

PIRATICAL JURISDICTION: THE PLUNDERING OF DUE PROCESS IN THE CASE OF LEI SHI

INTRODUCTION

Piracy is alive and well.

To the Western world, the thought of pirates likely conjures up images of wooden ships, bearded captains outfitted with hooks, and an entire host of other delightful stereotypes, all relegated to a forgotten time in our past. It would be erroneous, however, to assume that the world has fully eradicated the plague of piracy. In places like the South China Sea, Indonesia, and off the coast of the failed-state of Somalia, pirates continue to be a very real threat, having traded their swords and cannons for rocket-propelled grenades and automatic rifles.¹

These modern pirates are a threat to even the largest ships. For example, in November 2008, Somali pirates used speedboats, rifles, and rocket-launchers to seize a Saudi oil super-tanker, which was filled with crude oil valued at \$110 million,² off the coast of Kenya.³ They subsequently demanded a \$25 million ransom in exchange for the tanker and the safe release of its crew.⁴ Underscoring this attack is the consideration that it was not an isolated incident.⁵ In fact, between January and October 2008, in the Gulf of Aden alone, Somali pirates attacked more than sixty ships, extracted between \$18 million and \$30 million in ransoms, and stole “booty” ranging from relief supplies to Soviet-made tanks and artillery shells.⁶

¹ Hassan Barise, *Somalia—Where Pirates Roam Free*, BBC NEWS, Nov. 11, 2005, <http://news.bbc.co.uk/2/hi/africa/4424264.stm>.

² Caroline Alexander & Flavia Krause-Jackson, *Saudi Oil Tanker Owners in Negotiations with Pirates*, BLOOMBERG, Nov. 19, 2008, http://www.bloomberg.com/apps/news?pid=20601087&sid=aXa_OnogQU2A&refer=home.

³ *Somali Pirates Demand 25 Million Dollars for Saudi Oil Tanker*, AGENCE FRANCE-PRESSE, Nov. 20, 2008, <http://www.google.com/hostednews/afp/article/ALeqM5hYIbeFRKVbP14p4YrMRNDBaaII0Q>.

⁴ Alexander & Jackson, *supra* note 2.

⁵ Mohamed A. Adow, *NATO Warships Arrive to Deter Somali Pirates*, CNN, Oct. 19, 2008, <http://www.cnn.com/2008/WORLD/africa/10/19/somalia.nato.pirates/index.html>.

⁶ *Id.*

Based on the brief illustrations above, one can see that piracy is a current and prevalent issue. Consequently, as it has for centuries, international law faces the task of bringing to justice those who undertake these crimes and disrupt the peaceful seas. Because piracy threatens the trade, travel, commerce, and safety of every nation that utilizes the high seas, a near-pandemic desire developed to allow *any* nation to prosecute piracy, regardless of whether the prosecuting nation had any connection to the actual piratical crime.⁷ As William Blackstone commented:

[A pirate has] 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: for that every community hath a right, by the rule of self-defence, to inflict that punishment upon him.⁸

The issue with permitting a nation to prosecute an instance of piracy to which it has no connection, is that this offends traditional jurisdictional requirements.⁹ In most cases, a sovereign obtains jurisdiction via a nexus with the defendant, like citizenship, or through a nexus with the action itself, like the location of the crime when committed within the confines of the prosecuting state's territory.¹⁰ In contrast, piracy usually occurs on the high seas,¹¹ outside the ambit of any country's territorial reach, and may be committed by gangs of pirates whose national governments are unwilling or lack infrastructure to prosecute.¹² In sum, nations desire to prosecute piracy

⁷ See discussion *infra* Part II.

⁸ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 71 (Univ. of Chi. Press 1979) (1768).

⁹ See discussion *infra* Part II (explaining that piracy is a basis for states to exercise universal jurisdiction over the pirates).

¹⁰ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 761 (2004) (“[Jurisdictional] concerns normally do not arise (or at least are mitigated) if the conduct in question takes place in the country that provides the cause of action or if that conduct involves that country’s own national—where, say, an American assaults a foreign diplomat and the diplomat brings suit in an American court.”) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1–2) (1986)); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1–2) (1986).

¹¹ The concept of the high seas is defined as “[t]he seas or oceans beyond the jurisdiction of any country Today the distance is generally accepted to be 12 miles.” BLACK’S LAW DICTIONARY 1376 (8th ed. 2004).

¹² See *Sarei v. Rio Tinto, P.L.C.*, 550 F.3d 822, 844 (9th Cir. 2008) (Reinhardt, J., dissenting) (“[A] third-party state exercises universal jurisdiction only when the state with a traditional basis of jurisdiction is unable or unwilling to investigate and prosecute an international crime”) (citing Cedric Ryngaert, *Applying the Rome Statute’s Complementarity Principle*, 19 CRIM. L.F. 153, 175 (2008)).

universally because of its global effects on maritime safety but, at first glance, are unable to do so because of the confines of nexus-based jurisdiction.

In response to this predicament, international law began to apply a unique weapon to gain jurisdiction over pirates—universality.¹³ Universal jurisdiction is unique because unlike other recognized forms of jurisdiction, it does not require a connection between the defendant or illegal act and the prosecuting country.¹⁴ Instead, universality gives subject-matter jurisdiction over certain crimes to any nation that finds the defendant in its borders.¹⁵ No connection between the prosecuting nation and the criminal act is required.¹⁶

Universal jurisdiction only has two basic requirements. However, few crimes meet these preconditions because both mandate an international consensus. The first requirement is the existence of a “substantive agreement as to certain universally condemned behavior.”¹⁷ The second requirement is there must be a “procedural agreement that universal jurisdiction exists to

[P]iracy is a useful basis for understanding the exercise of universal jurisdiction over war crimes because both pirates and war criminals take advantage of the absence of legitimate criminal justice systems that can or will prosecute and punish their actions. The assertion of universal jurisdiction over war criminals is usually tied to the unlikelihood of prosecution by the states where the crime occurred, “either because the perpetrators remain in power or influence, or . . . because a post-genocide social and political modus vivendi is built upon forgetting the crimes of the past.” As the power controlling the territory will not prosecute, other states must exercise universal jurisdiction in order to bring the perpetrators to justice.

Anthony Sammons, *The “Under-Theorization” of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts*, 21 BERKELEY J. INT’L L. 111, 126–27 (2003) (footnotes omitted).

¹³ Although curbing piracy had been important to all seafaring societies since the time of ancient Greece, it was during the eighteenth century when a clear notion of universal jurisdiction began to arise. See G. Edward White, *A Customary International Law of Torts*, 41 VAL. U. L. REV. 755, 767 (2006). The movement towards giving all nations the ability to prosecute pirates stemmed from “the fact that a very large portion of international commerce in the eighteenth century took place on ships in the high seas” and “the fact that, as compared with land, the ocean was boundless and far more difficult to police.” *Id.* Thus, because “pirates were the equivalent of twenty-first century terrorists,” jurists began to advocate for the use of universality. *Id.* at 767–68.

¹⁴ See discussion *infra* Part II.

¹⁵ *United States v. Shi*, 525 F.3d 709, 722 (9th Cir. 2008) (citing STEPHEN MACEDO, UNIVERSAL JURISDICTION 2–12 (2004)) (“Universal jurisdiction is based on the premise that offenses against all states may be punished by any state where the offender is found.”), *cert. denied*, 129 S. Ct. 324 (2008).

¹⁶ *Id.* at 722–23 (“[I]t allows a state to claim jurisdiction over such an offender even if the offender’s acts occurred outside its boundaries and even if the offender has no connection to the state.”).

¹⁷ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (2004) (Breyer, J., concurring) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 404, 404 cmt. a (1986); INT’L LAW ASS’N, FINAL REPORT ON THE EXERCISE OF UNIVERSAL JURISDICTION IN RESPECT OF GROSS HUMAN RIGHTS OFFENSES 2 (2000)).

prosecute a subset of that behavior.”¹⁸ Stemming from these requirements is a third implicit condition—that this subset of condemned behavior be precisely defined.¹⁹ Without a precise definition of the triggering crime, universal jurisdiction could be prone to abuse.

For example, courts could simply apply the label of a crime that gives universal jurisdiction to prosecute a defendant, even if the substance of that defendant’s actions should not confer universality.²⁰ In this case then, any court could easily avoid the requirements of nexus-based forms of jurisdiction. Accordingly, a precise definition is essential to cabin a court’s ability to extend universality beyond its internationally accepted boundaries. Sadly, this type of abuse of universality is not rare; in fact, the Ninth Circuit Court of Appeals recently committed such a misdeed in the case of *United States v. Shi*.²¹ Here, the court stretched the conventional definition of piracy under international law beyond its limits to obtain universal jurisdiction so that it could justify prosecuting a case which it otherwise could not have adjudicated.²²

In light of this offense, this Comment aims to enumerate the *Shi* court’s errors to both ensure fair treatment of future defendants and, more importantly, to illustrate the serious ramifications on international law and citizen well-being that can stem from a court applying universality without care. Because the doctrine accords such extreme adjudicatory power, all courts must take the utmost care in applying it. Otherwise, as will be articulated in the Conclusion, an attempt to stretch piracy, and thus universality, beyond its breaking point will produce ramifications far beyond the hull of a single ship.

To accomplish these ends, this Comment will: (1) introduce the case of *United States v. Shi*; (2) outline the basis of universal jurisdiction and piracy; (3) determine whether Lei Shi’s actions fit under the law of nations’ definition of piracy;²³ and finally, (4) conclude with an evaluation of the possible effects

¹⁸ *Id.*

¹⁹ *See id.* at 725 (“[C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity . . .”).

²⁰ *See generally Shi*, 525 F.3d at 709.

²¹ *Id.*

²² *See* Eugene Kontorovich, *The “Define and Punish” Clause and the Limits of Universal Jurisdiction*, 103 Nw. U. L. REV. 149, 154 n.22 (2009).

²³ It is important to note that the goal of this inquiry is *not* to formulate a comprehensive definition of piracy itself. Although this would be a productive inquiry, it far exceeds the investigation needed to evaluate the *Shi* court’s ruling. Instead, the goal is to evaluate different definitions of piracy under international law to determine whether any of these definitions match Lei Shi’s conduct.

and ramifications of *Shi* on the doctrine of universality, general jurisdiction, and international law.

I. THE CASE OF *UNITED STATES V. SHI*

Before evaluating the merits of the Ninth Circuit's decision or drawing any conclusions about the scope of universal jurisdiction in relation to piracy, it is first necessary to understand the facts of *United States v. Shi*. The details of this case are important because they are used as a reference point throughout this Comment for comparing forms of piracy that confer universal jurisdiction with those that do not.

