private'.⁸²

This understanding of 'private ends' as the inverse of 'public ends' (and not 'political ends') would prevent perpetrators from avoiding liability by constructing political justifications for their piratical conduct.⁸³ It would also allow the exercise of enforcement jurisdiction over pirate ships believed to be preparing terrorist acts, particularly when the suspected pirate-terrorist ship is operating, not under the jurisdiction of any flag-state, but in a state of anarchy.

Still, the anti-terrorism regime has now developed sufficiently that there is no need to stretch the anti-piracy regime to cover terrorist acts — and there may be some real costs to doing so.⁸⁴ When new threats emerge, existing legal notions may be broadly interpreted to avoid lacunae, but such stop-gap measures can in the long run have unintended consequences. With the wide adoption of the SUA Convention (and the development of several Protocols to cover additional emerging threats), prosecutors and courts have a better-tailored regime for addressing the problem of maritime terrorism. While there is a legitimate argument that some acts of terrorism could constitute piracy, the *Dahir* court was correct in spirit: courts should avoid relying on the law of piracy to sanction politically motivated violence unless absolutely necessary — and only if all the other elements of Article 101 have been met.

B. Article 101 as Customary International Law

State practice and *opinio juris* uniformly make clear that Article 101 of UNCLOS reflects the current customary international law of piracy. The definition was adopted almost word-for-word from Article 15 of the High Seas Convention, itself a codification of existing customary international law.⁸⁵ Between the states parties to the High Seas Convention and to UNCLOS, 168 countries have bound themselves to this definition, including 138 of the 150 countries with

81 77 ILR 537 (1986).

82 *Ibid.*, at 539–540.

83 See e.g. Mensah, *supra* note 76, at 165.

84 Cf. Collins and Hassan, *supra* note 3, at 100 ('To expand piracy to include terrorist acts would undermine the anti piracy regime, since the strategies to combat each crime are poles apart'); Tuerk, 'The Resurgence of Piracy', *supra* note 74, at 32 (expressing concern about the conflation of piracy's universal jurisdiction and the SUA Convention's more narrow prosecute-or-extradite regime).

85 See Oppenheim, *supra* note 34, at 723–724, 726; V. Lowe, *International Law* (Oxford University Press, 2007), at 83.

maritime borders.⁸⁶ And of the 162 countries that have ratified or acceded to UNCLOS, none have made any declaration or reservation regarding the piracy provisions.⁸⁷ While the United States, a major maritime country, has not yet ratified UNCLOS, it has nonetheless consistently affirmed that the Convention's piracy provisions represent binding customary international law.⁸⁸ Meanwhile, the states most affected by modern-day piracy in Southeast Asia and around the Horn of Africa have adopted additional anti-piracy cooperation agreements that incorporate the Article 101 definition.⁸⁹

At the international level, the UN Security Council in unanimous resolutions has repeatedly reaffirmed that Article 101 'sets out the legal framework applicable to combating piracy and armed robbery at sea'.⁹⁰ The IMO has similarly invoked Article 101 as the definitive statement of the crime of piracy,⁹¹ and other UN agencies have reiterated the definition's customary status.⁹² The customary status of Article 101 is further supported by major treaties and the consensus of the scholarly community.⁹³ While some would *extend* the definition to encompass additional acts, there is no significant dispute that Article 101 embodies the core of the crime which all agree should be universally condemned.⁹⁴ Thus, Article 101 sets the minimum extent to which national courts can apply universal jurisdiction.

Despite this strong evidence that Article 101 represents customary international law, two US trial courts — sitting in the same district, considering similar facts, and ruling within months of each other — nonetheless reached opposite conclusions as to the clarity and content of the customary law of piracy. While the analysis employed by the *Hasan* court demonstrates an accurate understanding of the nature and sources of international law, the analysis

86 The status of ratifications for both the High Seas Convention and UNCLOS are available online at <http://treaties.un.org/Pages/ParticipationStatus.aspx> (visited 20 June 2012) (see Chapter XXI: Law of the Sea).

87 See *ibid.*

88 See 'Declaration of Legal Adviser Harold Hongju Koh', *United States v. Hasan*, Case No. 2:10cr56 (E.D. Va., 3 September 2010), at §§ 10–18 (gathering statements).

89 See Djibouti Code of Conduct, *supra* note 53, Art. 1; *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia*, 28 April 2005, reprinted in 44 ILM (2005) 829, Art. 1.

