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Universal Jurisdiction and the Pirate: Time for an Old Couple to Part

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Universal Jurisdiction and the Pirate: Time for an Old Couple to Part

ABSTRACT

For hundreds of years, the world has allowed any nation-state to exercise universal jurisdiction over high seas piracy. This has been recently codified by the United Nations in the Convention on the Law of the Seas. It has been almost universally assumed that allowing states to do this was legitimate. As this Note will argue, however, the reasons for allowing states to exercise jurisdiction in this way no longer make sense in the modern world. Further, allowing states to exercise universal jurisdiction over pirates violates the due process rights of the pirates and poses a threat to international stability. To address these concerns, this Note proposes prohibiting states from exercising universal jurisdiction over pirates and instead requiring that states wishing to exercise jurisdiction over pirates base that jurisdiction on a more traditional jurisdictional form.

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I. INTRODUCTION

On November 5, 2005, a band of pirates attacked the *Seabourn Spirit*, a luxury cruise liner, 100 miles off the Somali coast. They attacked from a small boat with grenade launchers and machine guns.¹ The attack caught the world's attention and prompted several questions. What can be done about piracy in general, and how can it be stopped? How can the pirates that attacked the *Seabourn Spirit* be found and captured? Who should be responsible for finding and capturing them? And once a country does find and capture the pirates, how should it punish them?

Throughout history, scholars and politicians have attempted to answer the question of how to stop piracy.² Yet, piracy remains a problem. Unfortunately, piracy is likely to continue to be a problem for the foreseeable future. While unable to solve the piracy problem in general, politicians and scholars seem to agree about who can capture and punish the pirates. If a country finds the pirates within its territorial waters, it can capture and punish the pirates under its

1. Rodrigue Ngowi, *Luxury Cruise Ship Outruns Pirates off Coast of Somalia*, BUFFALO NEWS, Nov. 6, 2005, at A4.

2. Pompey just tried to eradicate the society of pirates in the Mediterranean of Ancient Rome. See *infra* Part II.A. England would hang pirates at the low water mark, to show that the convict was within the jurisdiction of the admiralty, and would often hang the bodies in chains to serve as a reminder of what happens to pirates. DAVID CORDINGLY, *LIFE AMONG THE PIRATES: THE ROMANCE AND THE REALITY* 259-61 (1995). Several countries granted letters of marque in an attempt to use piratical tactics to help the country. *Id.* at 6. Today, there is the International Maritime Bureau's piracy reporting center in Kuala Lumpur. See International Chamber of Commerce [ICC] Commercial Crime Services, *IMB Piracy Reporting Center: Overview*, <http://www.icc-ccs.org/prc/overview.php> (providing an overview of the piracy reporting center).

municipal law. On the high seas, any country may capture the pirates and punish them according to the capturing country's laws. Thus, if the Brazilian Navy found and captured the Somali pirates on the high seas despite no obvious connection between Brazil and the pirates or the cruise ship, Brazil could capture the pirates and subject them to Brazilian law. This concept is known as universal jurisdiction, and it is this Note's focus.

According to some legal scholars, universal jurisdiction is a deeply entrenched exception to the norms of international jurisdiction that has developed over the past several hundred years.³ The concept of universal jurisdiction has been codified in the U.N. Convention on the Law of the Sea (UNCLOS).

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship. . . . The courts of the State which carried out the seizure may decide upon the penalties to be imposed⁴

Under this article, if a pirate from country A attacks a vessel from country B on the high seas, country C has the right to capture the pirate, subject him to country C's laws, and punish him according to those laws. Country C can do this even though it has no tie to the pirate or the vessel attacked. By reviewing piracy's history, comparing universal jurisdiction with other forms of jurisdiction, and discussing why the reasons once given for allowing states to exercise universal jurisdiction over pirates are no longer applicable, this Note will show that pirates should no longer be subject to universal jurisdiction.

Part II of this Note provides a brief history of piracy itself. To understand why universal jurisdiction was originally applied to piracy, it is important to understand how piracy was originally viewed and how this view has changed over time. This Note considers three major periods: piracy in the ancient world, piracy from the time of Sir Francis Drake through the 1720s, and piracy in the twentieth century. These periods are important to the development of the principle of universal jurisdiction. While it would certainly be entertaining to recount the story of the *Queen Anne's Revenge* and her travels prior to ending up at the bottom of Beaufort inlet, this Note will avoid telling such legends and focus instead on why and how piracy was punished during these periods.

Part III of this Note will review how courts and legal scholars have viewed international jurisdiction in general and as applied to piracy. It will also analyze the historical reasons for allowing states to

3. WILLIAM BLACKSTONE, 4 COMMENTARIES, 71; LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 240 (1995).

4. United Nations Convention on the Law of the Sea art. 105, Nov. 16, 1994, 1883 U.N.T.S. 397 [hereinafter UNCLOS].

exercise universal jurisdiction over pirates. Further, Part III will also show that those reasons no longer apply to modern piracy.

Part IV will explain why states should not be allowed to exercise universal jurisdiction over piracy; doing so creates an unnecessary risk of international tension as well as violates notions of due process. This will be based mostly on lessons learned from the application of the Due Process Clause of the U.S. Constitution to issues of personal jurisdiction in the United States.

Part V will suggest alternative ways the international community can deal with piratical jurisdiction. Despite scholarly comment, bases of jurisdiction other than universal jurisdiction are applicable to pirates on the high seas. Use of these other forms of jurisdiction ensures no one is denied due process and prevents some of the tension that may result in the international community if a country were to misuse universal jurisdiction.

II. PIRACY'S HISTORY

A brief history of piracy is important to understand the reasons why states were initially allowed to exercise universal jurisdiction over pirates and why it is still allowed today. Thus, Part II will first discuss piracy as it existed in the ancient world. This Part will focus on two subjects: the history of the word piracy and how the Ancient Greeks and Romans viewed piracy. Then, the discussion will shift to piracy during the sixteenth, seventeenth, and eighteenth centuries. Lastly, there will be a brief discussion of modern piracy.

A. Piracy in the Ancient World

What is commonly thought of as piracy has existed for thousands of years. The Ancient Greeks used two different words to describe piracy: ληστής (*leistes*) and πειρατής (*peirates*).⁵ Homer and other Greek writers of the Classical period (c. 500–330 B.C.) used the word *leistes*.⁶ It described both an armed robber and a plunderer at sea.⁷ Historians cannot find any use of the word *peirates* firmly dated before 267 B.C.⁸ But, like *leistes*, it described both what is now considered piracy as well as land based banditry.⁹

The Romans also used two different words to describe piracy: *praedo* and *pirata*. The latter is a derivative of the Greek *peirates* and

5. PHILIP DE SOUZA, PIRACY IN THE GRAECO-ROMAN WORLD 3 (1999).

6. *Id.*

7. *Id.*

8. *Id.* at 5.

9. *Id.* at 8.

is the word from which the English word “pirate” is derived.¹⁰ *Praedo* and *pirata* described both land based bandits and sea-faring pirates.¹¹ While the word “pirate” may have ancient roots, the meaning of the word has changed to cover only sea-based robbery. It is important to remember when ancient writers used words like *peirates* and *pirata*, they were not necessarily referring to the modern day view of piracy.

Early historians have suggested that the act of piracy can be traced back to the beginnings of navigation. “From the time when men first went down to the sea in ships, piracy and robbery have been regarded only as one of the means of livelihood that the sea offered.”¹² It is tempting to talk about piracy dating back to the second millennium B.C.¹³ There are records that show that ships were sailing the Mediterranean by 1200 B.C., and there are scenes that depict fighting at sea around 1190 B.C.¹⁴ Thucydides wrote that Minos cleared the sea of pirates around 1700 B.C.¹⁵ But reliable evidence is lacking to show that people practiced piracy at this time.¹⁶ It is not until the Homeric poems that piracy is first mentioned.¹⁷

The concept of piracy in the Homeric poems is different from the modern day concept of piracy in other ways as well. The aims and methods of piracy and warfare were “virtually indistinguishable in the Homeric World.”¹⁸ Homer mentions piracy several times in the *Odyssey* in addition to his tales of the story’s heroes, but there seems to be little difference between the heroes and pirates. “[B]oth . . . set off in their long ships to distant shores to plunder and kill. The difference . . . seems only to be their god-given fate.”¹⁹ In the Homeric poems, piracy is “an evil business” and looked upon unfavorably. Yet, the practice of piracy could bring higher status and prestige to the pirate due to the fighting involved and the wealth one could obtain.²⁰

10. *Id.* at 12–13.

11. *Id.* at 13.

12. HENRY A. ORMEROD, *PIRACY IN THE ANCIENT WORLD* 13 (Johns Hopkins Univ. Press 1997) (1924).

13. DE SOUZA, *supra* note 5, at 15.

14. *Id.*

15. *Id.*; ORMEROD, *supra* note 12, at 80. Ormerod claims that archaeological evidence proves that Minos actually did clear the seas. ORMEROD, *supra* note 12, at 80. However, modern historians seem to believe this is nothing more than a myth with no historical basis. DE SOUZA, *supra* note 5, at 16.

16. DE SOUZA, *supra* note 5, at 16.

17. *Id.* at 17. This does not necessarily mean that piracy did not exist before this time, only that the historical record has not yielded any reliable evidence of its existence. The largest problem with the historical record of the period before the Homeric poems is that there seems to be no distinction between piracy and warfare. *Id.* at 16.

18. *Id.* at 18.

19. *Id.* at 19.

20. *Id.* at 21.

During the Classical Greek period, writers referred to almost anyone who attacked another on the open sea as a pirate.²¹ The victim of an attack would call the attacker a pirate and the attacker would consider himself to be conducting a legitimate form of warfare.²²

Piracy plagued not only the Greeks but also the Romans. For example, pirates captured a young Julius Cesar in 75 B.C. and held him for ransom.²³ Around the same time, piracy became such a serious problem that it, along with other factors, caused a grain shortage and threatened to provoke riots in Rome.²⁴ This led to a number of military actions culminating in Pompey "clearing" the Mediterranean of pirates.²⁵

Part of the reason that examining piracy in the ancient world is so difficult is because the Greeks and Romans also used the words *peirates* and *pirata* to refer to "undesirable 'others.'"²⁶ For many communities that coexisted with the Greeks and Romans, the modern day understanding of piracy was viewed as a legitimate way of life, and had been for generations prior to the rise of Rome.²⁷ These communities were similar to the Viking communities of the 800s A.D.²⁸ Thus, when historians write of Pompey clearing the sea of pirates, he was clearing the sea of a group of communities that posed a threat to Roman hegemony.²⁹ These communities posed a threat to Roman hegemony because the piracy they practiced disrupted Roman trade. The formerly legitimate lifestyle these communities practiced was anachronistic in the modern commercial world that was ancient Rome.³⁰

To the Romans, pirates were more than just those who plundered Roman ships. They were communities that did not follow

21. *Id.* at 41.