Lei Shi, the defendant in *Shi*, was a cook aboard the *Full Means No. 2*, a Taiwanese commercial fishing liner registered in the Republic of the Seychelles.²⁴ Apparently, Shi's employment environment was less than ideal. According to Shi, he had drawn the ire of the captain and first mate, who subjected Shi to repeated harassment, physical abuse, and eventual demotion to deckhand.²⁵ On March 14, 2002, Shi's patience reached a breaking point after receiving an exceptionally savage beating.²⁶ Shi responded with violence—he retrieved a kitchen knife from the ship's pantry and stabbed his two tormentors, killing the captain and the first mate.²⁷ Shi then ordered the crew to throw the captain's body overboard and took control of the ship in an attempt to return home to China.²⁸ He forbade anyone to use the radio and “threaten[ed] to scuttle the vessel if his instructions were not obeyed.”²⁹

Shi subsequently controlled the ship for two days until the crew overpowered him and locked him in a storage compartment.³⁰ Unaware of how to use the ship's radio, the crew set a course for Hawai'i.³¹ The U.S. Coast Guard, who had been alerted by the *Full Means's* parent company that the ship had been out of radio contact, intercepted the vessel approximately

²⁴ *Shi*, 525 F.3d at 718.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

sixty miles from Hilo, Hawai‘i.³² The crew permitted Coast Guard officials to board the *Full Means* to detain, arrest, and later incarcerate Shi.³³

Shi was charged with one count of forcefully seizing control of a ship under 18 U.S.C. § 2280(a)(1)(A)³⁴ and two counts of committing an act of violence likely to endanger the safety of the ship in violation of § 2280(a)(1)(B).³⁵ Further, Shi faced life in prison because his violation of § 2280 resulted in the deaths of the captain and the first mate.³⁶ At trial, the jury convicted Shi on all counts and sentenced him to thirty-six years of incarceration.³⁷ The defense appealed to the Ninth Circuit under several theories, including the assertion that the United States did not have proper jurisdiction over the case.³⁸

The Ninth Circuit issued an opinion affirming the conviction³⁹ and the trial court’s jurisdiction over Shi.⁴⁰ It justified its reasoning on both statutory and constitutional grounds. First, the court found jurisdiction over Shi based on § 2280(b)(1)(C), which gives a court jurisdiction over an offender that “is later found in the United States after such an activity is committed.”⁴¹ The court affirmed that this provision is satisfied “even when a foreign national is forcibly abducted in another country by United States officials for the sole purpose of being brought to trial here.”⁴² Accordingly, because Coast Guard officials “found” Shi in Hawai‘i, albeit against his will, § 2280 was satisfied.⁴³

Though the statute was satisfied, for jurisdiction to have been proper the case still had to meet the constitutional requirements of due process.⁴⁴ “[D]ue process requires ‘a sufficient nexus between the defendant and the United

³² *Id.*

³³ *Id.* at 718–19.

³⁴ *Id.* at 720; 18 U.S.C. § 2280(a)(1)(A) (2006) (stating that offenses include “[a] person who unlawfully and intentionally . . . seizes or exercises control over a ship by force or threat thereof or any other form of intimidation”).

³⁵ *Shi*, 525 F.3d at 720; 18 U.S.C. § 2280(a)(1)(B) (2006) (stating that offenses include “[a] person who unlawfully and intentionally performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship”).

³⁶ *Shi*, 525 F.3d at 720.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 733.

⁴⁰ *Id.* at 725.

⁴¹ *Id.* at 725; 18 U.S.C. § 2280(b)(1)(C) (2006).

⁴² *Shi*, 525 F.3d at 724 n.6 (citing *United States v. Alvarez-Machain*, 504 U.S. 655, 661–62 (1992)).

⁴³ *Id.* at 725.

⁴⁴ *Id.* at 722.

States, so that such application would not be arbitrary or fundamentally unfair.”⁴⁵ Further, the court reasoned, “[a] nexus requirement, imposed as a matter of due process, makes sense when the ‘rough guide’ of international law also requires a nexus.”⁴⁶ To be sure, a jurisdictional nexus between the defendant and the prosecuting nation is essential for two reasons: (1) to give the defendant notice of possible prosecution by the U.S. government⁴⁷ and (2) to guard against a nation adjudicating a case—thus passing judgment on a foreign national or an action by a foreign sovereign—to which it has no connection.⁴⁸

The necessities of due process forced a legal ultimatum upon the court: either dismiss the case or find a nexus. Because Shi’s actions were committed on the high seas outside the territorial jurisdiction of any state, onboard a Taiwanese ship with a completely mainland-Chinese crew and a Taiwanese captain, and were not directed against the United States,⁴⁹ there was no connection or sufficient nexus with the United States that would confer jurisdiction in the traditional sense. The court mulled that such a nexus could “be established, for example, if the foreign defendant’s extraterritorial conduct [was] purposefully aimed at the United States.”⁵⁰

Faced with the prospect of dismissal, the court outlined two alternative bases of jurisdiction, which would independently satisfy the due process requirement. The first possibility was founded on the idea that because § 2280 codified an international treaty, the Maritime Safety Convention, all foreigners were already on notice of its requirements; therefore, a nexus would not be necessary to prosecute a defendant found in violation of § 2280.⁵¹ This justification was rejected, however, for two reasons. First, the court reiterated

⁴⁵ *Id.* (quoting *United States v. Davis*, 905 F.2d 245, 248–49 (9th Cir. 1990)).

⁴⁶ *Id.* (quoting *United States v. Caicedo*, 47 F.3d 370, 372 (9th Cir. 1995)).

⁴⁷ *Id.* “The Due Process Clause requires that a defendant prosecuted in the United States ‘should reasonably anticipate being haled into court in this country.’” *Id.* (quoting *United States v. Moreno-Morillo*, 334 F.3d 819, 827 (9th Cir. 2003)). This notion of due process has also been codified in international law. *See* International Covenant on Civil and Political Rights arts. 9, 14–15, Mar. 23, 1976, 999 U.N.T.S. 171 (describing international due process requirements for arrest, detention, trial proceedings, and conviction).

⁴⁸ *See Shi*, 525 F.3d at 722. “[W]e held in *Davis* that due process requires a foreign defendant apprehended on a foreign flag ship to have some connection to the United States before he can be prosecuted in a domestic court.” *Id.* (citing *United States v. Davis*, 905 F.2d 245, 248–49 (9th Cir. 1990)).

⁴⁹ *Id.* at 718.

⁵⁰ *Id.* at 722 n.4.

⁵¹ *Id.* at 721. The Maritime Safety Convention is the common name of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221 [hereinafter *Maritime Safety Convention*].

a basic principle of international law that “treaties create obligations only in States party to them”⁵²—unless the treaty obligation is also a custom of international law.⁵³ Apparently, conceding that the details of the Maritime Safety Convention were not international custom and recognizing that China, the country of Shi’s nationality, was not a party to the Convention,⁵⁴ the court ruled the United States could not claim that Shi was on notice via the Convention.⁵⁵ Second, the court acknowledged that the Convention did not create universal jurisdiction.⁵⁶ Consequently, this first rationale still lacked a nexus sufficient to satisfy due process.⁵⁷

Undeterred, the court instead premised its power to prosecute Shi on a second, more radical basis—the application of universal jurisdiction.⁵⁸ By branding Shi’s actions under § 2280(a)(1)(A) and § 2280(a)(1)(B) as piratical,⁵⁹ the court was able to accord itself jurisdiction through universality.⁶⁰ To clarify, because piracy, as defined by the law of nations, “was the original rationale for creating universal jurisdiction” and “federal courts have historically accepted the notion that a pirate may be tried by any state,” the court needed no further proof of any “nexus.”⁶¹ This is because “the universal condemnation of the [pirate’s] conduct puts him on notice that his acts will be prosecuted by any state where he is found.”⁶² Thus, the lynchpin allowing the court to proceed was defining Shi’s actions as piracy under the

⁵² *Id.* at 723 n.5.

⁵³ *See* *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266, 276–78 (Nov. 20).

⁵⁴ United Nations Treaty Collection, Status of Treaties Database, Entry for the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, <http://treaties.un.org/Pages/showDetails.aspx?objid=08000002800b9bd7> (illustrating that China joined the Convention in 1992, after the *Shi* case was decided).

⁵⁵ *Shi*, 525 F.3d at 723 n.5.

⁵⁶ *Id.* “[I]t is incorrect to speak of these treaties as creating ‘universal jurisdiction,’ or even ‘treaty-based universal jurisdiction,’ because the treaties create obligations only in States party to them, not universally in all states.” *United States v. Yousef*, 327 F.3d 56, 95 n.29 (2003), *quoted in* *United States v. Shi*, 525 F.3d 709, 723 n.5 (9th Cir. 2008).

⁵⁷ *Shi*, 525 F.3d at 723 n.5.

⁵⁸ *Id.* at 722.

⁵⁹ *Id.* at 723.

⁶⁰ *Id.* at 724.

⁶¹ *Id.* at 723; *see* *United States v. Klintonck*, 18 U.S. (5 Wheat.) 144, 152 (1820) (“[Individuals] acting in defiance of all law, and acknowledging obedience to no government whatever . . . are proper objects for the penal code of all nations . . .”); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 34 cmt. a (1965) (citing piracy as a crime subject to universal jurisdiction); PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 45 (Stephen Macedo ed., 2001) (stating that piracy is “crucial to the origins of universal jurisdiction”).

⁶² *Shi*, 525 F.3d at 723.

law of nations.⁶³ If Shi's actions were not piratical, as defined by international law, then due process would have forced the court to dismiss the case.⁶⁴

A. *Analytical Method*

The key to determining whether the court was justified in issuing its ruling rests on whether the components of Shi's actions did indeed fall within the scope of piracy under the law of nations. To conduct this analysis it is necessary to first identify the components of Shi's substantive actions that gave rise to the criminal proceeding and the context in which they took place. Second, the general bounds of the limited definition of piracy that confers universal jurisdiction under international law must be articulated. Finally, it must be determined whether the components of Shi's actions, outlined below, fit the criteria of piracy under the law of nations. This three-part analysis will show that the court improperly labeled Shi a pirate and erroneously assumed jurisdiction. The first part is conducted in the following paragraph and the second and third parts, which respectively define piracy and apply Shi's actions to this definition, are undertaken throughout Parts III and IV.

Proceeding to the first part of the analysis, Shi's substantive actions can be summarized as (1) the murder of a captain and first mate and (2) taking control of a ship against the will of the owner and crew for a period of two days.⁶⁵ The context in which these actions were executed, however, are more detailed. They include that Shi's actions were committed:

- (1) by a mainland-Chinese citizen;⁶⁶
- (2) against a captain, a Taiwanese citizen, and a first mate, a mainland-Chinese citizen;⁶⁷
- (3) on a Taiwanese-owned and operated vessel;⁶⁸
- (4) on the high seas outside any nation's jurisdiction;⁶⁹
- (5) without any American citizens onboard the ship at the time of the crime;⁷⁰

⁶³ *See id.*

⁶⁴ *See id.*

⁶⁵ *Id.* at 718.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

- (6) without any activity directed against the United States or any other nation.⁷¹

These substantive and contextual facts yield two important conclusions. The first has already been alluded to—that none of Shi’s actions were committed in or against the United States or one of its instrumentalities.⁷² Instead, they took place on a Taiwanese vessel with a Chinese and Taiwanese crew, on the high seas.⁷³ Thus, without universal jurisdiction, only China or Taiwan could prosecute Shi.⁷⁴ Second, the only actions that could be used as the basis for labeling Shi’s actions as piratical are the murder of a captain by a crewmember, the takeover of a ship by a single crewmember for two days with the intent of returning to homeport, or both.⁷⁵

These two key conclusions from the facts of *Shi* are subsequently applied in Parts III and IV to determine whether the Ninth Circuit properly characterized Shi’s actions as piratical, which would thus confer universal jurisdiction. Still, before determining whether Shi’s actions granted universality, it is first necessary to investigate the parameters and details of universal jurisdiction itself.