90 SC Res. 1976, 11 April 2011, preamble; see also, e.g. SC Res. 1950 (2010), preamble; SC Res. 1918 (2010), preamble.

91 IMO Code of Practice, *supra* note 55, at § 2.1.

92 See UN Division for Ocean Affairs and the Law of the Sea, *Piracy: Elements of National Legislation Pursuant to the United Nations Convention on the Law of the Sea*, 1982, IMO Doc. LEG/98/8/1, 18 February 2011, at §§ 1, 11; UN Office on Drugs and Crime, *Establishment of a Legislative Framework to Allow for Effective and Efficient Piracy Prosecutions*, IMO Doc. LEG/98/8/2, 18 February 2011, at § 3.

93 See e.g. Bantekas and Nash, *supra* note 78, at 178; Shearer, *supra* note 60, at § 27; Treves, *supra* note 37, at 401 ('[A]s a matter either of customary or of conventional law, these Articles state the law as currently in force.'). I. Brownlie, *Principles of Public International Law* (7th edn., Oxford University Press, 2008), at 229; see also *Hasan* at 747 F. Supp. 2d at 636 n.32 (collecting additional sources).

94 See e.g. Dubner, *supra* note 65, at 91–92; Madden, *supra* note 65, at 140–141.

conducted by the *Said* court suggests instead a misapprehension of how customary international law is formed and from what sources it can most accurately be gleaned.

To identify the customary international law of piracy, the *Hasan* court correctly considered ‘the works of jurists, writing professedly on public laws;... the general usage and practice of nations; [and] judicial decisions recognising and enforcing that law’.⁹⁵ Focusing on state practice, the court noted UNCLOS’s wide ratification, including by countries like Somalia most affected by modern-day piracy, and it acknowledged that a treaty ratified by an ‘overwhelming majority’ of states is evidence of customary international law, at least when states consistently act in conformity with the treaty provisions.⁹⁶ It also considered significant piracy decisions from the US, British and Kenyan courts.⁹⁷ Finally, in collecting scholarly writings, the court correctly clarified that academic debates over some aspects of the definition of piracy do not detract from the consensus that Article 101 represents the core of the customary international law of piracy.⁹⁸ Applying the Article 101 definition of piracy, the *Hasan* court determined that the alleged acts of violence, regardless of *animus furandi*, could constitute ‘piracy’ under 18 U.S.C. § 1651.

Unlike the *Hasan* court, the *Said* court interpreted 18 U.S.C. § 1651 as limited to acts of armed robbery on the high seas, based primarily on a US Supreme Court decision from 1820, *United States v. Smith*.⁹⁹ As a result, it dismissed a piracy charge because the defendants did not board or rob the targeted ship. The US government had argued, in line with the subsequent decision in the *Hasan* case, that an intent to rob is not an element of the modern customary definition of piracy. The *Said* court acknowledged that the government’s position was supported by UNCLOS and the High Seas Convention; by the celebrated British case *In re Piracy Jure Gentium*, which addressed this question in 1934;¹⁰⁰ and by commentary in treatises such as *Oppenheim’s International Law*.¹⁰¹ Nonetheless, the court held that it could not apply the Article 101 definition of piracy because the clarity of that customary norm was fatally undermined by some doubts raised by seven commentators.¹⁰² This conclusion was flawed.

First, as the *Said* court itself recognized,¹⁰³ what matters most in the determination of customary international law is state practice. As described above,

95 *Hasan*, 747 F. Supp. 2d at 630 (quoting *Smith*, 18 U.S. at 160–161).

96 *Ibid.*, at 633–634 (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 137 (2d Cir. 2010)).

97 See *ibid.*, at 615–618, 621–622, and 635–636.

98 *Ibid.*, at 636–637.

99 See *Said*, 757 F. Supp. 2d at 559–560.

100 *In re Piracy Jure Gentium* [1934] A.C. 586 (P.C.).

101 *Said*, 757 F. Supp. 2d at 563–564. The court’s apparent dismissal of *Oppenheim* as ‘certain published treatises by a German law professor’ suggests the court may have misapprehended the nature and import of this particular scholarly source. See *ibid.*, at 563.

102 *Ibid.*, at 564–565.