22. *Id.*

23. *Id.* at 140; see also DANIEL DEFOE, A GENERAL HISTORY OF THE ROBBERIES AND MURDERS OF THE MOST NOTORIOUS PYRATES 18–20 (Garland Publishing 1972) (1724) (providing a historical account of this event possibly mixed with some embellishment). This edition lists DeFoe as the author, but it is now believed that the mysterious Capt. Johnson is the true author. See PHILIP N. FURBANK & W. ROBERT OWENS, THE CANONISATION OF DANIEL DEFOE 100–21 (1988) (explaining why the work was initially attributed to Defoe, why the reasoning supporting the attribution was faulty, and concluding that the identity of Captain Johnson remains an open mystery).

24. DE SOUZA, *supra* note 5, at 142–43.

25. See generally *id.* at 149–78 (describing the events leading up to Pompey's sweeping the sea of piracy and the immediate aftermath as well as how effective, or ineffective, this clearing truly was).

26. *Id.* at 2.

27. Alfred Rubin, *The Law of Piracy*, 63 U.S. NAVAL WAR C. INT'L L. STUD. 6 (1988).

28. See *id.* at 8 (comparing the classification of pirate to that of the "Viking" which is used today to "evoke a way of life legitimate within the harsh legal order of the middle ages).

29. *Id.* at 6.

30. *Id.*

the rules of war because they did not go through the formalities of declaring war before attacking.³¹ The Romans believed that these pirate communities were in a “permanent state of ‘war’” with everyone around them.³² Further, in ancient Rome, unlike today, “[t]he word [piracy] did not imply criminality under any legal system, Roman or law of nations.”³³ Instead, Romans applied it to organized societies whose religious order and social organization were not “shockingly different” than those around them.³⁴

There are several things to remember about ancient piracy throughout this Note. First, while the English word “pirate” can be traced to ancient roots, its meaning has changed. Further, what the ancients considered piracy and what is now considered piracy are not the same. The assumption that ancient piracy was the same as modern piracy is part of the problem with the current application of universal jurisdiction to piracy as will become clear later.

B. Piracy from the Sixteenth to the Early Eighteenth Century

This Part will begin by discussing Sir Francis Drake and Henry Morgan. This discussion will serve to illustrate how sixteenth and seventeenth century Europe viewed piracy. The discussion will then shift to changing views of piracy in Europe, and England in particular. Lastly, this Part will discuss the rationales countries gave for punishing piracy.

Sir Francis Drake was a pirate in the eyes of history, even if neither he nor his country viewed him as such. Although he flew the flag of England while attacking vessels and told his victims that he acted on the behalf of England, he plundered Spanish towns and vessels at a time when Spain and England were not at war.³⁵ His victims showed admiration at the humane way he treated them. After attacking the *Nuestra Señora de la Concepción* in 1579, Drake gave gifts and a letter of safe passage to her captain after unloading all of the ship’s cargo.³⁶

Despite the fact that England and Spain were not at war, England did not punish Drake, much to the dismay of the Spaniards. In fact, Queen Elizabeth knighted Drake in 1581 aboard his ship the *Golden Hind*.³⁷ She had good reason for doing so. Not only was Drake

31. *Id.* at 12; *see id.* at 9–10 (reprinting Livy’s description of the ritual which would formally declare war in the ancient Roman world).

32. *Id.* at 12.

33. *Id.*

34. *Id.*

35. PETER R. GALVIN, PATTERNS OF PILLAGE: A GEOGRAPHY OF CARIBBEAN-BASED PIRACY IN SPANISH AMERICA, 1536–1718, at 42 (1999).

36. DAVID CORDINGLY, UNDER THE BLACK FLAG: THE ROMANCE AND THE REALITY OF LIFE AMONG THE PIRATES 30 (1995).

37. GALVIN, *supra* note 35, at 42.

disrupting Spanish commerce and Spain's exploitation of the New World as she had asked (without giving him an actual commission),³⁸ he also brought back five tons of silver along with other treasure. It is estimated that he enhanced the royal treasury by £500,000, which in 1995 would have been worth more than £68 million.³⁹

Henry Morgan also plundered Spanish America, but did so during the latter half of the seventeenth century.⁴⁰ The governor of Jamaica (which was an English colony at the time) gave him a commission to attack the Spanish.⁴¹ Each time he attacked though, he went well beyond the commission's authority.⁴² Instead of punishing Morgan, the governor overlooked the overreaching and embraced the money and treasure that Morgan gave him.⁴³ It was not until Morgan plundered and burned Panama to the ground that the authorities brought Morgan to trial.⁴⁴ The King of Spain was so outraged over the attack that the English had no choice but to try him. As his punishment, the King of England knighted him and sent him back to Jamaica where the King made him the Deputy Governor of the island.⁴⁵

Sir Francis Drake and Henry Morgan are viewed as patriotic pirates. During the majority of the sixteenth century, England did not discourage piracy, but actually encouraged it and viewed its pirates as national heroes. The Dutch and French also lionized their pirates.⁴⁶ How could the Queen of England be upset with Sir Francis Drake for his plundering of the Spanish, even though the two countries were not at war, when his plundering made such a generous contribution to the royal treasury?⁴⁷ This trend would be reversed by the early eighteenth century.⁴⁸

From the 1700s to the 1720s, England began to crack down on piracy. It is at this time that pirates like Blackbeard and John Gow roamed the seas. What led to this change in policy? Scholars believe that the consolidation of state sovereignty, the rise of mercantilist economic theories, developments in international laws and diplomacy, and the growing influence of the mercantile class are the chief

38. CYRUS HARRELD KARRAKER, *PIRACY WAS A BUSINESS* 42 (1953).

39. CORDINGLY, *supra* note 36, at 31.

40. See PHILIP GOSSE, *THE HISTORY OF PIRACY* 156 (1932) (stating that Morgan did not have his first command of a ship until 1666).

41. *Id.*

42. *Id.* at 157.

43. *Id.*

44. *Id.* at 159.

45. *Id.* at 160.

46. JAMES G. LYDON, *PIRATES, PRIVATEERS, AND PROFITS* 28-31 (1970).

47. *Id.* at 29-30.

48. See BLACKSTONE, *supra* note 3, at *71 (commenting that pirates are enemies of all mankind, marking the different view England had of pirates in 1731); LYDON, *supra* note 46, at 32-33.

reasons that England and the world no longer viewed the pirate as a patriot but as a plague.⁴⁹

The economic concerns seem to be highly relevant. The bullion obtained by pirates like Drake was crucial during the time he roved the sea because bullion was the base of the world's economy. But the economic paradigm shifted from bullion to trade goods.⁵⁰ It would be hard for trade to flourish if pirates regularly interfered with the trade routes as the Romans discovered when piracy threatened Rome's grain supply. While the courts placed great weight on the heinousness of piracy in English piracy trials, the importance of trade and economic considerations—notably the enrichment of England—seem to have played important roles as well for punishing pirates. The courts stated that, "Suffer pirates, and the commerce of the world must cease."⁵¹ The court also stated that if pirates are not punished, piracy could lead to the "destruction of the innocent English in those countries, the total loss of the Indian trade, and thereby the impoverishment of this kingdom."⁵² It seems that trade was an important rationale for the harsh punishment of pirates. This is not to say that Europe did not consider the heinousness of piracy as a factor in the punishment of piracy. But the fact that Europe encouraged piracy for such a long time prior to the beginning of the eighteenth century would suggest it did not consider piracy particularly heinous.

While England was trying to end piracy, privateering was openly encouraged and regulated. But, before 1700, privateering was synonymous with piracy.⁵³ Once England cracked down on piracy, privateering became the preferred method of plunder on the high seas.⁵⁴ The privateer carried a letter of marque from the crown that authorized him to capture enemy ships.⁵⁵ The privateer and the government would share the spoils.⁵⁶ Of course, privateering was piracy in which the state profited both economically and militarily through the destruction of the enemy's supplies. Outside the issuance of the letter of marque and the sharing of profits with the state, little separated the pirate from the privateer in tactics. This also shows that economics and not necessarily heinousness is the reason England began to punish piracy. If the concern was that piracy was extremely heinous, why have an official policy of allowing privateers

49. LYDON, *supra* note 46, at 32–33.

50. *Id.* at 30.

51. *Rex v. Dawson*, (1696) 13 Howell's State Trials 451, 453 (U.K.).

52. *Id.*

53. LYDON, *supra* note 46, at 25; Rubin, *supra* note 27, at 17. Part of this synonymy may have been that a number of pirates had letters of marques from one country or another. LYDON, *supra* note 46, at 25–26.

54. LYDON, *supra* note 46, at 25–26.

55. *Id.*

56. *Id.*

perform the same heinous acts the pirate performed? The answer is that Europe did not view piracy as particularly heinous, but it was economic consideration behind the decision to punish piracy.

C. Modern Piracy

As demonstrated by the recent attack on the *Seabourn Spirit*, piracy is still a problem today. For the year 2003, the International Maritime Bureau's Piracy Reporting Center in Kuala Lumpur had 452 pirate attacks or attempted attacks reported,⁵⁷ 122 of which occurred in international water and would allow a state to exercise universal jurisdiction.⁵⁸ In these attacks, pirates killed thirteen people, injured forty-five, and caused fifty-four to go missing. The pirates tossed eleven of those that went missing overboard, and they were still missing at the time of the report.⁵⁹ In addition to this great human toll, there was an economic toll as well: pirates hijacked eleven ships reported as missing, set another ablaze, and ran a third aground.⁶⁰

Apart from having greed as a motivating factor, modern pirates and their eighteenth century counterparts have little in common. Instead of sailing in tall ships, modern pirates tend to sail in smaller, quicker boats such as canoes around Western Africa,⁶¹ fast outboard *prahus* in the Singapore area,⁶² and sometimes in yachts that they have hijacked at sea.⁶³ Modern pirate groups are smaller as well, usually consisting of twenty-five people or less.⁶⁴ The armament of pirates has changed as well. Instead of fitting out with heavy cannons and flintlock pistols, modern pirates are using "automatic rifles such as the M-16 and AK-47[,] rocket launchers, grenade launchers, and mortars."⁶⁵

Governments and politicians around the world have recognized, to a greater or lesser extent, the problems that piracy poses. Maureen Walker, Acting Deputy Director of the Office of Oceans Affairs in the

57. Int'l Mar. Org. [IMO], *Reports on Acts of Piracy and Armed Robbery Against Ships*, Annual Report—2003, at 1, T2-NAVSEC/2.7.1, Apr. 27, 2004, available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D9332/50-colour.pdf [hereinafter 2003 Piracy Report]. It is important to note that not all 452 of these attacks occurred outside the territorial jurisdiction of every state. Many attacks occurred in port or within the territorial water of a littoral state.

58. *Id.* at Annex 2.

59. *Id.* at 2.

60. *Id.*

61. CAPTAIN ROGER VILLAR, *PIRACY TODAY, ROBBERY AND VIOLENCE AT SEA SINCE 1980*, at 16 (1985).

62. *Id.* at 24.