II. OVERVIEW OF UNIVERSAL JURISDICTION AND ITS APPLICATION TO PIRACY

As discussed previously, a court must have an accepted basis of jurisdiction to prosecute a defendant. “International law recognizes five other principles of jurisdiction by which a state may reach conduct *outside* its territory: (1) the objective territorial principle; (2) the protective principle; (3) the nationality principle; (4) the passive personality principle; and (5) the universality principle.”⁷⁶ Although Congress can authorize jurisdiction over crimes that do not fit within these five principles,⁷⁷

⁷⁰ *Id.*

⁷¹ *See id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *See id.* at 722–23.

⁷⁵ *See id.* at 718.

⁷⁶ *United States v. Bin Laden*, 92 F. Supp. 2d 189, 195 (S.D.N.Y. 2000); *see also United States v. Best*, 172 F. Supp. 2d 656, 660 (D.V.I. 2001), *rev’d on other grounds*, 304 F.3d 308 (D.V.I. 2002). The following list outlines the five principles of jurisdiction in international law:

- (1) Objective Territorial Principle: “provides that a state has jurisdiction to prescribe law with respect to ‘conduct outside its territory that has or is intended to have substantial effect within its territory.’”

in determining whether a statute applies extraterritorially, [courts] presume that Congress does not intend to violate principles of international law In the absence of an explicit Congressional directive, courts do not give extraterritorial effect to any statute that violates principles of international law Hence, courts that find that a given statute applies extraterritorially typically pause to note that this finding is consistent with one or more of the five principles of extraterritorial jurisdiction under international law.⁷⁸

In other words, one of the five principles must be present for a court to hear a case unless the legislature explicitly states otherwise.⁷⁹

Of these five principles, universality is the only form that does not require a nexus between the defendant and the prosecuting country.⁸⁰ For example, the court in *Shi* described universal jurisdiction based on the premise that “offenses against all states may be punished by any state where the offender is found. Accordingly, it allows a state to claim jurisdiction over such an

Bin Laden, 92 F. Supp. 2d at 195–96 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987)).

- (2) Protective Principle: “provides that a state has jurisdiction to prescribe law with respect to ‘certain conduct outside its territory by *persons not its nationals* that is directed against *the security of the state* or against a limited class of other state interests.” *Id.* at 196 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(3) (1987)).
- (3) Nationality Principle: “provides that a state has jurisdiction to prescribe law with respect to ‘the activities, interests, status, or relations of its nationals outside as well as within its territory.’” *Id.* (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1987)).
- (4) Passive Personality Principle: “provides that ‘a state may apply law—particularly criminal law—to an act committed outside its territory by a person not its national where the victim of the act was its national.’” *Id.* (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. g (1987)).
- (5) Universality Principle: “provides that, ‘[a] state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps *certain acts of terrorism*,’ regardless of the locus of their occurrence.” *Id.* (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987)).

⁷⁷ See *Bin Laden*, 92 F. Supp. 2d at 196. “Because Congress has the power to override international law if it so chooses . . . none of these five principles places ultimate limits on Congress’s power to reach extraterritorial conduct.” *Id.*

⁷⁸ *Id.* at 196 (quoting *United States v. Vasquez-Velasco*, 15 F.3d 833, 839 (9th Cir. 1994)).

⁷⁹ See *id.*

⁸⁰ See *id.* at 195–96; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. a (1987). “[I]nternational law permits any state to apply its laws to punish certain offenses although the state has no links of territory with the offense, or of nationality with the offender (or even the victim).” *Id.*

offender even if the offender's acts occurred outside its boundaries and even if the offender has no connection to the state."⁸¹

Generally, courts and commentators have justified applying universal jurisdiction in cases in which a defendant is stateless,⁸² his actions make him an enemy of all humankind (*hostis humani generis*),⁸³ or the conduct at issue is "so heinous as to be universally condemned by all civilized nations."⁸⁴ Furtherance of national self-defense has also been cited as a justification.⁸⁵ Stemming from this, there has been a recent movement by some courts and commentators to rationalize the use of universality on grounds of terrorism.⁸⁶ For example, the terrorist action on the vessel *Achille Lauro* was a catalyst for the Maritime Safety Convention which eventually yielded 18 U.S.C. § 2280, the statute at issue in *Shi*.⁸⁷

Furthermore, piracy meets these justifications of universality. In fact, piracy is often described as "the original rationale for creating universal jurisdiction."⁸⁸ Because pirates "attack the rights of all mankind, and menace with destruction the lives and property of all who resist their unlawful acts,"⁸⁹ it is well established that, "[o]n the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship."⁹⁰ Subsequently, "the courts of the State which carried out the seizure may decide upon the

⁸¹ United States v. Shi, 525 F.3d 709, 722–23 (9th Cir. 2008).

⁸² United States v. Caicedo, 47 F.3d 370, 372 (9th Cir. 1995) ("By attempting to shrug the yoke of any nation's authority, they subject themselves to the jurisdiction of all nations 'solely as a consequence of the vessel's status as stateless.'").

⁸³ See United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 232 (1844); *The Ambrose Light*, 25 F. 408, 422–23 (S.D.N.Y. 1885); BLACKSTONE, *supra* note 8, at 71.

⁸⁴ United States v. Yousef, 327 F.3d 56, 91 n.24 (2d Cir. 2003).

⁸⁵ See *Bin Laden*, 92 F. Supp. 2d at 196; United States v. Yunis, 924 F.2d 1086, 1092 (D.C. Cir. 1991), *aff'g* 681 F. Supp. 896 (D.D.C. 1988).

⁸⁶ See *Bin Laden*, 92 F. Supp. 2d at 196; *Yunis*, 924 F.2d at 1092.

⁸⁷ Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L L. 269, 291 (1988); see also United States v. Shi, 525 F.3d 709, 720 (9th Cir. 2008).

⁸⁸ *Shi*, 525 F.3d at 723; see, e.g., Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 803 (1988) (citing piracy as the "archetypal universal crime").

⁸⁹ *The Ambrose Light*, 25 F. 408, 413 (S.D.N.Y. 1885).

⁹⁰ United Nations Convention on the Law of the Sea art. 105, Dec. 10, 1982, 1833 U.N.T.S. 33 [hereinafter UNCLOS]; see also Geneva Convention on the High Seas 1958 art. 19, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 [hereinafter The Geneva Convention]. See generally United States v. Klintock, 18 U.S. (5 Wheat.) 144, 152 (1820) (illustrating that the U.S. Supreme Court permits punishment of piracy committed by citizens originating from countries other than the United States).

penalties to be imposed.”⁹¹ Some authorities have seen universal jurisdiction as necessary when dealing with pirates because it is the only “other remedy except open war.”⁹²

It is important to note, however, that the only type of piracy subject to universal jurisdiction is piracy that meets the universally accepted definition of the term under the law of nations.⁹³ This term is a narrow subset of the broader term of piracy in general. Because universality requires that there be consensual agreement on the terms that confer it,⁹⁴ logically, only the commonly agreed upon parts of definitions of piracy confer universal jurisdiction. Any conflicting criteria of what constitutes piracy, thus, cannot confer universality. Further, because courts have “no congressional mandate to seek out and define new and debatable violations of the law of nations,”⁹⁵ a court cannot justify deviating from the strict consensual definition agreed upon by international law.

Here, in applying these conclusions to *Shi*, international law required the Ninth Circuit to fit *Shi*’s actions within the narrow definition of piracy accepted by the rest of the world before obtaining universal jurisdiction. Any other definition of piracy that the court creatively fashioned would be but an empty label. Only the international consensus definition of piracy could confer universal jurisdiction.⁹⁶

With this in mind, it is necessary to determine the parameters of this universally agreed upon definition of piracy.

⁹¹ UNCLOS, *supra* note 90, art. 105; *see also* The Geneva Convention, *supra* note 90, art. 19. *See generally* *Klintock*, 18 U.S. (5 Wheat.) at 152.

⁹² *The Ambrose Light*, 25 F. at 413.

⁹³ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732–33 (2004); *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 737 (9th Cir. 2008). The Supreme Court in *Sosa v. Alvarez-Machain*

made clear that any claim based on the law of nations must “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms” of piracy, infringement on the rights of ambassadors, and violation of safe conducts.

Id.

⁹⁴ *See* discussion *supra* Introduction.

⁹⁵ *Sosa*, 542 U.S. at 695, 728.

⁹⁶ *Id.* at 732, 762; *Abagninin*, 545 F.3d at 737.

III. WHAT IS PIRACY UNDER THE LAW OF NATIONS?

Two possible “types” of piracy definitions exist. The first type includes the *varying* definitions of piracy under municipal law as outlined by domestic statutes, which are unable to confer universal jurisdiction.⁹⁷ These are the “broad” definitions of piracy. The second type is *the* definition of piracy under the law of nations. This is the “narrow” definition of piracy. Here, 18 U.S.C. § 1651 defines piracy under U.S. law according to the “law of nations.”⁹⁸ Thus, only the internationally accepted definition matters to our inquiry because U.S. law recognizes this narrow definition, and only this narrow definition confers universal jurisdiction.⁹⁹

Unfortunately, two significant issues stand in the way of clearly defining piracy under international law. First, few cases on piracy, especially modern ones, exist.¹⁰⁰ Second, “international law was not crystallized in the 17th century, but is a living and expanding code.”¹⁰¹ Thus, “[o]ffences, too, against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognised by the common consent of nations.”¹⁰² These two issues ensure that a simple reference to a commentary or seminal case will not yield an accurate description of what piracy entails under the law of nations.

Hence, to discern whether Shi’s actions fit within international law’s narrow definition of piracy, this Comment will undertake a comprehensive inquiry into how multilateral international accords, commentators on the subject, and U.S. law (all foundations of international law applicable in U.S. courts) define the term.¹⁰³ Then, after each source’s view is articulated, Shi’s actions will be analyzed to determine whether they meet the necessary criteria to be deemed piratical.

⁹⁷ See *Sosa*, 542 U.S. at 732, 762; *Abagninin*, 545 F.3d at 737.

⁹⁸ See 18 U.S.C. § 1651 (2006).

⁹⁹ See *The Ambrose Light*, 25 F. at 416; *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 70 (Sept. 7) (Moore, J., dissenting).

¹⁰⁰ See discussion *infra* Part III.C; see also George Smith, *From Cutlass to Cat-o-Nine Tails: The Case for International Jurisdiction of Mutiny on the High Seas*, 10 MICH. J. INT’L L. 277, 290 (1989).

¹⁰¹ *In re Piracy Jure Gentium*, [1934] A. C. 586, 592 (P.C.) (special reference).

¹⁰² *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 159 (1820).

¹⁰³ *Smith*, 18 U.S. (5 Wheat.) at 160–61 (stating to determine piracy, as defined by the law of nations, look to “jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions”).