103 *Ibid.*, at 558.

that practice overwhelmingly indicates the acceptance and application of Article 101 as the binding international legal definition of piracy; indeed, this author is not aware of any contrary declarations by states. Second, even in terms of state practice, absolute consensus is not required before a norm can crystallize into customary international law¹⁰⁴ — much less is it required among scholars, whose very job is to criticize and spark debate, or to suggest how that law should develop over time.¹⁰⁵

Third, to the extent courts do rely on scholarly writings as a *subsidiary* means for determining the content of international law,¹⁰⁶ the writers should be 'the most highly qualified publicists of the various nations',¹⁰⁷ those 'who by years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat'.¹⁰⁸ The seven commentators relied upon by the *Said* court do not seem collectively to satisfy this standard. Two of the writers appear to agree that Article 101 of UNCLOS is the authoritative definition of piracy,¹⁰⁹ while another has subsequently explicitly rejected the *Said* court's holding.¹¹⁰ Of the remaining four, one was a student,¹¹¹ one was a non-academic practitioner¹¹² and one was quoting a treatise from 1830 in passing while discussing an entirely different topic.¹¹³ The remaining admittedly significant work relied upon by the court was written more than 20 years ago,¹¹⁴ for perspective, during the intervening decades more than

104 See Cassese, *International Law*, *supra* note 48, at 157 (discussing the ICJ decisions in the *North Sea Continental Shelf* cases and *Nicaragua (merits)*).

105 Cf. Brownlie, *supra* note 93, at 24 ('It is ... obvious that subjective factors enter into any assessment of juristic opinion, that individual writers reflect national and other prejudices, and, further, that some publicists see themselves to be propagating new and better views rather than providing a passive appraisal of the law').

106 See ICJ Statute, Art. 38(1)(d).

107 *Ibid.*

108 *In re The Paquete Habana*, 175 U.S. 677, 700 (1900). The US Supreme Court further clarified that '[s]uch works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is'. *Ibid.*

109 Judge Tuerk (of ITLOS) posits that UNCLOS 'authoritatively defined' piracy, although more narrowly than pre-existing customary international law. Tuerk, 'The Resurgence of Piracy', *supra* note 74, at 10. The *Said* court cites to Professor Kontorovich's passing comment that '[t]he crime of piracy consists of nothing more than robbery at sea.' E. Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation', 45 *Harvard International Law Journal* (2004) 183, 191. But Professor Kontorovich has elsewhere explicitly and directly disagreed with the *Said* court's proposition, writing instead that '[a] 200-year-old case [meaning *Smith*] is weak authority for the content of modern customary international law. Today, the definition of piracy is codified in Article 101 of [UNCLOS]'. Kontorovich, '*United States v. Shi*', *supra* note 32, at 736.

110 Dubner, *supra* note 65, at 94–95.

111 See Goodwin, *supra* note 3.

112 See G. Gabel, 'Smoother Seas Ahead: The Draft Guidelines as an International Solution to Modern-Day Piracy', 81 *Tulane Law Review* (2007) 1433.

113 See J. Bybee, 'Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause', 66 *George Washington Law Review* (1997) 1, at 26 n.166.

114 See A. Rubin, *The Law of Piracy* (Newport: Naval War College Press, 1988).

100 additional states have ratified or acceded to UNCLOS.¹¹⁵ Even taken together, these criticisms of the Article 101 definition do not undermine the clear scholarly consensus that Article 101 represents customary international law.¹¹⁶

The *Said* court also emphasized that the International Maritime Bureau (IMB), an organ of the International Chamber of Commerce, uses a different definition from Article 101 when tracking incidents of piracy worldwide.¹¹⁷ But the IMB definition is not intended to have any legally enforceable import.¹¹⁸ The IMB tracks piracy for commercial purposes, to determine the financial impact of sea-based violence on the global shipping industry. Its definition is designed to encompass all violent attacks on ships, including those that occur in territorial waters (and therefore are not acts of piracy, in the international sense discussed here). How the IMB defines piracy for a statistical purpose is irrelevant to the identification of a unitary definition of piracy under customary international law.