63. JACK A. GOTTSCHALK ET AL., *JOLLY ROGER WITH AN UZI, THE RISE AND THREAT OF MODERN PIRACY* 47–48 (2000).

64. VILLAR, *supra* note 61, at 16–17.

65. GOTTSCHALK ET AL., *supra* note 63, at 121.

U.S. State Department sent a letter to the United Nations recognizing the dangers piracy posed.⁶⁶ In a statement by Dr. Marie Jacobsson, the EU recognized the growing problem of piracy and the economic threat as well as the threat to human life it poses.⁶⁷ The International Maritime Bureau's Piracy Reporting Center gives weekly reports detailing recent attacks and warnings of where there has been recent piratical activity.⁶⁸

Despite this awareness, the world's governments have done little in terms of stopping piracy and bringing it to the world's attention. A number of factors contribute to this. For the most part, piracy occurs in areas other than the United States and other world powers. The areas most prone to attack are "the South China Sea and the Malacca Strait, South America and the Caribbean, the Indian Ocean, West Africa, and East Africa."⁶⁹ In 2003, there was only one reported, alleged attack in the United States.⁷⁰ As long as it does not immediately affect the United States—or any other major country—it is not surprising it is not a major issue in those countries.

There is also an economic reason. It is impossible to determine precisely how much money is annually lost because of piracy due to the nature of piracy, the fact that not all incidents of piracy are reported, and because there is not a systematic method in place to track financial loss.⁷¹ This is not to say people have not made estimates: based on a number of assumptions about estimated loss and the number of incidents that went unreported, some have stated that the estimated loss worldwide in 1995 might have been as high as \$62,200,000.⁷² While this is a lot of money, a conservative estimate for the total amount of maritime commerce for the same year amounts to over \$2 trillion.⁷³ Thus, worldwide piracy losses accounted for an "essentially negligible" 0.0029% of the overall world maritime

66. Maureen O'C. Walker, Acting Deputy Director, Office of Oceans Affairs, Piracy and Armed Robbery at Sea, U.S. Statement to the United Nations Open-ended Informal Consultative Process on Oceans and Law of the Sea (Mar. 10, 2001) (transcript available at <http://www.state.gov/g/oes/rls/rm/4994.htm>).

67. Dr. Marie Jacobson, Alternate Head of Delegation of Sweden on behalf of the European Union, Combating Piracy and Armed Robbery at Sea, Statement to the First Committee (Disarmament and International Security) (transcript available at http://europa.eu-un.org/articles/lt/article_233_lt.htm).

68. The International Maritime Bureau Piracy Reporting Centre, Weekly Piracy Report, <http://www.icc-ccs.org/prc/overview.php>.

69. 2003 Piracy Report, *supra* note 57, at 1.

70. *Id.* at Annex 1, p. 6; *see also* Int'l Mar. Org. [IMO], Reports on Acts of Piracy and Armed Robbery Against Ships, Issued Monthly—Acts reported during April 2003, at Annex 1, p. 1, T1/13.01, May 7, 2003, available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D7581/35.pdf.

71. GOTTSCHALK ET AL., *supra* note 63, at 86.

72. *Id.* at 89–90.

73. *Id.* at 90.

commerce, or 29.3¢ on every \$10,000.⁷⁴ With piracy accounting for such a small amount of commerce, states might find that it is simply not worth it economically to put in place a regime that will discourage piracy.

D. *Summation*

Piracy has a long history and, unfortunately, a seemingly active future. It has changed from a legitimate way of life to an outlaw profession. The notion of who is a pirate has changed over time. Piracy has been encouraged both expressly and implicitly in one century and brutally punished in the next. Piracy is a heinous crime worthy of punishment. It is important not to forget the human toll piracy can take on society. But it is also apparent that it is not necessarily this human toll, but the economic toll that caused piracy to be punished heavily starting in the eighteenth century.

III. VIEWS ON JURISDICTION AND PIRACY

With a general background of piracy's history, this Note will now turn to how the international legal community has dealt with piracy. First, this Part will discuss the bases for a state's exercise of jurisdiction over a person. Next, it will consider the views of scholars on the subject of jurisdiction as it relates to pirates. Further, this Part will discuss the needs and reasons scholars have given for allowing states to exercise universal jurisdiction over pirates. Lastly, this Part will discuss why those reasons no longer support an exception to the generally accepted views of jurisdiction.

A. *Bases of Jurisdiction*

If a state wishes to prosecute someone, it must have jurisdiction over the person. The state's relation to the actor or activity regulated often provides the basis of this jurisdiction. The most common and uncontroversial form of jurisdiction to prosecute is territorial jurisdiction.⁷⁵ Territorial jurisdiction gives a state power to prescribe, adjudicate, and enforce its laws as to those actors, activities, and things that are found within its sovereign territory with few exceptions.⁷⁶ As an example, the United States would have territorial jurisdiction over

74. *Id.*

75. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1), § 402(1) cmt. c (1987) ("The territorial principle is by far the most common basis for the exercise of jurisdiction to prescribe, and it has generally been free from controversy.").

76. *See id.* at § 402 cmt. c.

anyone that commits murder within the borders of the United States. Not only would it make no sense for another country to prosecute the murderer for the murder, but it also may lead to international tension.⁷⁷

In some circumstances, a special form of jurisdiction called “flag-state” jurisdiction—a quasi-territorial form of jurisdiction—is recognized.⁷⁸ The flag-state principle of jurisdiction states that a ship is an extension of the territory of its flag state.⁷⁹ Put another way, “the ship is to be treated as a floating island belonging to the flag state.”⁸⁰ This is a legal fiction, but it has good uses.⁸¹ Problems can arise though as to who has jurisdiction over the ship when it is in the territorial waters of a state other than its flag state.⁸² Almost all governments recognize this as a legitimate form of jurisdiction as evidenced by its inclusion in the UNCLOS.⁸³

Under customary international law, a state may base jurisdiction on factors other than territoriality. The “nationality” principle allows a state to exercise jurisdiction over its citizens for their conduct abroad.⁸⁴ One of the reasons for this is that nationality is an essential link to statehood. Another is that if a person willingly chooses to remain a national of a state while traveling abroad and reaps the benefits of that citizenship, he should also remain subject to the jurisdiction of the state of which he is a citizen.⁸⁵ This form of jurisdiction has been most prevalent in the area of “private law” regarding wills, divorce, etc.⁸⁶ Jurisdiction based on nationality is a

77. See *id.* at § 403 reporters’ note 8 (“[T]he exercise of criminal jurisdiction in relation to acts committed in another state may be perceived as particularly intrusive.”).

78. The Restatement (Third) of Foreign Relations Law of the United States says that while this principle may be viewed as an extension of territorial jurisdiction, it is best viewed as a wholly independent form of jurisdiction. *Id.* at § 402 cmt. h. The Author believes that labeling it quasi-territorial makes clear that it is not to be viewed as a strict form of the territorial principle, but that it does share a number of similarities with territorial jurisdiction.

79. HENKIN, *supra* note 3, at 234; see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. h (“[A] state may apply its law to activities, persons, or things aboard a vessel, aircraft, or spacecraft registered in the state.”).

80. HENKIN, *supra* note 3, at 234.

81. *Id.*

82. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 502 cmt. d.

83. See UNCLOS, *supra* note 4, art. 94 (“Every state shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.”).

84. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2); HENKIN, *supra* note 3, at 236–38.

85. HENKIN, *supra* note 3, at 236–37.

86. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. e.

traditional exception to the exclusivity of territorial jurisdiction.⁸⁷ Tension is possible if the state with territorial jurisdiction and the state with nationality jurisdiction are not the same and both are seeking to assert jurisdiction over an individual; however, there has been little tension in practice.⁸⁸

While the nationality principle gives an individual's state of citizenship the right to exercise jurisdiction over him, the passive personality principle grants a state the authority to exercise jurisdiction if one of its citizens is the victim of crime in a foreign state.⁸⁹ In general, scholars and governments have not viewed this form of jurisdiction as favorably as they have the nationality form of jurisdiction despite the link of citizenship.⁹⁰ France used this principle when it sought to punish Pinochet for the forced disappearance of French nationals living in Chile.⁹¹

Another basis of jurisdiction is the "effects" principle. A state can exercise jurisdiction over a foreign national who takes action in a foreign state if that action affects the state seeking to assert jurisdiction.⁹² This is most commonly seen and least controversial in the criminal practice where a shot from one country is aimed at and lands in another country, which will then seek jurisdiction over the shooter. The act took place in a foreign state by foreign nationals, but the state that felt the effects of the act can exercise jurisdiction based on the effects principle.⁹³ One of the specialized categories within the effects principle is the "protective" principle.⁹⁴ The protective principle allows a state to exercise jurisdiction over foreign nationals

87. Because this Note's focus is not on whether territorial jurisdiction is to be considered exclusive and nationality jurisdiction an exception or whether jurisdiction based on territory and nationality are both co-equal bases for jurisdiction, the traditional view of exclusivity will be used. *But see* HENKIN, *supra* note 3, at 237.

88. HENKIN, *supra* note 3, at 238.

89. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt g & reporters' note 3; *see also* HENKIN, *supra* note 3, at 239-40; Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 787-88 (1988).

90. *See* HENKIN, *supra* note 3, at 239 (stating that the interest of a foreigner abroad has not been seen as "an essential element of statehood"); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. g ("The [passive personality] principle has not been generally accepted for ordinary torts or crimes.").

91. Brigitte Stern, *International Decisions: French Tribunal de grande instance (Paris)*, 93 AM. J. INT'L L. 696, 696-99 (1999).

92. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402(3), 402 cmt. d; HENKIN, *supra* note 3, at 241-42.

93. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. d.

94. *See id.* § 402 cmt. f ("[The] protective principle may be seen as a special application of the effects principle, Comment d, but it has been treated as an independent basis of jurisdiction."); *cf.* HENKIN, *supra* note 3, at 238 (explaining that the effects principle and the protective principle are not the same).

who commit acts in a foreign territory (or outside the territory of any state) when those acts will affect a state's interests.⁹⁵ This has been the most controversial of the traditional bases of jurisdiction.⁹⁶

The preceding forms of jurisdiction all contain some nexus between the state wishing to assert jurisdiction and the actor. The other basis of exercising jurisdiction recognized is the "universality" principle, or universal jurisdiction. Universal jurisdiction allows for the exercise of jurisdiction over certain actors or activities wherever they occur without regard to nationality or territoriality.⁹⁷ Traditionally, the concept of universal jurisdiction has been limited to piracy.⁹⁸ On the high seas or any place outside of the territory of any state, any state has the right to seize any pirate ship and subject those on board to its legal regime.⁹⁹ Thus, if a citizen of the United States aboard a ship bearing a flag of the United States piratically attacks another ship bearing the U.S. flag and carrying citizens and goods of the United States in the middle of the Atlantic Ocean, any state can capture the pirate ship and subject the pirate to the capturing state's laws.¹⁰⁰ It can do this despite the fact that only the United States has any relation to the actors, activities, and items involved. This is an example of universal jurisdiction as applied to piracy.

B. *Reasons for Applying Universal Jurisdiction to Piracy*

A number of reasons have been put forth to explain why piracy is subject to universal jurisdiction. For each reason, this Note will discuss the rationale for applying universal jurisdiction and criticisms of that rationale.

95. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402(3), 402 cmt. f; HENKIN, *supra* note 3, at 238–39.

96. HENKIN, *supra* note 3, at 238–39.

97. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. a.

98. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 34 cmt. b (1965) (citing piracy as the only crime subject to universal jurisdiction); PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 45 (2001) [hereinafter PRINCETON PRINCIPLES] (stating that piracy is "crucial to the origins of 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 . . ."); Randall, *supra* note 89, at 791 ("Piracy is the oldest offense that invokes Universal jurisdiction.").

99. UNCLOS, *supra* note 4, art. 105; see also BLACKSTONE, *supra* note 3, at *71 (stating that every community has a right to self defense and can therefore inflict punishment upon pirates who invade one's person or personal property); 18 U.S. (5 Wheat) app. 8 (1820) ("[Piracy] is an offense against all and every nation, and is therefore alike punishable by all.").

100. UNCLOS, *supra* note 4, art. 105.

1. Statelessness

One of the reasons given for allowing states to exercise universal jurisdiction over pirates is that by practicing piracy, the pirate and his ship become denationalized.¹⁰¹ If pirates are denationalized, then any traditional form of jurisdiction predicated on the nationality of the pirate will not apply. Further, if the ship itself is denationalized, or loses its flag, no state could exercise jurisdiction over the pirate through the flag-state principle.

Since piracy occurs on the high seas, the territoriality principle is difficult to apply. Since the early seventeenth century, all governments have recognized the concept of *mare liberum*.¹⁰² In 1609, Hugo Grotius developed the concept of *mare liberum*, which is the idea that the seas can belong to no country and are entirely free to trade and travel.¹⁰³ Therefore, ships, while floating on the high seas,¹⁰⁴ float not within the territorial jurisdiction of any state, but outside the jurisdiction of every state. Thus, the traditional territorial form of jurisdiction does not apply since the ships float in neutral waters while on the high seas. Thus, states could only exercise jurisdiction over pirates through a traditional form of jurisdiction by using the passive personality principle or the protective principle, two somewhat controversial forms of jurisdiction.

The problem with this analysis is that it assumes that by cruising piratically, the ship and its crew are stripped of their nationality. This is a complete legal fiction that has been largely eliminated.¹⁰⁵ The UNCLOS now discredits the notion that it is a universal rule that pirates and their ships lose their national character. Instead, it leaves it up to each state to decide whether its ships lose their national character if they practice piracy.¹⁰⁶ During the twentieth century, and even before, many states declared that its ships did not lose their national character by cruising as pirates.¹⁰⁷ Thus, the only stateless ships would be those whose flag state denied

101. Joseph W. Bingham, *Part IV—Piracy*, RES. INT'L L., 739, 825, 831 (1932) ("The pirate has in fact no national character."); Randall, *supra* note 89, at 793; see also BLACKSTONE, *supra* note 3, at *71 (noting that pirates had renounced society and its benefits and returned to "the savage state of nature" which suggests they lose any national identity or the protections that go with it).

102. See HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 190 (Francis W. Kelsey trans. 1925) (1646) (stating that the sea "both as a whole and in its principle divisions cannot become subject to private ownership.").

103. UNCLOS, *supra* note 4, art. 89 ("No State may validly purport to subject any part of the high seas to its sovereignty.").

104. See *id.*, art. 86 (explaining what constitutes the high seas).

105. Bingham, *supra* note 101, at 825.

106. UNCLOS, *supra* note 4, art. 104.

107. See Bingham, *supra* note 101, at 826 ("[T]here can be little doubt that the law of nations would today accord a protecting authority over him and his interests to the state of his nationality.").

nationality based on cruising piratically or those ships that flew more than one flag.¹⁰⁸

Even if the ship itself were stateless, however, there is nothing to suggest that the pirate himself loses his national character. When referring to pirates, many courts refer to the nationality of the pirate, which would suggest that nationality still matters.¹⁰⁹ What is so special about piracy that one loses his nationality by practicing it? Surely mass murderers like Ted Bundy never lost their nationality, despite the fact that they committed truly heinous acts. Why should the pirate lose his nationality? It no longer makes sense to consider pirates as stateless, and thus, a state can always exercise a less controversial form of jurisdiction based on territoriality or nationality.

2. Pirates are *Hostis Humani Generis*

One of the more frequently cited rationales for subjecting piracy to universal jurisdiction is the notion that pirates are *hostis humani generis*—enemies of all mankind.¹¹⁰ The reasoning is that because pirates indiscriminately attack ships on the high seas, they are waging war on all countries. They are the enemies of all of mankind. Therefore, any country can capture and punish a pirate.¹¹¹ But, as this Part will show, this argument is questionable at best.

Part of the appeal of this argument comes from the phrase *hostis humani generis* itself. Because it is a Latin phrase, it instantly suggests that it is a phrase of ancient origin, or has been around at least several centuries. Thus, if pirates have always been considered the enemies of all mankind, why should it be any different today. But, is the phrase really of ancient origin?

The Romans did not use the phrase *hostis humani generis*. The phrase may be a shortening of a phrase used by Cicero. He claimed that pirates were the common enemies of all communities.¹¹² But the pirates that Cicero was referring to were not the same as the pirates of the seventeenth century and today. As noted above, the Romans used their word for pirate to describe a community who, without formally declaring war before attacking, practiced what would today

108. UNCLOS, *supra* note 4, art. 92.

109. See *Rex v. Dawson*, (1696) 13 Howell's State Trials 451, 453 (noting that defendants had practiced their crimes "upon their own countrymen, the English . . .").

110. Coke, in 1638, seems to be the first to apply the phrase to piracy. Others before him seem to have hinted that they may be *hostis humani generis*. See *infra* note 115.

111. BLACKSTONE, *supra* note 3, at *71.

112. See M. TULLI CICERONIS, DE OFFICIIS III. 107 ("sed communis hostis omnium").

be considered piracy or land-based banditry.¹¹³ Cicero was not necessarily talking about pirates like Edward Teach.

This is not to say that the Romans may not have considered pirates the enemies of all mankind. It only says that they never used the phrase *hostis humani generis* to describe pirates. When the Romans thought of piracy, they may have considered the pirates to be “enemies of all mankind” because they never declared war before they attacked.¹¹⁴ As shown earlier, this failure to declare war formally before attacking is why the Romans felt the pirate communities were in a constant and permanent state of war.

From this, it is clear that the concept of *hostis humani generis* cannot be said to be of Roman origin. Further, the Romans, while they may have considered pirates the enemies of all mankind, were not thinking necessarily of pirates like Blackbeard but of communities whose way of life conflicted with the Roman way of life. They were also thinking of people who plundered on both land and sea.

In 1612, Gentili wrote about the problem of piracy and how states may deal with pirates. He did not use the phrase *hostis humani generis* to describe pirates, but he did speak of pirates as the “common enemies of all mankind” using language similar to Cicero.¹¹⁵ Unlike Cicero and the Romans, Gentili felt that a state of war could not exist with pirates and brigands because, even though they may act as pirates, individuals are still the citizens of a state. As citizens, they are still subject to the laws of their state of citizenship.¹¹⁶ Therefore, pirates do not come under the laws of war and states need not treat pirates in accord with the laws of war because only sovereigns fall under the laws of war.¹¹⁷ By engaging in piracy, pirates do not free themselves from the law of their country.¹¹⁸

Another reason the laws of war do not apply to pirates is that the laws of war are “derived from the law of nations, and malefactors do not enjoy the privileges of a law to which they are foes.”¹¹⁹ He states that “[w]ith pirates and brigands, who violate all laws, no laws remain in force.”¹²⁰ Because they are everyone’s enemies, pirates do

113. See *supra* Part II.A.

114. Rubin, *supra* note 27, at 83.

115. ALBERTO GENTILI, 1 DE JURE BELLI LIBRI TRES *33 [35] (“Piratæ omnium mortaliū hofes funt communes.”). It is interesting that the English translation does use the phrase “enemies of all mankind” in describing pirates. A look at the Latin original shows he did not use the phrase *hostis humani generis*.

116. *Id.* at *34 [36]. This is different than the Roman view which viewed pirates as in a constant state of war.

117. *Id.* at *34–35 [36–37].

118. *Id.*

119. *Id.* at *35 [37].

120. *Id.* at *38 [40].

not get the benefit of any law.¹²¹ Therefore, it seems states can do with pirates what they wish. Part of the difference in view between Gentili and the Romans as to whether pirates could wage war may be due to the fact that they were referring to different people and concepts when they discussed pirates. Yet, his argument for his treatment of pirates derives ancient authority from Cicero, despite the fact he and Cicero were talking about different concepts and people.

England did not initially share Gentili's view that pirates were the common enemy of mankind and anyone had the right to seize them. Lord Coke was the first to use the phrase *hostis humani generis* to describe pirates.¹²² Originally, according to Lord Coke, piracy was a form of treason. Coke does not cite to another source for this phrase, though his use of the Latin phrase in an English text suggests that he was borrowing it from some older source with some speculating that it was from Cicero.¹²³ This would be a shortening of the passage by Cicero mentioned above.¹²⁴ Coke declared that piracy was a form of treason because pirates were *hostis humani generis*.¹²⁵ Unfortunately, he does not explain why the pirates are *hostis humani generis* or why this makes piracy treason.

If an English admiralty court was to try a pirate, there had to be English citizens or ships involved or the pirate himself had to be English because piracy was a form of treason.¹²⁶ This seems to align itself with the views of Gentili in that pirates were still subject to the jurisdiction of a state.¹²⁷ This also suggests that pirates were not subject to universal jurisdiction because the English admiralty courts required a link to England before they could punish pirates.

Within a century, England would replace the view of piracy as a form of treason, limited to instances where there was a connection to England, with something similar to universal jurisdiction. In 1696, the jury in *Rex v. Dawson* was instructed that:

The King of England hath not only an empire and sovereignty over the British seas, but also an undoubted jurisdiction and power . . . for the punishment of *all* piracies and robberies at seas, in the most remote

121. *Id.* at *36 [38].

122. SIR EDWARD COKE, THE THIRD PART ON THE INSTITUTES ON THE LAWS OF ENGLAND *113 (1797).

123. See Rubin, *supra* note 27, at 55 n.61. This would make sense based on the work of Gentili, who referred to the Cicero passage. See also GENTILI, *supra* note 115, at 35.

124. See CICERONIS, *supra* note 112, at III.107 ("Nam pirata non est ex perduellum numero definitus, sed communis hostis omnium: cum hoc nec fides nec jus iurandum esse commune.")

125. See COKE, *supra* note 122, at *113.

126. Rubin, *supra* note 27, at 47.

127. See GENTILI, *supra* note 115. Interestingly, this also undercuts the argument that pirates become stateless because they practice piracy.

part of the world; so that if *any* person whatsoever, native or foreign . . . with whose country we have no war . . . and are in amity shall be robbed or spoiled [on the high seas], it is piracy within the limits of your enquiry, and the cognizance of this court.¹²⁸

From this, it seems that the courts were no longer constrained in whom they could punish as pirates.