A. *Multilateral International Accords*

The first source, multilateral international accords, is likely the most pertinent in determining the parameters of piracy. This is because large groups of nations have already debated and agreed upon the statements and principles contained within these conventions.¹⁰⁴ Thus, having already received limited international consensus, these treaties should be the most important source in determining whether Shi's actions constitute piracy under international law.¹⁰⁵ Three main international accords have shed light on the definition of piracy under the law of nations: the Geneva Convention on the High Seas ("Geneva Convention"),¹⁰⁶ the U.N. Convention on the Law of the Sea ("UNCLOS"),¹⁰⁷ and the Maritime Safety Convention.¹⁰⁸

1. *The Geneva Convention*

The Geneva Convention entered into force on September 30, 1962.¹⁰⁹ The self-described purpose of the Geneva Convention was "to codify the rules of international law relating to the high seas."¹¹⁰ Because all signatories "adopted the . . . provisions as generally declaratory of established principles of international law,"¹¹¹ the signatories to the Geneva Convention likely intended the definition of piracy contained therein to also be an established principle of international law.¹¹² Considering sixty-three nations are currently parties to the Convention, a large portion of the world's coastal nations support this definition.¹¹³

The United States was one of the Geneva Convention's original signatories¹¹⁴ and subscribed to the Geneva Convention's section concerning

¹⁰⁴ See generally MARK W. JANIS & JOHN E. NOYES, INTERNATIONAL LAW: CASES AND COMMENTARY 29 (3d ed. 2006) (noting that treaties are a primary source of international law); Harlan Grant Cohen, *Finding International Law: Rethinking the Doctrine of Sources*, 93 IOWA L. REV. 65, 76, 78 (2007). "Treaties also carry a perceived legitimacy that comes from being negotiated." *Id.* at 76. "Treaties, having been negotiated, written, signed, and ratified, present the strongest evidence of consent." *Id.* at 78.

¹⁰⁵ See generally JANIS & NOYES, *supra* note 104; Cohen, *supra* note 104.

¹⁰⁶ The Geneva Convention, *supra* note 90.

¹⁰⁷ UNCLOS, *supra* note 90.

¹⁰⁸ Maritime Safety Convention, *supra* note 51.

¹⁰⁹ U.N. Treaty Collection: Status of the 1958 Convention on the High Seas 1, available at <http://treaties.un.org/doc/Publication/MTDSG/Volume II/Chapter XXI/XXI-2.en.pdf> (last visited Feb. 12, 2009).

¹¹⁰ The Geneva Convention, *supra* note 90, pmb1.

¹¹¹ *Id.*

¹¹² See *id.*

¹¹³ See U.N. Treaty Collection: Status of the 1958 Convention on the High Seas, *supra* note 109.

¹¹⁴ See *id.* at 2. An October 27, 1967, transmission of the U.S. government stated,

piracy without reservation. For that reason, not only is the Geneva Convention a significant source of international law, but because “all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound,” the Geneva Convention also is a binding source of law for the United States and the Ninth Circuit.¹¹⁵

The pertinent section of the Geneva Convention that outlines the definition of piracy is Article 15, which is based on draft articles prepared by the International Law Commission (“ILC”).¹¹⁶ Article 15 defines piracy as:

- (1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.¹¹⁷

This definition does not appear to apply to Shi’s actions since it requires an act by a crew of one ship directed “against another ship.”¹¹⁸ In other words, this definition appears to necessitate an interaction of two ships. Thus, a crime completely insulated onboard one ship, like Shi’s act of murder and commandeering of the *Full Means*, would seemingly not meet the Geneva Convention’s definition of piracy under international law.

The *travaux préparatoires* found in the ILC draft articles for the U.N. Conference on the Law of the Sea (“Conference”), where the Geneva Convention’s articles were discussed, affirms the conclusion that the Geneva Convention’s definition of piracy requires two ships. First, the comments from the ILC’s draft articles (the *travaux* of which is discussed in detail in Part

The Government of the United States wishes to state that it has considered and will continue to consider all the Geneva Law of the Sea Conventions of 1958 as being in force between it and all other States that have ratified or acceded thereto, including States that have ratified or acceded with reservations unacceptable to the United States.

Id. at 7 n.9.

¹¹⁵ U.S. CONST. art. VI, cl. 2.

¹¹⁶ See discussion *infra* Part III.B.3.

¹¹⁷ The Geneva Convention, *supra* note 90, art. 15.

¹¹⁸ *Id.*

III.B.3), which served as a guide and model for the Geneva Convention, explained that “acts of piracy were necessarily acts committed by one ship against another ship—which ruled out acts committed on board a single vessel.”¹¹⁹ Accordingly, the U.N. delegates of the Geneva Convention discussing Article 15 likely understood it as requiring two ships.¹²⁰

Second, at the Conference, China proposed to amend Article 15 to include mutinous conduct in the definition of piracy, which would have thus removed the necessity of two ships.¹²¹ China promptly withdrew this revision, however, without comment from its delegation or any other nation.¹²² This lack of objection or discussion to China’s suggestion enforces the delegates’ implicit acceptance of the two-ship requirement.¹²³ Apparently, even though Article 15 may have “failed to enumerate all the categories of acts which in theory and practice were encompassed by th[e] concept” of piracy, delegates still accepted the ILC’s interpretation and wording.¹²⁴

Even though this two-ship requirement appears to be the generally accepted understanding of the Geneva Convention, some commentators have vehemently argued that Article 15(1)(b) does not require a second ship.¹²⁵ Although this is against the evidence in the *travaux*, one could argue that this is still a plausible interpretation since Article 15(1)(b) omits a term like “another”

¹¹⁹ *Summary Records of the 290th Meeting*, [1955] 1 Y.B. Int’l L. Comm’n. 40, U.N. Doc. A/CN.4/SER.A/1955.

¹²⁰ *See id.*

¹²¹ China: Proposal, U.N. Conference on the Law of the Sea, 2d Comm., Annex at 128, U.N. Doc. A/CONF.13/C.2/L.45 (Mar. 21, 1958) [hereinafter China: Proposal]. China’s proposal on Article 39, Paragraph 1 was to “add a third sub-paragraph, reading as follows: ‘On the high seas, against the persons of property on board the ship if, for these ends, the person or persons committing such act take over the navigation or command of the ship.’” *Id.*

¹²² U.N. Conference on the Law of the Sea, 2d Comm., 29th mtg. at 84, U.N. Doc. A/CONF.13/40 (Apr. 10, 1958) [hereinafter U.N. Conference on the Law of the Sea, 29th Meeting].

¹²³ On the other hand, one could argue to the contrary that the general view of international law was that acts onboard one ship were considered piracy and, thus, China withdrew its amendment because it would have been superfluous. However, this would be a highly unlikely conclusion because the status quo definition, or general understanding of piracy at the time of the Geneva Convention on the High Seas, included two ships. Evidence for this comes from the articles and explanations on which the framers based the Geneva Convention. *See infra* Part III.B.3. These foundational materials explicitly stated that actions confined to a single ship could not be piracy. *Id.* Thus, it is more likely that China proposed to *amend* the convention to include acts on one ship and upon not receiving any support for this contrary view (not one delegation even commented on the Chinese proposal), China quickly withdrew their proposal without discussion. *See generally* United Nations Conference on the Law of the Sea, 29th Meeting, *supra* note 122.

¹²⁴ U.N. Conference on the Law of the Sea, 2d Comm., 27th mtg. at 78, U.N. Doc. A/CONF.13/40 (Apr. 9, 1958).

¹²⁵ *See* Smith, *supra* note 100, at 295.

before the clause “ship, aircraft, persons or property,” which could imply that Article 15(1)(b) encompasses actions against the same “ship, aircraft, persons or property.”

Lending *some* support to this conclusion is the Scottish case *Cameron v. HM Advocate*.¹²⁶ Here, a crew was convicted of piracy based on its mutinous actions aboard a single ship.¹²⁷ These actions included overthrowing the captain, putting him onshore, running away with the ship, and attempting to ram another vessel.¹²⁸ The defense appealed this conviction by arguing that the Geneva Convention’s definition of piracy as an articulation of international law, which did not include acts of mutiny, superseded the definition of piracy under Scottish municipal law.¹²⁹ The court did not mention whether the Geneva Convention included a two-ship requirement.¹³⁰ Instead, the court responded that the Convention did not supersede prior Scottish common law, which held mutiny to be a piratical action, but only supplemented municipal jurisdiction.¹³¹

However, *Cameron’s* assertion that mutiny was piracy under common law does not weaken the conclusion that Article 15 requires two ships. To explain, the court articulated that it was not issuing an opinion on the Geneva Convention, or thus, any possible two-ship requirement.¹³² Thus, *Cameron* has no bearing on whether the Geneva Convention includes mutiny because it only addresses whether piracy includes mutiny under Scottish common law.¹³³ Further, when one considers that a statement on traditional municipal common law is not a decisive conclusion on the details of current international law, then *Cameron*, at most, illustrates a historical legal interpretation of piracy. It does not assert that the Geneva Convention then adopted this interpretation.

Additionally, *Cameron’s* ruling would not be a persuasive argument in a U.S. court attempting to decide on the merits of the Geneva Convention’s possible two-ship requirement because the United States, unlike Scotland, specifically adopts the definition of piracy *under international law* by

¹²⁶ *Cameron v. HM Advocate*, [1971] J.C. 50, 61.

¹²⁷ *Id.* at 51–52.

¹²⁸ *Id.*

¹²⁹ *Id.* at 58.

¹³⁰ *Id.* at 61.

¹³¹ *Id.*

¹³² *Id.* at 63. (“In the present case the Crown do not require to rely on [the Geneva Convention], and I can see no ground for holding that that Act in any way supersedes or restricts the definition of piracy as known in the law of Scotland, and as expounded by the presiding judge.”).

¹³³ *Id.*

statute.¹³⁴ Thus, a U.S. court could not rule, like the *Cameron* court, that the Geneva Convention simply “supplements” U.S. common law on piracy. If one accepts that international accords signed by the United States are proof of the United States’s acceptance of the terms within those accords, then a U.S. court should accept that the Geneva Convention does supersede common law. Thus, prior common law is irrelevant to determining the definition of piracy under U.S. law, and only the current internationally-accepted definition matters.

Cameron may have failed to address the two-ship requirement in regard to the Geneva Convention, but it does allude to the primary argument against a two-ship requirement—that the Geneva Convention does not *explicitly* exclude the actions on one ship. Accordingly, one could argue that prior common law understandings of piracy, some of which included single-ship actions like mutiny, should continue to prevail. That said, logic stemming from the Geneva Convention’s basic sentence structure and punctuation weighs in favor of the two-ship requirement. For example, consider that subsections 1(a) and 1(b) to Article 15 are not separated by a word or phrase such as “or,” or prefaced by a word or phrase such as “either,” which would denote that both clauses independently satisfy the definition of piracy under international law. Instead, because (a) and (b) are separated by a semi-colon only, basic rules of syntax require both sub-sections (a) *and* (b) to be fulfilled to satisfy the definition of piracy. Thus, because subsection (a) requires “another” ship, the two-ship requirement appears to be the only plausible interpretation of the definition.

Accordingly, the combination of the Conference *travaux* along with the sentence structure of Article 15 is enough to conclude that the Geneva Convention’s definition of piracy under the law of nations requires two ships. Therefore, because Shi’s crime only involved one ship, the *Full Means No. 2*, his actions could not be construed as piratical under the Geneva Convention.

2. UNCLOS

The second major convention, the 1982 U.N. Convention on the Law of the Sea (UNCLOS), entered into force on November 16, 1994.¹³⁵ Apparently satisfied with the work of the Geneva Convention, the delegates of UNCLOS

¹³⁴ See 18 U.S.C. §1651 (2006).