The *Said* court overlooked the overwhelming consensus as to the customary status of Article 101 because it focused on sources that do not directly bear on the formation and content of customary international law. The *Hasan* court better applied the process for identifying customary international law, and as a result it reached the correct conclusion that Article 101 reflects customary international law, based on state practice (both *usus* and *opinio juris*) and reinforced by a clear consensus among scholars of international law.¹¹⁹

C. Intertemporality and the Domestic Incorporation of Customary International Law

Underlying the difference in the analysis conducted by the *Hasan* and *Said* courts may be a more fundamental disagreement: whether a domestic statute incorporating the law of nations by reference should be interpreted on the basis of customary international law as it exists today or as it existed at the time of the statute's adoption.¹²⁰

115 UNCLOS entered into force in 1994, following the deposit of the sixtieth instrument of ratification or accession. See UN Division for Ocean Affairs and Law of the Sea, 'UNCLOS Overview and Full Text', http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm (last updated 21 July 2010). UNCLOS now has 162 state parties.

116 For thorough criticism of *Said's* reliance on US case law, see T. Helfman, 'Marauders in the Courts: Why the Federal Courts Have Got the Problem of Maritime Piracy (Partly) Wrong', 62 *Syracuse Law Review* (2012) 53.

117 *Said*, 757 F. Supp. 2d at 565.

118 See Campbell, *supra* note 60, at 29.

119 See also *Dire*, 2012 WL 1860992, at *18 (approving 'the conception of the law outlined' by the *Hasan* court).

120 The *Said* court did not explicitly limit itself to the latter view, but it emphasized that a statute must be interpreted 'by its ordinary meaning at the time of its enactment', and it suggested that recognizing the evolution of the customary international law incorporated in the piracy statute would render that statute unconstitutionally vague, thereby violating due process. 757 F. Supp. 2d at 559, 566. This latter line of argument is taken up below, in Part 5.

As Professor Cassese has explained, a state legislating on the basis of international norms has two options: to detail precisely within national legislation the content of the international norms ('statutory ad hoc incorporation of international rules'), or to incorporate the international norm by general reference ('automatic ad hoc incorporation of international law').¹²¹ The former has the benefit of added clarity but the disadvantage of ossifying the law, requiring further amendment to keep pace with international law over time. The latter requires those interpreting and applying the statute to take the extra step of identifying the referenced body of law, but it also allows the national law to develop in tandem with international law.¹²²

From the perspective of international law, the choice of approach is left to the individual state, and it will fall to domestic courts to determine which approach the legislators in fact adopted. Nonetheless, when a statute only references an international norm without specifying its content — as the US piracy statute does — it is logical to impute to the drafters an intention to automatically incorporate international law, including any developments in that law over time.¹²³ Thus it was reasonable for the court in *Hasan* to conclude that the US Congress, by outlawing 'the crime of piracy as defined by the law of nations', adopted a 'flexible — but at all times sufficiently precise — definition'.¹²⁴ Within the context of the US legal system, this conclusion is supported by the US Supreme Court decisions suggesting that statutes referencing the

121 Cassese, *International Law*, *supra* note 48, at 221.

122 *Ibid.*, at 221–222. The *Hasan* court used as a cautionary example the expansion of territorial waters from three to twelve nautical miles. A state whose piracy statute still incorporated the law of nations as it existed 100 years ago could find itself claiming universal jurisdiction over piracy occurring within the territorial waters of other states, in clear contradiction to today's international law and the limits of universal jurisdiction. See *Hasan*, 747 F. Supp. 2d at 625. Indeed, statutory ad hoc incorporation can risk introducing rules that contradict those of international law that may also bind individuals, thereby potentially misleading or confusing individuals as to what conduct is in fact prohibited. See Ferdinandusse, *supra* note 4, at 240–241.

123 This was not the approach taken, however, by the Seychelles court in *Dahir*, which felt bound by domestic precedent to interpret the piracy statute as incorporating the common law of piracy as it existed on 29 June 1976, when the Seychelles attained independence. *Dahir*, at § 48. The statute in force at the time of the offence provided that 'any person who is guilty of piracy or any crime connected with or akin to piracy shall be liable to be tried and punished according to the law of England for the time being in force'. Prior decisions had definitively interpreted the phrase 'for the time being in force' to refer to the state of the law when the Seychelles attained its independence. *Ibid.* Regardless, the Seychelles has subsequently updated its statute to provide a more detailed definition of piracy in line with Art. 101 of UNCLOS. *Ibid.*, at § 49.