Blackstone, in his Commentaries on the Laws of England, declared that piracy is a crime “against the universal law of society.”¹²⁹ He then declared that pirates are *hostis humani generis*, and cites to Coke.¹³⁰ While he may have cited to Coke for the phrase *hostis humani generis*, he did not agree with Coke that piracy was a form of treason. Instead, according to Blackstone, because a pirate was *hostis humani generis*, the pirate had

renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right, by the rule of self-defence, to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do, any invasion of his person or personal property.¹³¹

This view of piracy seems to follow that of Gentili in that every individual has a right to punish pirates wherever they are found because they are the enemies of all mankind and they no longer enjoy the privileges of law.¹³² Contrary to Gentili’s view that the pirate did not lose his citizenship, however, the Blackstonian pirate, by engaging in unlawful pursuits, is stripped of his nationality.

Robert Walton, writing in 1693 had a different conception of to whom the phrase should be applied and arguably may have been making the most apt analogy. To Walton, pirates were a limited set of people who “commit[] acts of hostility against *all* men without distinction.”¹³³ This would be in line with the Roman tradition because those who were considered pirates were said to be at war with *all* who were around them.¹³⁴ Walton’s reasoning seems to suggest that Vikings, the Barbary states, and Malayan nobles should also be considered pirates.¹³⁵ England though recognized the

128. Rex v. Dawson, (1696) 13 Howell’s State Trials 451, 455 (U.K.) (emphasis added).

129. BLACKSTONE, *supra* note 3, at *71.

130. *Id.*

131. *Id.*

132. See *supra* text accompanying notes 115–21.

133. DOCUMENTS RELATING TO LAW AND CUSTOM OF THE SEA 147 (R.G. Marsden ed., 1915).

134. See Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L.J. 183, 234 (2004).

135. Rubin, *supra* note 27, at 84.

sovereignty of the Barbary States and did not consider their actions to be piracy.¹³⁶

This all shows that even if the writers of the seventeenth and eighteenth centuries were using a phrase of Roman origin, they were not using it in the manner in which the Romans would have thought of it or applying it to the same concept or peoples the Romans would have. Even amongst themselves, they could not come up with a consistent use or definition of the phrase. It would seem that the word “pirate,” if it is to be used in the historical way the Romans would have used it, would be fitting for those from the Barbary states: states that were formed for reasons other than piracy but practiced what is commonly considered piracy. But these states were not considered pirate nations.¹³⁷ In fact, by this time, the word “pirate” and the phrase *hostis humani generis* were used to describe outlaws, something that neither had ever been used to describe.¹³⁸ It would seem odd to claim that the use of the phrase *hostis humani generis* provides a historical link between piracy in Roman times and piracy in the seventeenth century.¹³⁹

The phrase *hostis humani generis* is still used to describe pirates today. But instead of being considered *hostis humani generis* because of all of the reasons given so far, they are now considered *hostis humani generis* because of piracy’s heinousness. Professor Randall has stated that part of the reason pirates are considered *hostis humani generis* is because of the heinousness of their crime.¹⁴⁰ The number of groups or people considered *hostis humani generis* has also expanded. Professor Randall states that “[t]hose who commit hijacking, hostage taking, crimes against internationally protected persons, apartheid, and torture are today’s *hostis humani generis*.”¹⁴¹ The Second Circuit Court of Appeals in the United States has stated that “the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.”¹⁴² This is again based on the heinousness of each of these crimes.

So why are pirates labeled *hostis humani generis*? Literally, it translates from Latin to English as “common enemies of all mankind.”¹⁴³ In Roman times, this may have been true because the concept was applied to communities that were constantly at war with everyone around them—literally enemies of all mankind.¹⁴⁴ But, to

136. *Id.* at 49, 68.

137. *Id.* at 68, 83–84

138. *Id.* at 83–84.

139. *Id.* at 84.

140. Randall, *supra* note 89, at 794.

141. *Id.* at 832.

142. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (emphasis added).

143. Rubin, *supra* note 27, at 11.

144. Kontorovich, *supra* note 134, at 234.

say that pirates of the seventeenth century and today are enemies of all mankind is nothing more than an “embellishment.”¹⁴⁵ The U.S. District Court for the Southern District of New York stated that “it is doubtful whether any pirates ever really practiced or intended to practice, wholly indiscriminate robbery upon all vessels alike.”¹⁴⁶ It would seem that pirates do not fall within the literal meaning of the phrase as would have been understood by the Romans.

Outside of the literal translation of the phrase, a consistent definition is fleeting. The Romans would have applied it to communities that did not declare war before attacking or to the communities of the eastern Mediterranean with whom they felt they were in perpetual war because they attacked ships without first declaring war. Blackstone and others of the seventeenth and eighteenth centuries would apply it to individuals because they attacked “indiscriminately” against the laws of all nations. Today, the phrase applies not just to piracy but a litany of crimes where the only common link seems to be heinousness.¹⁴⁷ To claim that because pirates are *hostis humani generis*, and therefore subject to universal jurisdiction because it has been that way since Ancient Rome in no way comports with history. The phrase has been applied to different people and concepts for differing purposes for the past two-thousand years with the only true constant being the words of the phrase itself for the past four-hundred years.

This analysis seems to lead to one question: “Is the jurisdiction [over piracy] universal because [pirates] are *hostes humani generis*, or are they said to be *hostes humani generis* because the jurisdiction is universal?”¹⁴⁸ It has been shown that to be found guilty of piracy and have universal jurisdiction apply, a pirate does not need to be truly the enemy of all mankind. There have been pirates convicted after committing only one attack, without proof that they were enemies of all countries.¹⁴⁹ It would seem therefore that pirates are *hostis humani generis* not because of their actions, but because the major naval powers have traditionally exercised universal jurisdiction over them. They called the pirate *hostis humani generis* for rhetorical purposes, as a “metaphorical invective.”¹⁵⁰ Thus, to say that because pirates are *hostis humani generis* and therefore subject to universal jurisdiction is circular. The only rational reason to label them *hostis humani generis* in most cases is because they are subject to universal jurisdiction. Yet, they are subject to universal jurisdiction in part

145. The *Ambrose Light*, 25 F. 408, 423 (S.D.N.Y. 1885).

146. *Id.*

147. Kontorovich, *supra* note 134, at 237.

148. Edwin D. Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334, 351 (1924).

149. *See id.* at 351–55.

150. *Id.* at 359.

because pirates and slavers and other are considered *hostis humani generis*. The labeling of pirates as *hostis humani generis* is neither accurate nor can it provide a good reason to apply universal jurisdiction to piracy.

3. Heinousness

One of the reasons for subjecting pirates to universal jurisdiction today has been the heinousness of piracy.¹⁵¹ As Professor Kontorovich has implied, this may be a case of the tail wagging the dog or reverse engineering.¹⁵² Because society felt that truly heinous crimes such as genocide and torture should be subject to universal jurisdiction, society started looking for analogous crimes whose perpetrators were subject to universal jurisdiction. Piracy was first on the list. But the only common link (outside the use of the phrase *hostis humani generis* to describe the perpetrators) would appear to be heinousness.¹⁵³ Therefore, piracy must have been subject to universal jurisdiction due to its heinousness.¹⁵⁴ The Princeton Principles lists piracy as a crime subject to universal jurisdiction amongst other crimes, where all are subject to universal jurisdiction due to their heinousness.¹⁵⁵ But is piracy so heinous that it should be subject to universal jurisdiction?

It is obvious that pirates and piracy can be heinous. There are accounts such as Exquemelin's and Captain Johnson's that go into great detail in describing the atrocities pirates committed long ago, though one may question the validity of some of their claims.¹⁵⁶ More recently, pirates murdered the entire twenty-seven-member crew of the *Cheung Sun* in 1998; only six of the bodies were found.¹⁵⁷ China executed the pirates that committed these murders in 2000.¹⁵⁸

151. OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 270 (1991); PRINCETON PRINCIPLES, *supra* note 98, at 23–24.

152. See Kontorovich, *supra* note 134, at 236–37.

153. *Id.* at 236

154. See *generally id.* at 236–37 (giving the impression that the expansion of universal jurisdiction is what has caused piracy to be considered particularly heinous and not that piracy is of such acute heinousness to allow for universal jurisdiction. Instead, modern theorists of universal jurisdiction, looking for a link to the past, reclassified piracy as heinous to meet their ends.).

155. PRINCETON PRINCIPLES, *supra* note 98, at 28–29.

156. For example, Exquemelin was successfully sued by Henry Morgan for libel because his writing, at least parts of it, were found to be untrue. See ALEXANDER O. EXQUEMELIN, *THE HISTORY OF THE BUCANIERS OF AMERICA* (printed for Tho. Newborough 1699), available at <http://www.eebo.chadwyck.org>. One must also read *A General History* by Johnson with skepticism.

157. *10 Charged on Piracy Killings*, HONG KONG STANDARD, Feb. 5, 1999.

158. Jack Hitt, *Bandits in the Global Shipping Lanes*, N.Y. TIMES MAG., Aug. 20, 2000, 68–69.

Traditionally though, heinousness is not the underlying rationale for punishing piracy. While early English piracy cases discussed heinousness, it seems that it was mostly for rhetorical purposes. As explained above, one of the primary concerns for the English was not the heinousness of piracy, but the negative effects it had on trade. "Piracy is the worst sort of robbery, both in its nature and its effect, since it disturbs the *commerce* and friendship betwixt different nations."¹⁵⁹ Other examples of the primacy of economic concerns have been given above.¹⁶⁰ In fact, early English cases felt piracy was terrible not because it hurt individuals, but because it hurt the state itself.¹⁶¹ If the concern over piracy and rationale for allowing universal jurisdiction¹⁶² was heinousness, it seems odd that the admiralty courts would focus not on the human toll, but on the international relations of the state and the economic impact piracy posed.

Additionally, many other crimes and acts are considered heinous.¹⁶³ Therefore, for the degree of heinousness to be the motivation for subjecting pirates to universal jurisdiction, it would presumably have to be the most heinous of crimes to warrant such a radical departure from traditional norms.¹⁶⁴ But piracy is not *that* heinous.¹⁶⁵ For the U.S. Supreme Court, "[n]o crime is greater than treason."¹⁶⁶ Murder, rape, and kidnapping amongst others are undoubtedly extremely heinous in nature.¹⁶⁷ Again, while piracy can be very heinous, so are murder and other crimes. Yet, they are not subject to universal jurisdiction. Canada cannot prosecute one American for the murder of another American that took place within the United States. Yet, the killing of another human being is one of the most heinous crimes is it not? Is robbery on the ocean as heinous as cold-blooded murder? If heinousness is the basis of universal jurisdiction, why are murder and other heinous crimes not subject to universal jurisdiction?

Heinousness is of course a very subjective term and reasonable people may disagree on which crimes are more heinous than others.

159. *Rex v. Dawson*, (1696) 13 Howell's State Trials 451, 482 (U.K.) (emphasis added).

160. *See supra* notes 50–52 and accompanying text.

161. *Rex v. Dawson*, (1696) 13 Howell's State Trials 451, 453 (U.K.).

162. It must be remembered that while *Rex v. Dawson* stated that it is undoubted that England had the power to punish piracy wherever it existed, this was nothing but dicta. *See supra* note 128. The case actually involved all English citizens, so it was not necessary to exercise universal jurisdiction.

163. *Kontorovich*, *supra* note 134, at 233.

164. *Id.*

165. *See id.* at 233–35.

166. *Hanauer v. Doane*, 79 U.S. 342, 347 (1871).