¹³⁵ U.N. Treaty Collection: Status of the 1982 Law of the Sea, http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtmsg_no=XXI-6&chapter=21&Temp=mtmsg3&lang=en (last visited Sept. 29, 2009).

adopted the Geneva Convention's definition of piracy verbatim.¹³⁶ Thus, even though the United States is still not a party to UNCLOS,¹³⁷ because the United States accepted the definition of piracy in the Geneva Convention without reservation, one can assume the United States agrees with the definition of piracy in UNCLOS as well.¹³⁸

Nevertheless, the importance of UNCLOS to our inquiry is not only that it adopted the definition of piracy in the Geneva Convention articulated more than two decades earlier, but that UNCLOS's verbatim adoption signals a growing consensus for the Geneva Convention's definition as authoritative under international law.¹³⁹ Indeed, because UNCLOS "has gained nearly universal acceptance since its entry into force,"¹⁴⁰ thus far garnering 157 signatories, it is an important statement of international consensus on piracy's definition.¹⁴¹ This number of signatories does not include the United States, Israel, and Venezuela, who were signatories to the 1958 Convention and still likely accept the definition of piracy adopted by UNCLOS.¹⁴² Therefore, because the consensus of the most widely accepted international accord requires two ships as a necessary tenant of piracy, it is even more likely that Shi's conduct, which only included one ship, would not meet the definition of piracy under international law.

3. *The Maritime Safety Convention*

Finally, the third international accord, the Maritime Safety Convention, was adopted in 1988 and entered into force on March 1, 1992.¹⁴³ Although the Maritime Safety Convention does not mention piracy by name, this

¹³⁶ See UNCLOS, *supra* note 90, art. 101.

¹³⁷ U.N. Treaty Collection: Status of the 1982 Law of the Sea, *supra* note 135.

¹³⁸ See Randall, *supra* note 88, at 797 ("Even for states that are not parties to the 1982 Convention, including the United States, this definition may be relevant because it represents piracy's definition from the earlier convention and under current customary law.").

¹³⁹ See Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20 EUR. J. INT'L L. 399, 401 (2009) ("The fact that these Articles repeat almost literally Articles 14 to 22 of the Geneva Convention on the High Seas of 1958, and that some states, including the United States as well as Israel, Switzerland and Venezuela, while not bound by UNCLOS, are bound by the Geneva Convention, entails that, as a matter of either customary or of conventional law, these Articles state the law as currently in force.").

¹⁴⁰ U.N. Division for Ocean Affairs and the Laws of the Sea, *The Oceans are the Very Foundation of Human Life*, http://www.un.org/Depts/los/oceans_foundation.htm (last visited Sept. 17, 2009).

¹⁴¹ See U.N. Treaty Collection: Status of the 1982 Law of the Sea, *supra* note 135.

¹⁴² See U.N. Treaty Collection: Status of the 1958 Convention on the High Seas, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=454&chapter=21&lang=en> (last visited Sept. 18, 2009).

¹⁴³ See Maritime Safety Convention, *supra* note 51.

Convention still is important because it was the basis for 18 U.S.C. § 2280, the statute under which Shi was charged, and it addresses actions that fall within Shi's conduct.¹⁴⁴ Specifically, Article 3 states:

Any person commits an offence [against this treaty] if that person unlawfully and intentionally: (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship[.]¹⁴⁵

Clearly, this section is applicable to Shi. It is important to note that the Maritime Safety Convention did not deem an Article 3 offense as piracy under international law.¹⁴⁶ This is especially telling considering the Maritime Safety Convention was premised on maritime safety and was convened in the wake of an internal ship seizure characterized by many nations as piracy.¹⁴⁷ With piracy at the forefront of the agenda, it is thus unlikely that the delegates mistakenly declined to define acts onboard a single ship, like Shi's, as piracy. A more likely explanation of piracy's absence from Article 3 is the international community's failure to regard an internal action on a ship as piratical.

This conclusion is also borne out by Article 3's failure to automatically confer universal jurisdiction. Consider that any actions deemed piratical under international law would in themselves confer universal jurisdiction.¹⁴⁸ Thus, the fact that a violation of Article 3 alone does not confer universal jurisdiction proves that it cannot be piracy under international law.¹⁴⁹ Accordingly, the omission of the term piracy from Article 3 appears to be a tacit recognition of the two-ship definition under the Geneva Convention and UNCLOS. Once again, because Shi's crimes only concerned one ship, his actions would not meet this definition.

As a result, according to three pertinent multilateral accords, all of which are primary sources of international law, the Ninth Circuit should not have

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* art. 3.

¹⁴⁶ *Id.*; see also *United States v. Shi*, 525 F.3d 709, 723 n.5 (9th Cir. 2008) (finding that Article 3 violations cannot be defined as piracy under international law because Article 3 violations do not confer universal jurisdiction and actions deemed as piratical under international law do confer universal jurisdiction).

¹⁴⁷ The ship seizure was of the *Achille Lauro*. Halberstam, *supra* note 87, at 269–70.

¹⁴⁸ *Shi*, 525 F.3d at 723.

¹⁴⁹ See *id.* at 723 n.5.

deemed Shi's actions as piratical, and likewise, should not have been able to assert jurisdiction.

B. Commentators

Although the primary foundation of international law, international accords, appears to prove that Shi's actions were not piratical, a secondary source of international law—the “teaching(s) of the most highly qualified publicists of the various nations”—has yet to be addressed.¹⁵⁰ Thus, to ensure a comprehensive inquiry and to bolster the conclusion that the Ninth Circuit should not have characterized Shi as a pirate, an overview of several important scholarly works on the definition of piracy is both appropriate and necessary. Because the number of commentaries on piracy is overwhelming, I have narrowed my focus to four commentaries that represent a diverse set of origins, authors, and purposes: William Blackstone's Commentaries,¹⁵¹ the Harvard Draft Convention of 1932,¹⁵² the International Law Commission,¹⁵³ and lastly, the U.S. Office of Naval Intelligence.¹⁵⁴

1. Blackstone's Commentaries

William Blackstone's Commentaries are a good starting point for determining the definition of piracy under international law because they “constitute the preeminent authority on English law for the founding generation.”¹⁵⁵ Because English law was influential for both U.S. and international jurisprudence, surveying Blackstone is an important task. Blackstone separates piracy into two types. The first type is at “common law” and consists of “acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to a felony there.”¹⁵⁶ This is distinguishable from the second type, statutory piracy, which consists of other actions specified by the legislature, like murder on the high seas or mutiny.¹⁵⁷

¹⁵⁰ *Statute of the International Court of Justice*, 1 Int'l Ct. Just. Y.B. 1946–1947, at 200.

¹⁵¹ BLACKSTONE, *supra* note 8.

¹⁵² Harvard Draft Convention of 1932, *Draft Convention on Piracy, with Comment*, 26 AM. J. OF INT'L L. Supp. 739 (1932).

¹⁵³ I THE WORK OF THE INTERNATIONAL LAW COMMISSION (7th ed. 2007) [hereinafter INTERNATIONAL LAW COMMISSION].

¹⁵⁴ U.S. Office of Naval Intelligence, <http://www.fas.org/irp/agency/oni/index.html> (last visited Sept. 18, 2009).

¹⁵⁵ *District of Columbia v. Heller*, 128 S.Ct. 2783, 2798 (2008); *Neder v. United States*, 527 U.S. 1, 30 (1999) (Blackstone was “the Framers’ accepted authority on English law and the English Constitution.”).

¹⁵⁶ BLACKSTONE, *supra* note 8, at 72.

¹⁵⁷ *Id.*

Facially, it seems that Blackstone's definition of "common law" piracy is synonymous with piracy under international law, which would accord universal jurisdiction; while conversely, Britain could only prosecute "statutory piracy" if committed by or against "his majesty's subjects."¹⁵⁸ This reasoning is supported by Blackstone's preface to his common law definition that a pirate "has renounced all the benefits of society and government, and has reduced himself to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him."¹⁵⁹ By stating all mankind should declare war against a pirate, Blackstone seems to suggest that universal jurisdiction would be applicable.¹⁶⁰ Indeed, the U.S. Supreme Court seemed to favor this interpretation, arguing that Blackstone "considered the common law definition as distinguishable in no essential respect from that of the law of nations."¹⁶¹

Still, salient arguments weigh against affirmatively concluding that Blackstone's common law definition of piracy would accord universal jurisdiction. First, Blackstone gives no explicit mention of universal jurisdiction or even a firm statement that a nation unaffected by a piratical act would have the power to prosecute the perpetrator of that act.¹⁶² In fact, Blackstone justifies declaring war on pirates because "every community hath a right, by the rule of *self-defence*, to inflict that punishment upon him."¹⁶³ In other words, by basing the right to prosecute a pirate on self-defense, Blackstone possibly intended only for nations actually victimized or threatened by a piratical act to have jurisdiction over prosecuting it.¹⁶⁴

Second, Blackstone's understanding of "common law" seems to weigh against concluding that he would have accorded a nation jurisdiction over piracy without that nation first having some connection to the underlying crime.¹⁶⁵ To explain, Blackstone characterized an offense against "common law" as "merely . . . an offense punishable in England by English

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ See Joshua Michael Goodwin, Comment, *Universal Jurisdiction and the Pirate: Time for an Old Couple to Part*, 39 VAND. J. TRANSNAT'L L. 973, 992 (2006) (emphasizing Blackstone's view that piracy is a crime against the universal law of society, demonstrating that the view of piracy "seems to follow . . . in that every individual has a right to punish pirates wherever they are found because they are enemies of all mankind and they no longer enjoy the privileges of the law").

¹⁶¹ *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820).

¹⁶² See BLACKSTONE, *supra* note 8, at 71–72.

¹⁶³ *Id.* at 71 (emphasis added).

¹⁶⁴ ALFRED P. RUBIN, *THE LAW OF PIRACY* 110 (1988).

¹⁶⁵ *Id.*

courts”¹⁶⁶ Therefore, because “common law” piracy would have only been “punishable in England” and piracy under international law would be punishable everywhere, “common law” piracy was likely different from piracy under international law.¹⁶⁷

Finally, even if Blackstone meant for his common law piracy definition to accord universal jurisdiction, it is far from clear whether Shi’s actions would meet his rubric for the common law crime. Although Shi’s act of murder would have been a felony on land, Blackstone’s reason for punishing piracy was to prevent the disturbance of interstate commerce and the “maintenance of a bright line between belligerency and commercial trafficking.”¹⁶⁸ Because Shi’s actions were confined to a single ship and neither disturbed trade nor blurred the lines between war and commerce, one could argue it is unlikely Shi’s actions were of a sufficient magnitude to be characterized as common law piracy by Blackstone.¹⁶⁹ Blackstone’s characterization of mutiny as a domestic offense, and not one under common law, further supports this contention.¹⁷⁰

In sum, regardless of whether Blackstone’s definition characterized Shi’s actions as piratical and worthy of universal jurisdiction, the applicability of his definition to modern international law and this inquiry would still be negligible. Blackstone’s definition sought to comment on the status of English common law during the eighteenth century, over two hundred years ago. Thus, in a field as ever changing as international law, his commentaries are probably only useful for information on the historical view of piracy, as opposed to a definitive articulation of what piracy is today.