124 747 F. Supp. 2d at 623; see also *Ex Parte Quirin*, 317 U.S. 1, 11 (1942) (Congress may legislate by reference to international law without having to 'itself undertake[] to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns').

law of nations should be construed according to contemporary international law.¹²⁵

This discussion casts some doubt on the *Hashi* Court's conclusion that Kenya's repealed statute, which outlawed 'piracy *jure gentium*', related to a substantively different crime from that of the new law, which incorporates Article 101 of UNCLOS.¹²⁶ The court did not clarify its reasoning, which might have been based on two different premises: that the crime of piracy under current customary international law differs from the definition found in Article 101, or that the old piracy statute — despite its general reference to the law of nations — statically incorporated customary law as of the time of its adoption. As the discussion here illustrates, both of these premises are vulnerable to challenge.

5. *Nullum Crimen Sine Lege* and the Requirement of Adequate Specificity

For states that do incorporate customary international law through general reference in domestic statutes (automatic *ad hoc* incorporation), the issue of intertemporal law leads directly to the principle of legality: how can a law that flexibly adapts to an external and, in the case of customary international law, largely unwritten set of laws be adequately specific so as to accord with modern notions of due process?

The requirement of specificity (*nullum crimen sine lege stricta*) is a subset of the overarching principle of legality: the idea that no one should be held criminally responsible for conduct that was not legally prohibited at the time of its commission (*nullum crimen sine lege*). From the defendant's perspective, the requirement of specificity ensures fair notice of potential liability, which in turn protects individuals from arbitrary government behaviour.¹²⁷ To satisfy this requirement under international law, a criminal prohibition must be *foreseeable*, which means it must also be *accessible*.¹²⁸

Customary international law — whether codified in treaties or unwritten — can satisfy the principle of legality.¹²⁹ Unwritten customary international law may be difficult for individuals to ascertain; nevertheless, to rise to the level of customary law, a norm must be *so widely accepted* and *so consistently expressed*

125 See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 730–732 (2004); see also *Hasan*, 747 F. Supp. 2d at 626–629 (discussing cases). Relying primarily on *Sosa*, the Fourth Circuit agreed with the *Hasan* court that '§ 1651 incorporates a definition of piracy that changes with advancements in the law of nations'. *Dire*, 2012 WL 1860992, at *18–19.

126 See *Hashi*, [2010] eKLR, at 26–27.

127 See Cassese, *International Law*, *supra* note 48, at 37–38; Ferdinandusse, *supra* note 4, at 222–223.

128 See e.g. J. Nilsson, 'The Principle *Nullum Crimen Sine Lege*', in O. Olusanya (ed.), *Rethinking International Criminal Law: The Substantive Part* (Europa Law Publishing, 2007) 35–64, at 44; Ferdinandusse, *supra* note 4, at 237.

129 Ferdinandusse, *supra* note 4, at 233, 235–236 & n.1390 (collecting authorities).

that it will perform be both foreseeable and accessible.¹³⁰ It must be borne in mind that 'accessible', in the context of *nullum crimen*, has a broad meaning and may require an individual to discern the law by drawing from multiple sources. Just as an individual may be expected to know how local courts have previously interpreted and applied domestic criminal prohibitions, so an individual can be expected to know the content of customary international law when it is consistently stated in the declarations of states, judicial decisions and respected treatises.¹³¹

Courts will still need to analyse, under the rubric of their respective legal systems, whether a principle of unwritten customary international law is adequately foreseeable and accessible in the circumstances.¹³² Particularly at the margins, unwritten customary international law may raise significant *nullum crimen* concerns.¹³³ But the task is made much easier when, as with piracy, the customary norms have been codified in widely adopted treaties. Indeed, the definition of piracy has been explicitly and stably codified for more than 50 years, first in the High Seas Convention and now in UNCLOS.

It thus should not offend the principle of legality for domestic statutes, like that of the United States, to criminalize piracy by reference to customary international law without further specifying the elements of the crime. The difference in approach taken by the US courts in *Hasan* and *Said* on this point is again instructive. The *Said* court worried that recognizing the evolution of customary international norms incorporated within domestic law would render 18 U.S.C. § 1651 unconstitutionally vague, as 'defendants in United States courts would be required to constantly guess whether their conduct is proscribed'.¹³⁴ The *Said* court ignored the fact that the definition of piracy is much more settled today (under Article 101) than it was in 1820, when the US Supreme Court in *Smith* resorted to diverse writings on international law to define piracy under the law of nations.¹³⁵ Yet even in that situation, the Supreme Court held that the US piracy statute (what is today 18 U.S.C. § 1651) 'sufficiently and constitutionally defined' the crime of piracy because the

130 See *Hasan*, 747 F. Supp. 2d at 639 ('Importantly, the high hurdle for establishing customary international law, namely the recognition of a general and consistent practice among the overwhelming majority of the international community, necessarily imputes to Defendants fair warning of what conduct is forbidden ...'); Ferdinandusse, *supra* note 4, at 237 (noting that the practical difficulty of accessing unwritten international law is 'greatly mitigated by the fundamental character' of many international crimes).