167. *See Kontorovich*, *supra* note 134, at 234 (listing crimes where the courts have applied the word "heinous" to the crime).

An objective way to determine the heinousness of a crime is to look at how a state punishes the crime.¹⁶⁸ The United States punishes piracy under the law of nations with life in prison.¹⁶⁹ The United States punishes murder with death in some instances.¹⁷⁰ The United States can punish treason with death.¹⁷¹ Death is certainly a harsher penalty than life in prison, which suggests those crimes punishable by death are more heinous than those crimes that are only punished with life in prison.

The fact that piracy is not the crime with the harshest punishment is not unique to America. In Russia, piracy is punished with a prison sentence of five to ten years if there are no weapons involved, eight to twelve years if a weapon is involved, and ten to fifteen years if an organized group commits it or death results from it.¹⁷² For some homicides, Russia uses the punishment of the death penalty or life imprisonment.¹⁷³ In Mexico, the punishment is imprisonment for fifteen to thirty years.¹⁷⁴ Argentina, on the other hand, punishes piracy with imprisonment for three to fifteen years, or fifteen to twenty-five years if death occurs during the commission of the piracy.¹⁷⁵ These are but a few examples, but they show that not everyone views piracy to be equally heinous. Most do not even view piracy as the most heinous crime. To base universal jurisdiction on heinousness alone then seems misguided.

4. Uniform Punishment

One of the rationales Professor Kontorovich provides for the historical application of universal jurisdiction to piracy is that piracy was punished equally everywhere.¹⁷⁶ At one point, determining the punishment for piracy was easy: regardless of which country was about to impose punishment, the punishment was always death.¹⁷⁷ As Professor Kontorovich points out, this uniformity was important in allowing piracy to be subject to universal jurisdiction. It prevented forum shopping. And a country whose interests a pirate had hurt

168. Jonathan Turley, *Reflections on Murder, Misdemeanors, and Madison*, 28 HOFSTRA L. REV. 439, 458 (1999).

169. 18 U.S.C. § 1651 (2004).

170. § 1111.

171. § 2381.

172. CRIMINAL CODE OF THE RUSSIAN FEDERATION 178–79 (William E. Butler trans., 2004).

173. *Id.* at 66–67.

174. Código Penal Federal [C.P.F.] [Federal Criminal Code], arts. 146–47, 14 de Agosto de 1931 (Mex.).

175. Cód. PEN. arts. 198–99 (Arg.).

176. Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 142–45 (2004).

177. *Id.* at 142.

would know that, no matter which country caught the pirate, his punishment would be death.¹⁷⁸ This eliminated concerns of over or under punishment and prevented international tensions.¹⁷⁹

While that may have been the case during the eighteenth century, such uniform punishment is no longer a reality. In 1897, the United States changed the punishment of piracy from the death penalty to life in prison.¹⁸⁰ The Congressman who introduced the bill stated that the purpose was, in part, to allow juries to find people guilty of certain crimes, including piracy; juries were refusing to convict people because they knew they would receive the death penalty.¹⁸¹ While some felt that the bill should have done away with capital punishment altogether, it seemed clear that the peoples' representatives felt that crimes such as rape and murder were heinous enough to deserve the death penalty.¹⁸² There was a failed amendment to the bill that would have allowed piracy to be punished by either death or life in prison that was voted down.¹⁸³ Representative Barrett, who proposed the amendment, felt that piracy was as evil as murder if not worse,¹⁸⁴ but the rest of the House did not agree.¹⁸⁵ This shows that the United States did not view piracy as such a heinous crime.

In 1901, the commission in whom Congress had entrusted the task of revising and codifying the penal laws of the United States remarked that nearly all other countries punished piracy with death and that it was of "questionable expedience that United States should constitute an exception."¹⁸⁶ By the time of the Harvard draft international agreement in 1935, more countries had moved away from the death penalty as the punishment of piracy.¹⁸⁷

Part of the problem is that the definition of piracy does not include a penalty for piracy. If a penalty was included, then arguably the exercise of universal jurisdiction would not be as objectionable because, as in days gone by, the pirate would be punished the same way regardless of where he is tried. Such is not the case, however, as the definition includes no penalty to be applied uniformly.

178. *Id.*

179. *Id.*

180. Act of January 15, 1897, 29 Stat. 487, 487-89.

181. See 28 CONG. REC. 3098-99 (1896).

182. *Id.* at 3099.

183. *Id.* at 3111.

184. *Id.* at 3110.

185. *Id.* at 3111.

186. ALEX C. BOTKIN ET AL., PENAL CODE OF THE UNITED STATES: REPORT OF THE COMMISSION TO REVISE AND CODIFY THE CRIMINAL AND PENAL LAWS OF THE UNITED STATES XXVII (1901).

187. Bingham, *supra* note 101, at 893-1013.

As shown above, different countries punish piracy in different ways, ranging from three years in prison¹⁸⁸ to death.¹⁸⁹ Therefore, the uniformity of punishment, if it ever did justify universal jurisdiction, no longer does. In fact, this difference may cause the very tensions and concerns about over/under punishment that Professor Kontorovich warned about.¹⁹⁰

5. Narrowly-Defined Offense

Another reason given for traditionally allowing states to exercise universal jurisdiction over piracy is that it was a narrowly defined offense.¹⁹¹ There existed, so the argument goes, a simple definition of piracy that all nations agreed upon and that all nations could easily apply. This seems to have been important in that it helped to prevent states from “exercise[ing universal jurisdiction] opportunistically for political ends.”¹⁹² It was also important that all nations agreed on a single definition of piracy, which remained stable for hundreds of years.¹⁹³ While there is some dispute over whether there ever existed a uniform definition of piracy in the seventeenth and eighteenth centuries, this Note will assume that there may have been a single definition at one time.¹⁹⁴

But even assuming that there was a single, uniform definition at one point, the question becomes whether there is a single, uniform definition now. In developing the Harvard Research Draft Convention for the Law of Piracy (from which a majority of the definition of piracy for the UNCLOS was derived), the reporters flatly stated, “[t]here is no authoritative definition.”¹⁹⁵ This view may seem to be undercut by the fact that there is a single definition of piracy in the UNCLOS, which most countries have signed.¹⁹⁶ There was much debate, however, as to whether the definition made sense and whether or not it adequately and accurately codified piracy.¹⁹⁷ In addition to Professor Rubin, others also criticize the current definition found in the treaty.¹⁹⁸

188. CÓD. PEN. arts. 198–99 (Arg.).

189. Hitt, *supra* note 158, at 68–69.

190. Kontorovich, *supra* note 176, at 142.

191. *See id.* at 139–42.

192. *Id.* at 139.

193. *Id.* at 140.

194. *Id.* at 141–42.

195. Bingham, *supra* note 101, at 795.

196. UNCLOS, *supra* note 4, art. 101.

197. *See* Rubin, *supra* note 27, at 319–37.

198. *See* Phillip A. Buhler, *New Struggle with an Old Menace: Towards a Revised Definition of Maritime Piracy*, 8 CURRENTS: INT'L TRADE L.J. 61 (Winter 1999) (detailing complaints with the current definition of piracy).

There are gaps in the current definition of piracy that undermine the existence of a uniform definition. Are rebels that are attacking the vessels of the state against which they rebel committing acts of piracy if they attack on the high seas?¹⁹⁹ If a citizen of country A, while on a cruise in international waters on board a ship flying the flag of country A, robs another citizen of country A, does this fall under the definition of piracy found in the UNCLOS? Should it? What about a group hijacking a ship as a form of protest? Should this constitute piracy or was the hijacking not for private ends?²⁰⁰ What exactly constitutes a "private end" for purposes of the definition in UNCLOS?²⁰¹ Are two ships a requirement (ship A attacking ship B) or can one ship commit piracy (mutiny)?²⁰² These are just some of the areas where individual states must interpret the treaty to define piracy. Each area is subject to several differing, but plausible interpretations, thus allowing for numerous variations as to what constitutes piracy depending on which state is doing the interpreting.

Because the international political and legal system is horizontal, there is no single court that can bring order to these various interpretations. Instead, each country can maintain its interpretation, even if it is at odds with every other country. Thus, to claim that there is a common definition may be correct in the sense that there is a definition of piracy in the UNCLOS, but the interpretation of that definition can potentially vary greatly between states. Differing interpretations have the potential to lead to state A considering an individual act piracy and state B not considering that same act piracy.

Professor Rubin puts forth an even stronger argument against the presence of a uniform definition of piracy. According to Rubin, the current definition and rules regulating piracy are "incomprehensible and therefore codify nothing."²⁰³ Thus, while the presence of a uniform definition *may* have at one time justified the use of universal jurisdiction, there is no longer any uniform definition to justify its application today.

199. Samuel Pyeatt Menefee, *The Case of the Castle John, or Greenbeard the Pirate?: Environmentalism, Piracy and the Development of International Law*, 24 CAL. W. INT'L L.J. 1, 4 (1993) (discussing *Burley's Case* during the U.S. Civil War).

200. See *id.* (discussing this topic in general).

201. See Samuel Pyeatt, *The "New Jamaican Discipline": Problems with Piracy, Maritime Terrorism, and the 1982 Convention on the Law of the Sea*, 6 CONN. J. INT'L L. 127, 142-43 (1990).

202. See *id.* at 144. This controversy has been referred to in different settings as the "internal seizure issue" or the "one ship/two ships controversy." See Menefee, *supra* note 199, at 5.

203. Rubin, *supra* note 27, at 344. For his explanation of the problems with the current rules defined in UNCLOS, see *id.* at 319-37.

6. Piracy Directly Threatens or Harms Many Nations

Professor Kontorovich points out that because piracy directly threatens and has the potential to harm many, if not all nations, it is legitimate to subject piracy to universal jurisdiction.²⁰⁴ While some pirates did focus solely on the ships of particular countries for various reasons, some simply preyed on any ship they saw, without regard to which state's flag the victim's ship was flying.²⁰⁵ Therefore, some pirates did pose a threat to every nation that sent ships out on the seas. Allowing universal jurisdiction over piracy can be seen as a sort of "national 'self-defence.'"²⁰⁶ Pirates today also act similarly in that they may attack either the ships of particular states or whatever ship happens their way.

Is the potential that a pirate may attack any ship that happens its way a sufficient reason to create an exception to traditional principles of jurisdiction? If a U.S. citizen murdered a fellow citizen near the Canadian border (but still in the United States) and then fled into Canada, would Canada have the right to prosecute the American because he may potentially harm Canadian citizens? Canada could capture him and extradite him, but they could not legitimately punish him. Suppose a U.S. citizen went on a bank robbing spree starting in Canada, went south through the United States, then headed further south through Mexico, robbing banks all the way. When he enters Belize, could Belize prosecute him for the bank robberies in the other countries on the theory that the robber poses a potential threat to Belize since he has a pattern of robbing banks and moving towards Belize? No.

Yet, pirates have been convicted after having committed only one piratical attack, without a showing that they had the intent to deprave every state.²⁰⁷ Is this different from the bank robber moving south? There is a very good chance the bank robber is going to start robbing banks in Belize. Yet, Belize is not allowed to prosecute him for his crimes committed against other countries. The potential of injuring any country cannot be a sufficient reason to allow every country to punish the pirate. There is no logical reason not to extend it to the bank-robbing situation. Thus, this is not a sufficient reason to allow pirates to be subject to universal jurisdiction.