2. *Harvard Draft Convention of 1932*

The Harvard Draft Convention of 1932 was the first truly international attempt at articulating a consensus definition of piracy under international law. The group cautioned that “[o]f the many definitions [of piracy] which have been proposed, most are inaccurate, both as to what they literally include and as to what they omit.”¹⁷¹ The group lamented the difficult task of sorting through the “chaos of expert opinion as to what the law of nations includes, or

¹⁶⁶ *Id.*

¹⁶⁷ *See id.*

¹⁶⁸ White, *supra* note 13, at 768.

¹⁶⁹ *See id.*

¹⁷⁰ BLACKSTONE, *supra* note 8, at 72.

¹⁷¹ Harvard Draft Convention, *supra* note 152, at 769.

should include, in piracy.”¹⁷² Nonetheless, this specialized team surveyed various arguments and opinions emanating from treaty and customary law, the laws of civilized nations, international legal decisions, and the writings of renowned publicists to articulate a definition of piracy under international law.¹⁷³ Article 3 of its draft convention states:

Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state:

1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. *If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.*¹⁷⁴

This last sentence (in *italics*) gives evidence that the Harvard Convention’s definition would not include Shi’s actions. Although the comments to Article 3 conceded that some scholars regarded mutiny as piracy,¹⁷⁵ the comments left no doubt that the Convention’s final definition, and the one asserted to be in accordance with international law, would not include Shi’s actions of mutiny and murder onboard a single ship:

[The last sentence of Article 3 is a] limitation . . . designed to exclude offences committed in a place subject to the ordinary jurisdiction of a state. The limitation follows traditional law. Some definitions of piracy are broad enough to include robberies and other acts of violence or depredation committed on board a merchant ship on the high sea by a passenger or a member of the crew who is not in control of the ship. Mutiny on the high seas has sometimes been included. The great weight of professional opinion, however, does not sanction an extension of the common jurisdiction of all states to cover such offences committed entirely on board a ship which by international law is under the excluding jurisdiction of a State whose flag it flies. Even though a mutiny succeeds, the common jurisdiction would not attach. It should attach, however, if the

¹⁷² *Id.*

¹⁷³ *See id.* at 1, 3, 5, 10, 12; *see also* INTERNATIONAL LAW COMMISSION, *supra* note 153.

¹⁷⁴ Harvard Draft Convention, *supra* note 152, at 743 (emphasis added).

¹⁷⁵ *Id.* at 810. The Harvard Draft Convention noted Professor T. J. Lawrence’s dissenting view: “A single act of violence will suffice, such, for instance, as the successful revolt of the crew of a vessel against their officers. If they take the ship out of the hands of the lawful authorities, they become pirates . . .” *Id.*

successful mutineers then set out to devote the ship to the accomplishment of further acts of violence or depredation (of the sort specified in Article 3, 1) on the high sea or in foreign territory.¹⁷⁶

Accordingly, because Shi did not devote the ship in his two days in control to “further acts of violence or depredation,” his actions were not piratical, and universal jurisdiction should not attach.¹⁷⁷ Instead, the ship’s flag nation should have exclusive jurisdiction by virtue of the doctrine of territoriality of vessels.¹⁷⁸

Even if these comments are ignored, the Convention’s requirement of a “pirate ship” to characterize an “attack or attempt [that] takes place from on shipboard” as piracy, would also exclude Shi’s actions from being subject to universal jurisdiction.¹⁷⁹ The Harvard Convention defined a “pirate ship” as:

A ship . . . devoted by the persons in dominant control to the purpose of committing an act described in the first sentence of paragraph 1 of Article 3 . . . provided in either case that the purposes of the persons in dominant control are not definitely limited to committing such acts against ships or territory subject to the jurisdiction of the state to which the ship belongs.¹⁸⁰

The *Full Means No. 2* could not be characterized as a “pirate ship” under the Harvard Convention because it was devoted to fishing before it was overtaken by Shi.¹⁸¹ Even for the two days in which Shi was in control, the ship was solely devoted to returning to home port and was not committed to an “act of violence or of depredation” necessary to characterize it as a pirate ship.¹⁸² Thus, because the *Full Means* was not a pirate ship, Shi’s actions onboard the *Full Means* could not be defined as piracy under the Harvard Convention.¹⁸³

Finally, Shi could not be characterized as a pirate because the intentions behind his actions were confined to self-defense and revenge,¹⁸⁴ which are not sufficient piratical intentions under the Harvard Convention.¹⁸⁵ “[A] single isolated attack by persons who had no further purpose of depredation on the

¹⁷⁶ *Id.* at 809–10.

¹⁷⁷ *See id.*; *see also supra* pp. 697–98.

¹⁷⁸ Harvard Draft Convention, *supra* note 152, art. 810.

¹⁷⁹ *Id.* at 794.

¹⁸⁰ *Id.* at 743–44.

¹⁸¹ *See id.*

¹⁸² *See id.* at 743.

¹⁸³ *See id.*

¹⁸⁴ *See supra* pp. 697–98.

¹⁸⁵ Harvard Draft Convention, *supra* note 152, at 743. *But see infra* text accompanying note 243.

sea . . . would not fall under the common jurisdiction.”¹⁸⁶ In conclusion, the Harvard Convention would not deem Shi a pirate under the law of nations.

3. *International Law Commission*

The objective of the International Law Commission (“ILC”) is the promotion of the “progressive development of international law and its codification.”¹⁸⁷ Its members have “a broad spectrum of expertise and practical experience within the field of international law . . . from the various segments of the international legal community, such as academia, the diplomatic corps, government ministries and international organizations.”¹⁸⁸ Accordingly, unlike international accords, which only contain states as signatories, this group’s definition of piracy encompasses a consensus definition of states as well as non-state actors.¹⁸⁹ Further, because the ILC created the draft articles used as the foundation for the definition of piracy in the Geneva Convention, probably the most widely accepted definition of piracy under international law, its interpretation of piracy is extremely important.¹⁹⁰

That said, the ILC’s interpretation of the law of nations’ definition of piracy would not include Shi’s actions. This conclusion is easily drawn because in discussing the draft articles used for the Geneva Convention, the ILC stated without reservation: “Acts committed on board a ship by the crew or passengers and directed against the ship itself, or against persons or property on the ship, cannot be regarded as acts of piracy.”¹⁹¹

Although the ILC discussed including the actions of a crew or passengers onboard a single ship in the definition of piracy, even these proposals would have only applied to “passengers or crew” that “boarded vessels with the intention of seizing and gaining control of the ship once it was out at sea.”¹⁹² The type of mutiny based on intentions that arose once a ship was already out to sea was never considered sufficient to be piracy; instead, the ILC only

¹⁸⁶ *Id.* at 794.

¹⁸⁷ INTERNATIONAL LAW COMMISSION, *supra* note 153, at 7.

¹⁸⁸ *Id.* at 8–9.

¹⁸⁹ *See id.*

¹⁹⁰ *See generally* Harvard Draft Convention, *supra* note 152; INTERNATIONAL LAW COMMISSION, *supra* note 153, at 3–4.

¹⁹¹ *Report of the International Law Commission to the General Assembly*, [1956] 2 Y.B. Int’l L. Comm’n 282, U.N. Doc. A/3159.

¹⁹² *Summary Records of the 292nd Meeting*, [1955] 1 Y.B. Int’l L. Comm’n 53, U.N. Doc A/CN.4/79.

considered “the different case of persons posing as crew or passengers in order to commit acts of piracy once the vessel had reached the high seas.”¹⁹³ In the end however, the ILC decided to exclude mutiny “even if mutineers killed the captain and ship’s officers,” asserting that the vessel of mutineers “did not thereby become a pirate unless acts of piracy were committed against another ship.”¹⁹⁴ This two-ship requirement was unanimously adopted.¹⁹⁵

Therefore, because the actions in *Shi* were committed by a crewmember exclusively onboard a single ship, the ILC would not deem Shi’s actions as piracy. Additionally, this further proves that the Geneva Convention’s definition of piracy requires two ships, since the ILC’s definition served as the model for the one adopted by the United Nations.¹⁹⁶

4. *United States Office of Naval Intelligence*

The last commentary analyzed is that of the United States Office of Naval Intelligence and the Coast Guard Intelligence Coordination Center. Considering the Coast Guard detained and brought Shi into the United States, its perspective on his actions could be of interest.¹⁹⁷ In a report released in 1999, these two intelligence groups accepted two varying definitions of piracy under international law: the definition of piracy propounded by UNCLOS (discussed *supra* in Part III.A.2)¹⁹⁸ and the definition of piracy articulated by the International Maritime Bureau (“IMB”).¹⁹⁹ As discussed previously, Shi’s actions do not fit under the definition of piracy supported by UNCLOS. Thus, this only leaves the IMB’s definition to address.

¹⁹³ *Id.*

¹⁹⁴ *Id.*; see also *Report of the International Law Commission to the General Assembly*, *supra* note 191.

¹⁹⁵ *Summary Records of the 343d Meeting*, [1956] 1 Y.B. Int’l L. Comm’n 46, U.N. Doc. A/2934.

¹⁹⁶ See generally Harvard Draft Convention, *supra* note 152; INTERNATIONAL LAW COMMISSION, *supra* note 153, at 3–4.

¹⁹⁷ See *supra* p. 698.

¹⁹⁸ UNCLOS, *supra* note 90, at 61.

[A]ny illegal acts of violence, or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State

Id.

¹⁹⁹ OFFICE OF NAVAL INTELLIGENCE & U.S. COAST GUARD INTELLIGENCE COORDINATION CENTER, THREATS AND CHALLENGES TO MARITIME SECURITY 2020 II-28 (1999), available at <http://www.fas.org/irp/threat/maritime2020/CHAPTER2.htm> [hereinafter OFFICE OF NAVAL INTELLIGENCE].

The IMB is a specialized division of the International Chamber of Commerce, jointly endorsed by the International Maritime Organization, “established in 1981 to act as a focal point in the fight against all types of maritime crime and malpractice” by using “industry knowledge, experience and access to a large number of well-placed contacts around the world.”²⁰⁰ In addition, “[o]ne of the IMB’s principal areas of expertise is in the suppression of piracy.”²⁰¹ Accordingly, as the “world’s premier independent crime-fighting watchdog,” IMB is a legitimate source for helping determine the definition of piracy.²⁰²

At its core, the IMB’s definition also does not appear to include Shi’s actions. It defines piracy under international law as: “the act of boarding any vessel with the intent to commit theft or other crime and the capability to use force in the furtherance of the act.”²⁰³ As a result, the requirement of “boarding” a vessel appears to necessitate another ship from which a pirate could board.²⁰⁴ This interpretation would easily fall in line with the definition propounded by UNCLOS.²⁰⁵

Of course, one could argue that the IMB’s requirement of “boarding” a vessel does not clearly require two ships. Instead, one could interpret the clause as meaning that a pirate could board the ship as part of the crew. However, in this case, the person boarding the ship as a crewmember would have to board with “intent to commit theft or other crime.”²⁰⁶ In other words, the person boarding the ship must intend to commit piratical acts from the outset.²⁰⁷ This would unequivocally exclude certain acts of mutiny and other crimes committed by crewmembers, like Shi, whose intentions were initially confined to serving as part of the crew.²⁰⁸ Shi likely would not be characterized as a pirate under the IMB’s definition, regardless of how it is interpreted, because it appears that Shi boarded the *Full Means No. 2* with the intention of being a cook and not with the intention of committing crimes.²⁰⁹

²⁰⁰ International Maritime Bureau Home Page, http://www.icc-ccs.org/index.php?option=com_content&view=article&id=27&Itemid=16 (last visited Sept. 2, 2009).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ OFFICE OF NAVAL INTELLIGENCE, *supra* note 199, at II-28.