131 See Nilsson, *supra* note 128, at 47; Ferdinandusse, *supra* note 4, at 237; see also *Hasan*, 747 F. Supp. 2d at 639–640 (citing *United States v. Lanier*, 520 U.S. 259 (1997)).

132 See Ferdinandusse, *supra* note 4, at 223–224, 230–231 (noting that most states enforce a stricter version of the principle of legality as a matter of domestic law).

133 See *ibid.*, at 238–241.

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

135 *Smith*, 18 U.S. at 163, note h (collecting foreign commentaries on the definition of 'piracy' under international law).

statute incorporated international law that is generally of ‘known and determinate meaning’.¹³⁶

Likewise, the *Hasan* court correctly concluded that UNCLOS provides a clear and settled definition of piracy under today’s international law that is more than sufficient to provide fair warning to the defendants.¹³⁷ As the court noted, ‘it is far more likely that the Defendants, who claim to be Somali nationals, would be aware of the piracy provisions contained in UNCLOS, to which Somalia is a party, than of *Smith*, a nearly two hundred year-old case written by a court in another country literally half a world away’.¹³⁸

Indeed, defendants prosecuted domestically for the international crime of piracy should have weak arguments that they lacked adequate notice that their conduct was prohibited.¹³⁹ Piracy is the oldest international crime, and the specific conduct that constitutes piracy has been internationally codified for more than 50 years. The right of states to exercise universal jurisdiction over that crime has also been firmly established for decades, if not centuries. Individuals engaging in piratical conduct on the high seas should thus be prepared to be hauled before any court in any jurisdiction — that is the very nub of the concept of universal jurisdiction.¹⁴⁰ At least under the fair trial standards of international human rights conventions, defence arguments based on the alleged vagueness of this particular criminal norm should fail.

6. Conclusion

When domestic courts exercise universal jurisdiction to prosecute piracy *jure gentium*, much will depend on domestic law: the scope of the jurisdiction of domestic courts, for example, and the question of intertemporal law. But there are some matters of international law on which there should be no substantial disagreement across jurisdictions. In particular, the definition of piracy in Article 101 of UNCLOS represents customary international law; universal jurisdiction will generally not extend to conduct falling outside of the UNCLOS definition; and defences based on Article 105 of UNCLOS (the alleged seizing state distinction) should be rejected. Additionally, courts should be sceptical of defendants’ arguments that they lacked adequate notice that conduct falling within the Article 101 definition was criminally — and universally — prohibited.

136 *Ibid.*, at 159–162; see also *Ex Parte Quirin*, 317 U.S. 1, 11 (1942) (noting *Smith*’s holding that the piracy statute adequately defined and punished the crime ‘because it has adopted by reference the sufficiently precise definition of international law’).

137 *Hasan*, 747 F. Supp. 2d at 639.

138 *Ibid.*

139 Cf. *Ferdinandusse*, *supra* note 4, at 238, 241 (noting that in both national and international prosecutions for international crimes, ‘claims about a lack of knowledge of the applicable law are relatively scarce and consistently denied’ because the norms of prescription are well-known and the crimes are *mallum in se*).

140 See e.g. *United States v. Shi*, 525 F.3d 709, 723 (9th Cir. 2008).

Assuming these aspects of international law are applied consistently and correctly across domestic jurisdictions, there should be no need for an international judicial solution to the modern piracy problem. As Professor Guilfoyle has previously commented, '[t]he international law on piracy is straightforward and provides all the legal authority needed to combat pirate attacks off the coast of Somalia. The real difficulties arise in national legal systems' implementation of that law and its application in individual cases'.¹⁴¹ Over time, domestic prosecutions of pirates will become simpler affairs as states continue to update their piracy statutes and judicial precedents are established. The challenge now is to ensure that the early precedents in each jurisdiction correctly analyse and apply international law.

141 Guilfoyle, 'The Legal Challenges in Fighting Piracy', *supra* note 37, at 127; see also Bahar, *supra* note 79, at 6.