204. Kontorovich, *supra* note 176, at 152–53.

205. *Id.* at 153.

206. *Id.*

207. Dickinson, *supra* note 148, at 352.

7. Summation

The most troubling aspect of the rationales given for piracy being subject to universal jurisdiction is that they can be applied to numerous crimes. The robbery example above illustrates a prime example. Robbery is almost universally condemned. Robbery, like piracy, is universally seen as a heinous crime. It has a differing definition between states, similar to the way different states may interpret the definition of piracy differently. Also, robbery and piracy are both dependent on the prosecuting state for the penalties that will be imposed on the convicted defendant. A serial robber often poses harm to any state in which he is found, even if he has not yet robbed a bank in that state.

The only real difference seems to be the site of the crime itself. Piracy takes place on the high seas outside the jurisdiction of every state, while robbery takes place in the territory of a single state. Yet, if one ascribes to flag state jurisdiction, the differences disappear. This is because under the flag-state principle, the attacks are committed on board a ship that flies the flag of some country, and the crime can thereby be considered to have been committed within the jurisdiction of the flag state.²⁰⁸ It is only in the rare case that piracy is committed and no state has at least a quasi-territorial claim of jurisdiction. In those situations, there is always the nationality principle on which to hang jurisdiction, which is less problematic than universal jurisdiction.

There is nothing that suggests that there is still a need to apply universal jurisdiction to piracy, as all of the old reasons for doing so no longer apply. The only reason remaining for continuing to do so, which is alluded to above, is simply because that is how piracy has been handled for hundreds of years. Given the long history of using universal jurisdiction in this way, why should it be changed, even if it is no longer need it?

IV. WHY UNIVERSAL JURISDICTION AS APPLIED TO PIRACY SHOULD BE ELIMINATED

Arguably, there are no good reasons for applying universal jurisdiction to pirates. This fact, however, may not be compelling enough to upset this system, which has been in place for hundreds of years. Unless there are considerations that counsel against the

208. Samuel E. Lojan, *The Proliferation Security Initiative: Navigating the Legal Challenges*, 14 J. TRANSNAT'L L. & POL'Y 253, 267-68 (2005). This is assuming the ship is on the high seas and outside the jurisdiction of any one state. When the ship is within the territorial waters of a state other than its flag state, different issues arise that are beyond the scope of this Note.

application of universal jurisdiction to pirates, perhaps the current system should be kept in place.

Unfortunately, there are a number of reasons to do away with universal jurisdiction. First, universal jurisdiction is a very powerful tool, which, wielded unwisely, is likely to create unduly tense international relations. More importantly, the application of universal jurisdiction, at least as applied to piracy, violates notions of due process.

A. *Potential to Cause International Tension*

Part of the problem with universal jurisdiction, regardless of its application to the pirate, the slaver, the war criminal, or the torturer, is its potential to cause international tension. The Princeton Principles recognized this danger in its introduction:

Improper exercises of criminal jurisdiction, including universal jurisdiction, may be used merely to harass political opponents, or for aims extraneous to criminal justice.²⁰⁹

The stated purpose of the Princeton Principles is to set up guidelines for the exercise of universal jurisdiction to help keep this concern in check.²¹⁰ Perhaps genocide or torture, due to the extreme heinousness of those crimes, have reasons that support the use of universal jurisdiction. But as demonstrated above, piracy no longer has good reasons to support the exercise of universal jurisdiction. By allowing piracy to remain subject to universal jurisdiction, the concern of causing international tension remains as it is possible that states will prosecute individuals for piracy for less than legitimate reasons. This fear is heightened in the area of piracy because of the ambiguous definition of piracy, which allows for much flexibility in the interpretation of who is a pirate or what constitutes piracy.²¹¹

B. *Violation of Notions of Due Process*

If pirates lose all of the privileges of the law, then allowing states to exercise universal jurisdiction over them would not seem an issue worthy of discussion.²¹² But, does it follow that by cruising piratically, the pirate loses all the rights and privileges of law as

209. PRINCETON PRINCIPLES, *supra* note 98, at 24–25.

210. *Id.* at 25.

211. The situation in Darfur may serve to undercut this argument to some extent, but the Author feels that genocide enjoys a more consistent and less varying definition than does piracy.

212. If they are not subject to the privileges of law, then it would not be offensive to hail them into any court in any state, even though that state has never had any connection with the pirate. *See supra* note 99 and accompanying text.

Blackstone suggested?²¹³ What is so special about piracy that would cause those who practice it to lose the protection of the law? If someone murders his neighbor, he violates the law of nearly every country in the world. Does the murderer lose the procedural rights and protections of the law? Absolutely not.²¹⁴ It would also be absurd to suggest that every individual in the world would have the right to go after a murderer, as Gentili would have every individual go after the pirate.²¹⁵ Further, it would hardly be proper for a nation, that had no territorial connection with the murder, murderer, or the victim, to capture the murderer, haul him into its court, subject him to its judicial process, and punish him in accordance with its laws and its penal system.

Part of the problem with the current system is the pirate is not afforded due process rights. Due process and terms related to it, such as fundamental fairness, are rather vague and not subject to a rigid definition.²¹⁶ According to Judge Wald and the D.C. Circuit Court of Appeals, “[i]t is universally agreed that adequate notice lies at the heart of due process.”²¹⁷ The idea of due process is not solely an U.S. idea. The U.S. Constitution’s Due Process Clause has its origins in the Magna Carta,²¹⁸ and the notion that all people have the right to due process has recently been recognized and codified in the international arena.²¹⁹ Notice, in all situations, seems to be the touchstone. It is notice that the pirate lacks when a country exercises universal jurisdiction over him because he cannot know in advance to whose law he will be subject.

When a person commits murder, he knows which laws will govern him. In the United States, the murderer knows that he will be

213. *See id.*

214. *See e.g.*, *Roper v. Simmons*, 543 U.S. 551, 560 (2003) (“By protecting even those convicted of heinous crimes, th[is] . . . reaffirms the duty of the government to respect the dignity of all persons.”). This point is rather self-evident. Every murderer in the United States must be given due process of law. They enjoy all the protections and privileges of the law. To list every state that also affords procedural rights to the murderer would be rather pointless.

215. GENTILI, *supra* note 115, at 204. This sounds more like vigilantism than any form of legal procedure.

216. Lowell B. Howard, Jr., Case Comment, *Cleveland Board of Education v. Loudermill: Procedural Due Process Protection for Public Employees*, 47 OHIO ST. L.J. 1115, 1120–21 (1986).

217. *Gray Panthers v. Schweiker*, 652 F.2d 146, 168 (D.C. Cir. 1980).

218. Robert Riggs, *Substantive Due Process in 1791*, 1990 WISC. L. REV. 941, 948 (1990) (“The ancestry of the due process clause is universally traced to chapter 39 of the Magna Carta.”).

219. *See* International Covenant on Civil and Political Rights arts. 9, 14–15, Mar. 23, 1976, 999 U.N.T.S. 173. Though more rigid than the U.S. Constitution’s Due Process Clause, it is an attempt to codify at the international level the notions of the Due Process Clause.

subject to the laws of the state in which he commits the murder.²²⁰ The murderer may have committed the murder in that state only because he valued the murder more than the risk of getting caught and the maximum penalty that state would impose. Suppose the state he committed the murder in would only punish him with a term of twenty years in prison. To the murderer, this was an acceptable trade off. He might not have committed the murder, however, had the state had the death penalty. The important point though is that he had the opportunity to consider the penalty before committing the murder because he knew which state would hold him accountable.²²¹

The pirate though may not have this same notice in a world in which any country can exercise jurisdiction over him using the universality principle. He cannot determine beforehand whose law will apply until some country catches him. He may choose to prey solely upon Argentinean ships because Argentina only punishes piracy with three to fifteen years imprisonment if murder is not committed during the attack.²²² He may have decided that pirating Argentinean ships was worth the risks of Argentina prosecuting him. He might have chosen not to prey upon U.S. shipping, however, because it was not worth the risk of spending life in prison. In this way, he is just like the murderer in his thinking. In theory, however, the United States, could capture the pirate, punish him under U.S. law, and sentence him to life in prison. This, despite his thinking that only Argentinean law would apply since he only plundered that country's ships.

The above illustrates why the pirate is not afforded due process when the only basis for exercising jurisdiction over him is universal jurisdiction. He has no way to determine in advance not only who will capture him but also who will punish him. To treat the murderer like the pirate would be to allow Canada to prosecute the U.S. murderer who murders a fellow citizen in North Dakota.

While universal jurisdiction denies the pirate due process, other forms of jurisdiction would not. Using the flag-state principle, the pirate knows that he is subject to the law of the ship's flag that he attacks. Using the nationality principle, he knows he is always subject to the laws of his state of citizenship. Lastly, using the passive personality principle, he knows that he is subject to whichever state may count his victims as a citizen. In all of these situations, he can

220. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district *wherein the crime shall have been committed* . . .") (emphasis added).

221. One would be reasonable in asking why the author did not use a negligent tortfeasor as the example because he does not choose to be negligent. Piracy is a crime of choice. The pirate consciously chooses to plunder a ship. This makes piracy more akin to deliberate murder than a negligent tortfeasor.

222. See *supra* note 175 and accompanying text.

determine in advance what state or states may exercise jurisdiction over him. This is unlike a situation where universal jurisdiction is used because in that situation, any state in the world could punish him under its laws. He would have no way of knowing what his possible punishment would be until after he commits piracy and a country captures him.

Another way to explain why a pirate's right to due process is violated by universal jurisdiction is to consider the minimum contacts test used in the United States to determine whether a state can exercise personal jurisdiction over a civil defendant. In *Phillips Petroleum Company v. Shutts*, Chief Justice Rehnquist stated that:

An out-of-state defendant summoned by a plaintiff is faced with the full powers of the forum State to render judgment against it. The defendant must generally hire counsel and travel to the forum to defend itself from the plaintiff's claim, or suffer a default judgment. The defendant may be forced to participate in extended and often costly discovery, and will be forced to respond in damages or to comply with some other form of remedy imposed by the court should it lose the suit. The defendant may also face liability for court costs and attorney's fees. These burdens are substantial, and the minimum contacts requirement of the Due Process Clause prevents the forum State from unfairly imposing them upon the defendant.²²³

Surely, the burdens a criminal defendant faces, loss of liberty and possibly life, are at least as great if not greater than the burdens a civil defendant faces. Thus, it seems that at a minimum, a state should not be allowed to exercise jurisdiction over a criminal defendant unless the minimum contacts test is met.²²⁴

There is no need to go into detail to determine whether the minimum contacts test is met. The court has made quite clear that the test is not met if the defendant has no contacts at all with the state seeking to exercise jurisdiction.²²⁵ A state only has to base its exercise of jurisdiction on the universality principle if it has no other contacts with the defendant on which to base jurisdiction. Put another way, when a state bases jurisdiction solely on the universality principle, that state is acknowledging that it has no contacts with the defendant. This means that universal jurisdiction does not meet the minimum contacts test and therefore, its exercise over pirates is a violation of notions of due process.