²⁰⁴ See Ethan C. Stiles, Comment, *Reforming Current International Law to Combat Modern Sea Piracy*,

27 SUFFOLK TRANSNAT’L L. REV. 299, 300 (2004).

²⁰⁵ See *supra* pp. 711–12.

²⁰⁶ See OFFICE OF NAVAL INTELLIGENCE, *supra* note 199, at II-28.

²⁰⁷ *Id.*

²⁰⁸ *United States v. Shi*, 525 F.3d 709, 718 (9th Cir. 2008).

²⁰⁹ *Id.*

Accordingly, neither definition of piracy accepted by the U.S. Office of Naval Intelligence and the Coast Guard Intelligence Coordination Center would define Shi's actions as piratical.

C. *United States Law*

Lastly, although the law of the United States is not definitively authoritative on the parameters of international law, because Shi was prosecuted in a U.S. court, it is nonetheless important to examine. In most instances, the Constitution and domestic statutes, not international law, would principally bind a U.S. court.²¹⁰ That said, the subject of piracy is unique because the statute governing piracy, 18 U.S.C. § 1651, defines piracy according to "the law of nations," thus incorporating the international law of piracy into the laws of the United States.²¹¹ Therefore, when defining piracy, unlike in usual cases, U.S. courts must give deference to international law and not to domestic law.²¹² The positive of this situation is that it allows the definition of piracy to evolve with international legal norms.²¹³ Yet, the negative is that this lack of statutory detail about what international law entails and proscribes is maddeningly unhelpful when trying to pinpoint a precise definition.²¹⁴

Accordingly, to determine how piracy is defined under 18 U.S.C. § 1651, one could either look directly to sources of international law, as done previously in Parts III(A) and (B), or one could look to U.S. courts' interpretations of international law. This Section applies the latter method. Looking at case law is disappointing, though, because few recent cases of piracy have come before U.S. courts, so their propositions may no longer be authoritative in the constantly changing realm of international law.

Still, even considering the dated nature of the case law, the basic U.S. court opinion on what constitutes piracy under international law squares with the majority of definitions articulated by more recent commentators and international accords.²¹⁵ Each source would not confer universal jurisdiction over Shi's actions (save of course, the Ninth Circuit's recent decision). Although the Supreme Court has never explicitly defined piracy under

²¹⁰ U.S. CONST. art. VI, cl. 2.

²¹¹ 18 U.S.C. § 1651 (2006).

²¹² DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 165 (2d ed. 2006).

²¹³ *Id.* at 16–25.

²¹⁴ 18 U.S.C. § 1651 (2006).

²¹⁵ *See supra* text accompanying notes 117–18, 136, 174–77, 192–96.

international law, its opinions, when read along with those of lower courts, definitively support this conclusion.²¹⁶

Three arguments back this contention. First, U.S. courts have only accorded jurisdiction over actions similar to Shi's—confined to a foreign ship and directed exclusively at foreign nationals—to the flag-nation or the nation of the victim or perpetrator's origin.²¹⁷ Second, U.S. courts require a sufficient piratical intent, which Shi lacked, to apply universal jurisdiction.²¹⁸ And third, although few U.S. courts have articulated a definition of piracy under international law, those that have would not characterize Shi's crimes as piratical.²¹⁹

Addressing these contentions in turn—first, U.S. courts have consistently affirmed that actions committed onboard foreign ships and exclusively involving foreign nationals, as in *Shi*, should not confer universal jurisdiction.²²⁰ For example, when a defendant was accused of murder and mutiny onboard a foreign ship, just like in *Shi*, a court recognized that although the Constitution “enables congress to define and punish piracies and felonies committed on the high seas . . . that clause can never be construed to make to the government a grant of power, which the people making it do not themselves possess.”²²¹ Thus, even though piracy under the law of nations is an exception to this rule, “the people of the United States have no jurisdiction over offences committed on board a foreign ship against a foreign nation.”²²² The Supreme Court later affirmed this conclusion by asserting that, although Congress has the power to define actions of piracy as applied domestically no matter the pirates' nationality,²²³

²¹⁶ See *infra* notes 217–19 and accompanying text.

²¹⁷ *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 627 (1818) (concerning American defendants that boarded a Spanish ship on the high seas, assaulted the Spanish mariners, and stole their cargo); *United States v. Klinton*, 18 U.S. (5 Wheat.) 144, 152 (1820) (affirming the ruling in *Palmer* that murder and robbery committed on board a foreign ship is exclusively within that flag state's jurisdiction and is not the type of piracy that would accord a U.S. court jurisdiction under the 1790 statute); see also *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820); *United States v. Furlong*, 18 U.S. (5 Wheat.) 184 (1820).

²¹⁸ See, e.g., *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 19 (1826); *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 223–24 (1844).

²¹⁹ *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820) (“Robbery, or forcible depredation, upon the seas, *animo furandi*, is piracy by the law of nations, and by the act of Congress.”).

²²⁰ *United States v. Robins*, 27 F. Cas. 825, 865 (D.S.C. 1799) (No. 16,175) (ruling on the application of habeas corpus in relation to a defendant accused of murder and mutiny aboard a British frigate).

²²¹ *Id.*

²²² *Id.*

²²³ *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 632–33 (1818).

it cannot be supposed that the legislature intended to punish a seaman on board a ship sailing under a foreign flag, under the jurisdiction of a foreign government, who should lay violent hands upon his commander, or make a revolt in the ship. These are offences against the nation under whose flag the vessel sails, and within whose particular jurisdiction all on board the vessel are. Every nation provides for such offences the punishment its own policy may dictate; and no general words of a statute ought to be construed to embrace them when committed by foreigners against a foreign government.²²⁴

U.S. courts justified this policy of declining to prosecute cases with which the United States has no connection on the basis of avoiding unnecessary international conflict.²²⁵ To explain, asserting jurisdiction over cases confined to one ship is a practice that would “get us into difficulties with other nations, who may not choose that we should hang their subjects by the mode of trial and sentence of our tribunals, for offences on board their own ships under their authority and protection.”²²⁶ Thus, because Shi confined his actions to one ship, case law directs the Ninth Circuit to reject applying universal jurisdiction.²²⁷

Second, U.S. courts appear only to accord universal jurisdiction over piratical actions that have sufficient piratical intent.²²⁸ For example, piratical intent would include “a reckless and wanton abuse of power, to gratify . . . lawless passions.”²²⁹ Or, for piratical intent to “be punished by all the penalties which the law of nations can properly administer,” the attack would have to be “from revenge and malignity, from gross abuse of power, and a settled purpose of mischief,” so that “it then assumes the character of a private unauthorized war.”²³⁰ Further, this intent not only must be directed against the flagship, but it also must be “against all nations,” committed by “a crew acting in defiance of all law, and acknowledging . . . no government.”²³¹ Only “because [a pirate] commits hostilities upon the subjects and property of

²²⁴ *Id.*

²²⁵ *United States v. Kessler*, 26 F. Cas. 766, 774 (C.C.D. Pa. 1829) (No. 15,528).

²²⁶ *Id.*

²²⁷ *See supra* note 217.

²²⁸ *See supra* note 218.

²²⁹ *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844).

²³⁰ *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 41 (1826). In *The Marianna Flora*, a Portuguese cargo ship sailing on the high seas, apparently mistaking an American vessel for a pirate ship, fired shots at the U.S. ship in an alleged act of protection. In response, the American vessel shot back and took control of the Portuguese ship, bringing it back to an American port on the grounds of “piratical aggression.” *Id.* at 40–41.

²³¹ *United States v. Klintock*, 18 U.S. (5 Wheat.) 144, 152 (1820).

any or all nations, without any regard to right or duty, or any pretence of public authority,” can a court use something as extreme as universal jurisdiction.²³² Thus, as discussed above, under U.S. case law, acts of aggression²³³ and attacks made without “a piratical or felonious intent, or . . . the purpose of wanton plunder, or malicious destruction of property,” are only sufficient to afford jurisdiction to the flag-nation.²³⁴

Applying this to Shi’s actions, it would be a stretch to say that he had a “settled purpose of mischief” that would rise to the level of “private unauthorized war” against all nations, even though his actions were to avenge his treatment at the hands of the captain and first mate.²³⁵ To the contrary, Shi aimed his actions at two private persons that had mistreated him.²³⁶ Shi did not commit murder or take over the *Full Means No. 2* intending “to gratify his own lawless passions.”²³⁷ Nor did he have a “felonious intent” for “the purpose of wanton plunder, or malicious destruction of property.”²³⁸ Thus, his actions should not have given the Ninth Circuit jurisdiction under U.S. law.

Conversely, at least one court has questioned the literal requirement of piratical intent needing to be against “all nations.”²³⁹ In *The Ambrose Light*, a district court opined that the idea of *hostis humani generis* is “but a rhetorical invective to show the odiousness of the crime.”²⁴⁰ It argued that there does not literally have to be indiscriminate hostility against all nations, but instead, there only needs to be felonious intent sufficient to be considered against “the law of nations.”²⁴¹ It gave the example of committing murder without provocation as being *hostis humani generis*.²⁴²

It is tempting to take this court’s rationale and example of murder being *hostis humani generis* and extrapolate that since Shi committed murder, his

²³² *Brig Malek Adhel*, 43 U.S. (2 How.) at 232.

²³³ Aggression is defined as acts including invasions or attacks, bombardments, blockades of another state’s ports or coasts, armed violation of territory, allowing other states to use a state’s territory for an act of aggression, and sending others to carry out acts of aggression. G.A. Res. 3314 (XXIX), art. 3, U.N. Doc. A/9691 (Dec. 14, 1974).

²³⁴ *The Marianna Flora*, 24 U.S. (11 Wheat.) at 39.

²³⁵ *Id.* at 41.

²³⁶ *United States v. Shi*, 525 F.3d 709, 718 (9th Cir. 2008).

²³⁷ *Brig Malek Adhel*, 43 U.S. (2 How.) at 233.

²³⁸ *The Marianna Flora*, 24 U.S. (11 Wheat.) at 39.

²³⁹ *The Ambrose Light*, 25 F. 408, 422–23 (S.D.N.Y. 1885).

²⁴⁰ *Id.*

²⁴¹ *Id.* at 422.

²⁴² *Id.* at 424.

actions were, thus, piratical. This conclusion, however, would be incorrect. First, it conflicts with the rationale of all other U.S. cases, including those from the Supreme Court, which exclude actions, even murder, confined to a single foreign ship from obtaining universal jurisdiction.²⁴³ Second, the court in *The Ambrose Light* asserted that for an action to be piratical, it had to rise to the level of “unauthorized maritime warfare . . . incompatible with the peace and order of the seas.”²⁴⁴ This was contrasted with municipal piracy, which was simply “robbery on the high seas.”²⁴⁵ Thus, although Shi did commit murder, it is doubtful that he intended to involve himself in “unauthorized maritime warfare.”²⁴⁶ Instead, it seems more plausible that his intent was far narrower, and that he only intended to liberate himself from the abuse of the captain and first mate.²⁴⁷ Third, the example of murder as piracy in *The Ambrose Light* was given in the context of other examples regarding large-scale mutinies, plundering, and actions involving more than one ship.²⁴⁸ Never did the court contemplate an example that would equate a small, isolated crime like Shi’s to piracy under international law.²⁴⁹ In fact, no U.S. case appears to do this.