223. 472 U.S. 797, 808 (1985).

224. This is not an issue in the United States because of the Sixth Amendment, which states that only the state in which the crime is committed can try the criminal defendant. See U.S. CONST. amend. VI. This ensures that the minimum contacts test will always be met. This also explains why there is no discussion of minimum contacts in case law relating to the criminal defendant usually.

225. *Phillips Petroleum*, 472 U.S. at 806 (discussing *International Shoe*, Chief Justice Rehnquist states that "the Due Process Clause did not permit a State to make a binding judgment against a person with whom the State had no contacts . . .").

This is not to say that every exercise of universal jurisdiction is a violation of due process. Some crimes may be so heinous that they constitute exceptions to the normal notions of due process. Perhaps piracy was one such crime in the past, but as illustrated in Part III, this is no longer true. Therefore, it should not count as an exception and the pirate should be afforded due process.

Because of the potential for tension in international relations exercises of universal jurisdiction poses, and the fact that its use to punish pirates violates notions of due process, states should no longer be allowed to exercise universal jurisdiction over pirates.

This concern may sound more theoretical than practical. It is a fair question to ask how often a state exercises universal jurisdiction to prosecute pirates. Traditionally, states have rarely exercised it.²²⁶ But recently, China executed several pirates, not all of whom were Chinese.²²⁷ India also recently tried and convicted a number of pirates using universal jurisdiction.²²⁸ In early 2006, the United States detained and searched an Arab sailing vessel (or *dhow*) it captured fifty-four miles from Somalia and questioned its crew of twenty-six—ten Somali men and sixteen Indians. The IMB alleged that the *dhow* may be linked to an attack on a Bahamian flagged ship.²²⁹ At the time this is written, it is still uncertain what will happen to those who were detained. The point is that the fear is not purely theoretical and countries are actually starting to use universal jurisdiction to punish pirates. If there are no solid reasons for continuing to use universal jurisdiction, it should not be used to avoid these risks.

V. SOLUTIONS

This Note discussed the history of piracy, the reasons for originally subjecting pirates to universal jurisdiction, why those reasons no longer make sense, and why universal jurisdiction should no longer apply to pirates. There are several solutions to the currently flawed system. First, retaining the status quo is always an option. Second, and at the opposite extreme, another option would be to create a truly international piracy regulatory regime. Lastly, states could just stop subjecting pirates to universal jurisdiction and instead resort to less controversial, and less dangerous, forms of jurisdiction

226. See Rubin, *supra* note 27, at 139–40.

227. See *supra* notes 158, 189 and accompanying text.

228. WILLIAM LANGEWIESCHE, *THE OUTLAW SEA* 34–83 (2004) (describing the pirates that attacked the *Alondra Rainbow* and noting that India, which tried the pirates, had no connection whatsoever with the attack).

229. See *26 Men Held by U.S. for Possible Piracy*, KAN. CITY STAR, Jan. 23, 2006, at A8.

such as the flag-state principle, the nationality principle, or the passive personality principle.

A. *Retain the Status Quo*

Doing nothing and retaining the status quo is always an option, and this Author harbors no illusion that this is the option many people may see as the best solution. It is true that pirates are not the most sympathetic of criminals. Despite, however, causing tens of millions of dollars in losses to international shipping and several lives each year, piracy seems to pale in comparison to other international problems such as the war on terror and global warming. Admittedly, the current system is efficient. Allowing any state to capture pirates and penalize those pirates according to its laws does away with hassles over extradition or creation of international courts.²³⁰ As this Note has already pointed out though, there are problems with the current system. These problems illuminate the need for a better option than universal jurisdiction.

B. *Creation of an International Piracy Regulatory Regime*

The opposite of doing nothing would be changing the whole system. This would involve doing several things. First, a new definition of piracy will need to be developed. Second, a court with international jurisdiction over the crime of piracy must be created. Then an international navy will need to be developed to hunt down the pirates. Lastly, universal, or near universal, acceptance of this plan would need to be obtained.

As has been mentioned on more than one occasion, the countries of the world need to rework the current definition of piracy. The drafters of the new definition should consider things such as whether maritime terrorism is or is not piracy. Most importantly, an international punishment for piracy must be determined. Currently, by committing piracy, the pirate can be sentenced anywhere from three years in prison to life (and possibly to death) depending on which state captures him.²³¹ If piracy is a truly international crime, then it should have an internationally agreed upon penalty. After all, the presence of a uniform punishment was one of the hallmarks of the world's way of dealing with piracy up until a hundred years ago.

Next, the world must establish a court with jurisdiction over the crime of piracy. With the creation of the International Criminal Court

230. Extradition can be cumbersome as illustrated by the Lockerbie bombing which took from November 14, 1991, to April 5, 1999, to extradite the accused. See Marlise Simmons, *2 Libyan Suspects Handed to Court in Pan Am Bombing*, N.Y. TIMES, Apr. 6, 1999, at A1, A14.

231. See *supra* notes 169–75 and accompanying text.

(ICC), the international community has shown a willingness to cooperate in the suppression of international crime.²³² Unfortunately, not all countries who are members of the United Nations have submitted to the ICC.²³³ Additionally, the treaty giving rise to the court would need to be amended to include piracy.²³⁴ It does not seem appropriate to create an international pirate court from scratch when an already existing court will suffice.

Not only would there need to be an international court to try pirates, but also there would need to be some international way of handling the punishment of pirates. It does not seem fair to tell a country that it cannot try a pirate under its laws, but then to force it to imprison the pirate for a number of years.²³⁵ The solution is to also create an international prison in which to hold the convicted pirates.

If a country cannot try them, it will also not want to have to go out and capture the pirates. What interest does the Brazilian Navy have in catching pirates in the Malacca Straits so long as those pirates are not disturbing Brazilian shipping? There is just not enough of an incentive to want to go out and capture pirates that would justify marshalling the resources to do so effectively. Therefore, keeping with the international nature of the crime of piracy, the world should also maintain an international navy whose job is to catch pirates.

The creation of a truly international piracy regime seems to best reflect the world's feelings on piracy and the reality this Note has shown. The pirate would not be deprived of his rights to due process of law by some random country punishing him for crimes he committed against another country. He also would know in advance what his punishment would be if he was caught. And, it would be fitting to deal with one of the world's oldest international crimes in such an international way. So, why has this method not been adopted already? The world has not adopted it because it is more akin to the utopian thinking of a high school student eager to change the world, rather than a practical solution. The costs of doing this would be greater than the losses piracy inflicts. The idea of the countries of the world uniting against the pirates of the world is laudable but probably is not going to happen in the near future. Thus, this solution should not be adopted.

232. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 91.

233. Notably, the United States has not ratified the treaty establishing the ICC. See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 706, 724 (2002).

234. See Rome Statute of the International Criminal Court, *supra* note 232, art. 121.

235. A more likely reason no country would want to house the pirate would be that it simply costs money to do so.

C. Rely Solely on Other Forms of Jurisdiction

Usually, the best answer to a question rarely lies at one of the extremes. Dealing with piracy is no exception. The best solution would be to drop universal jurisdiction and instead, rely on more conventional forms of jurisdiction such as the flag-state principle, the nationality principle, and the passive personality principle.

The general rule used to be that once a ship was used for piratical purposes, it lost its nationality.²³⁶ That general rule has been modified by Art. 104 of the UNCLOS, which now allows each state to determine whether or not those ships bearing its flag will be stripped of that flag by engaging in piracy.²³⁷ If they do not strip the ship of its flag, then that state would have a basis for exercising jurisdiction over the pirates using the ship. Also, even if the pirate ship lost its flag by engaging in piracy, the victim ship would not lose its flag and so the victim ship's flag state could exercise jurisdiction over the pirates.²³⁸ Further, the nationality or passive personality principles would also allow a state to exercise jurisdiction over a pirate that had injured its interests.

As to the capturing of pirates, allowing any state to capture the pirate, as is the current practice, may be worth retaining. It is more efficient to allow any state to capture a pirate, and then, once captured, to extradite the pirate to the state that can exercise jurisdiction over him. There are obvious problems with extradition,²³⁹ but it better assures that the pirate is afforded due process of law by ensuring the proper country is prosecuting him.

Lastly, this Author would suggest that piracy be redefined. While this Author can offer no suggestions as to what that new definition should look like, this Note has pointed out a number of problems that should be reviewed. Because part of the UNCLOS will need to be changed anyway to get rid of the universal jurisdiction provision, its definition might as well be fixed.

The attractive part of this solution is that it requires little change. Dropping the use of universal jurisdiction would prevent violations of the pirate's right to due process, thereby making this

236. See *supra* notes 102–09 and accompanying text.

237. See UNCLOS, *supra* note 4, art. 104.

238. There are a couple of potential situations where there would be no state that could exercise flag-state jurisdiction. If a country believes that the current definition of piracy allows for situations where mutiny is seen as piracy and that state adopts the view that a ship engaged in piracy loses its flag, then there would be no basis for flag state jurisdiction. Other forms of jurisdiction, however, such as nationality or passive personality would still exist. See e.g., Ray August, *International Cyber-Jurisdiction: A Comparative Analysis*, 39 AM. BUS. L. J. 531, 540 n.48 (2002).

239. See Kai I. Redbane, Note, *Extradition and Individual Rights: The Need for an International Criminal Court to Safeguard Individual Rights*, 19 FORDHAM INT'L L.J. 1636, 1636–38 (1996).

solution better than the first proposal. Also, this solution does not require the creation of a new international regime as would the previous solution. Most importantly, it is a practical solution that can be easily implemented. For these reasons, this solution should be adopted and universal jurisdiction should no longer be applied to piracy.

VI. CONCLUSION

Piracy is an age old crime that has plagued the world's shipping in the past, plagues it today, and will likely plague it into the foreseeable future. It is hard to imagine that piracy could be eradicated overnight. Therefore, the problem must be dealt with in an effective manner. But in doing so, the due process rights of the pirates should not be violated in the way that universal jurisdiction allows.

If universal jurisdiction ever applied to piracy, it did so only in the past, and the reasons for applying it do not comport with modern times. To exercise universal jurisdiction over pirates today is fundamentally unfair. Professor Rubin described universal jurisdiction in the following way:

It can be concluded that "universal jurisdiction" was at best a rule of international law only for a limited period of time and under political circumstances that no longer apply; at worst it was merely a British attribution to the international legal order of substantive rules forbidding "piracy" and authorizing all nations to apply their laws against it on the high seas, based on a model of imperial Rome, and British racial and commercial ambitions that never did reflect deeper realities, as part of the rationalization of imperialism never really persuasive outside of England alone.²⁴⁰

If universal jurisdiction is not exercised over pirates, another means of bringing them to justice is required. Having considered a number of possibilities, the best solution is to rely on other forms of jurisdiction. There are forms of jurisdiction available that are less controversial and less likely to cause international tensions. Why risk damaging international relations by exercising universal jurisdiction over a pirate when other options are available? States should no longer exclaim that all people deserve the right to due process and then so clearly violate the due process rights of the pirate. States must no longer exercise universal jurisdiction over the pirate.

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240. Rubin, *supra* note 27, at 343.

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