Finally, U.S. courts should not confer universal jurisdiction over Shi’s actions according to previous definitions of piracy. Although the Supreme Court has never articulated a firm definition of piracy under international law, lower courts have ventured to do so, and none of their definitions would characterize Shi’s actions as piratical.²⁵⁰ For example, one lower court asserted that a pirate under the law of nations is “one who acts solely on his own authority, without any commission or authority from a sovereign state, seizing by force, and appropriating to himself, without discrimination, every vessel he meets with.”²⁵¹ By establishing that a pirate must “meet with” other vessels, this definition is similar to that of the Geneva Convention and UNCLOS because it seems to necessitate two ships.²⁵² As discussed

²⁴³ See, e.g., *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 632–33 (1818); *United States v. Kessler*, 26 F. Cas. 766, 774 (C.C.D. Pa. 1829) (No. 15,528); *United States v. Robins*, 27 F. Cas. 825, 865 (D.S.C. 1799) (No. 16,175).

²⁴⁴ *The Ambrose Light*, 25 F. at 416.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *United States v. Shi*, 525 F.3d 709, 718 (9th Cir. 2008).

²⁴⁸ *The Ambrose Light*, 25 F. at 415–18.

²⁴⁹ See generally *id.*

²⁵⁰ See *supra* notes 217–19.

²⁵¹ *Davison v. Seal-Skins*, 7 F. Cas. 192, 193–94 (C.C.D. Conn. 1835) (No. 3661).

²⁵² Compare *id.*, with UNCLOS, *supra* note 90, art. 101 (stipulating that piracy consists of “illegal acts of violence . . . against another ship . . . [or] against a ship . . . outside the jurisdiction of any State.”), and The Geneva Convention, *supra* note 90, art. 15 (adopting the same language as that expressed in UNCLOS).

previously, because Shi's actions only involved one ship, his crimes would not be piratical under this rationale either.

In conclusion, U.S. courts have never recognized actions similar to those of Shi as piratical under international law. Thus, although U.S. case law is dated, when its principles are combined with the similar conclusions drawn from commentators and international accords, it seems that the Ninth Circuit's decision to characterize Shi's actions as piracy under international law was a gross deviation from the vast weight of applicable authority.

IV. THE DEFINITION OF MUTINY AFFIRMS THAT SHI'S ACTIONS WERE NOT PIRITICAL UNDER THE LAW OF NATIONS

Part III of this inquiry illustrated how Shi's actions were not piratical under the law of nations by distinguishing the definition of piracy in material sources of international law from Shi's particular crimes. The fundamental difference between Shi's conduct and the type of piracy that confers universal jurisdiction is that Shi's conduct occurred exclusively onboard one ship and only involved its homogeneous Chinese crew. Now, Part IV seeks to crystallize the idea that Shi's actions—the killing of a captain and the brief control of the *Full Means No. 2*—could not be deemed piratical because they were, in actuality, mutinous.

Simply put, mutiny and piracy, under the law of nations, are mutually exclusive.²⁵³ Therefore, if you are a mutineer, then you could not also be a *hostis humani generis* (an enemy of all mankind)—a term frequently used to describe pirates.²⁵⁴ In fact, a mutineer is far from an enemy to *all* mankind, but is, instead, only an enemy to those on his ship.²⁵⁵ Indeed, “both mutiny and piracy have been outlawed by the municipal laws of all civilized

²⁵³ See *infra* notes 254–60 and accompanying text.

²⁵⁴ See *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844); *The Ambrose Light*, 25 F. 408, 424 (S.D.N.Y. 1885).

²⁵⁵ See 18 U.S.C. § 2193 (2006).

Whoever, being of the crew of a vessel of the United States, on the high seas, . . . unlawfully and with force, or by fraud, or intimidation, usurps the command of such vessel from the master . . . or deprives him of authority and command on board, or resists or prevents him in the free and lawful exercise thereof, or transfers such authority and command to another not lawfully entitled thereto, is guilty of a revolt and a mutiny.

Id.; see also Ahmed A. White, *Mutiny, Shipboard Strikes, and the Supreme Court's Subversion of New Deal Labor Law*, 25 BERKELEY J. EMP. & LAB. L. 275, 291–301 (2004) (noting that mutiny is defined by acts of protest and revolt by a crew against their ship).

nations”²⁵⁶ However, both do not clearly have universal jurisdiction.²⁵⁷ Mutiny is only a domestic offense.²⁵⁸ Because a mutineer’s criminal status is confined to the bounds of his vessel, it would make sense that only the flag nation would have jurisdiction over his acts (unless, of course, he committed a crime against a foreign national on that vessel or proceeded to commit acts deemed piratical under international law).

U.S. statutes, agreements, and case law do not classify mutinous actions as piratical. For example, 18 U.S.C. § 2193 defines mutiny as:

Whoever, being of the crew of a vessel of the United States, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, unlawfully and with force, or by fraud, or intimidation, usurps the command of such vessel from the master or other lawful officer in command thereof, or deprives him of authority and command on board, or resists or prevents him in the free and lawful exercise thereof, or transfers such authority and command to another not lawfully entitled thereto, is guilty of a revolt and mutiny²⁵⁹

Although the description of taking “command of such vessel” by “force” describes Shi’s crimes, this statute gives no mention of universal jurisdiction or piracy.²⁶⁰ This is likely because piracy and mutiny are separate offenses under U.S. law.²⁶¹

Another example that shows mutiny and piracy are separate crimes comes from the extradition treaty between the United States and Brazil.²⁶² Article II

²⁵⁶ Smith, *supra* note 100, at 303.

²⁵⁷ *See id.*

²⁵⁸ *See* D. O’CONNELL, THE INTERNATIONAL LAW OF THE SEA 970–71 (I. Shearer ed., 1984) (detailing both the history of Article 15 of UNCLOS, which seems to militate against finding mutiny to be piracy, and U.S. case law, which holds that mutiny is not piracy if it involves the “seizure of a ship by persons unlawfully held captive”); L.C. Green, *The Santa Maria: Rebels or Pirates*, 37 BRIT. Y.B. INT’L L. 496, 497 (1961). *See generally* 18 U.S.C. § 2193 (2006) (declaring that a person found guilty of mutiny “shall be fined . . . or imprisoned,” but not because mutiny is an offense against the law of nations).

²⁵⁹ 18 U.S.C. § 2193 (2006).

²⁶⁰ *Id.*

²⁶¹ *Compare* 18 U.S.C. § 1651 (2006) (declaring that anyone guilty of piracy, “as defined by the law of nations . . . shall be *imprisoned for life*”) (emphasis added), *with* 18 U.S.C. § 2193 (2006) (declaring that anyone guilty of mutiny—which is “usurp[ing] the command of . . . [a] vessel from the master” by “force, or by fraud,” among other unlawful actions—“shall be fined . . . *imprisoned not more than ten years*, or both”) (emphasis added).

²⁶² Treaty of Extradition between the United States of America and the United States of Brazil, U.S.-Braz., art. II(9), Dec. 17, 1964, 15 U.S.T. 2093.

of this treaty outlines offenses that would be proper for extradition.²⁶³ Subsection II(9) separates the crimes of “Piracy, by the law of nations” and “mutiny on board a vessel . . . for the purpose of rebelling against the authority of the Captain or Commander of such vessel”²⁶⁴ Here, like in 18 U.S.C. § 2193, because the crimes of piracy and mutiny are listed separately, it can be inferred that they are, thus, separate offenses.²⁶⁵

The reasons behind a mutiny also distinguish it from piracy under the law of nations. For example, a variety of reasons could incite a mutiny, including the misconduct of officers, improper treatment of the crew, insufficient allowances, or even political beliefs.²⁶⁶ Piracy, on the other hand, seems to require an alternative, specific intent, which must include a “purpose of wanton plunder, or malicious destruction of property.”²⁶⁷ To be sure, mutiny *can become* piracy, but it does not seem to be piracy in itself. For example, if a mutinous crew, after taking hold of a ship, went on to plunder other ships or commit further crimes on the high seas, then their actions would be considered piracy.²⁶⁸ Courts have reasoned that to be piratical, the mutiny must have been committed “with intent to convert the vessel and cargo”²⁶⁹

Even the articulation of defenses for mutiny distinguishes it from piracy. For instance, piracy seemingly has no defense²⁷⁰ because it is so heinous that any nation may punish its conduct, usually by death.²⁷¹ On the other hand, mutiny can be excused in certain circumstances. For example, a mutiny may be excused if a defendant had a “fear of death, such as a man of ordinary courage and fortitude might yield to.”²⁷² Or a mutiny may also be excused to protect another crewmember from a great wrong.²⁷³ These tacit acceptances of

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*; *see also* 18 U.S.C. § 2193 (2006).

²⁶⁶ *See* United States v. Reid, 210 F. 486, 491 (D. Del. 1913); Smith, *supra* note 100, at 289.

²⁶⁷ *See* The Marianna Flora, 24 U.S. (11 Wheat.) 1, 39 (1826).

²⁶⁸ *See* United States v. Haskell, 26 F. Cas. 207 (C.C.E.D. Pa. 1823) (No. 15,321); WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 314 (A. Pearce Higgins ed., 8th ed. 1924) (stating that mutiny would rise to the level of piracy if a mutinous crew, after taking hold of ship, went on to commit “robbery or attempt at robbery of a vessel” on the open sea).

²⁶⁹ *Haskell*, 26 F. Cas. at 209.

²⁷⁰ Some may argue that piracy is defensible when sponsored by a state. However, this would not then be piracy, but would be “privateering,” an act completely distinct from the crime of piracy. *See* Ford v. Surget, 97 U.S. 594, 620 (1878).

²⁷¹ *See* Davison v. Seal-Skins, 7 F. Cas. 192, 193 n.2 (C.C.D. Conn. 1835) (No. 3661).

²⁷² *Haskell*, 26 F. Cas. at 210.

²⁷³ United States v. Borden, 24 F. Cas. 1202, 1202 (D. Mass. 1857) (No. 14,625).

certain mutinies further illustrate that mutiny is a separate offense from the crime of piracy under international law.

Lastly, the international accords surveyed in Part III also affirm the conclusion that mutiny is not piracy. First, international accords dealing with the laws of the sea never directly mention mutiny as piracy.²⁷⁴ Second, discussions surrounding the Geneva Convention in 1958 seem to clarify that the definition adopted concerning piracy did not include mutiny.²⁷⁵ For example, China proposed an amendment that would have revised Article 39 (now Article 15 of UNCLOS) to include mutinous conduct in the definition of piracy.²⁷⁶ Yet, this inclusion never materialized because the Chinese delegation later withdrew the amendment without discussion.²⁷⁷ China's proposal and subsequent withdrawal is extremely important because it demonstrates that mutiny was not part of the Geneva Convention's definition of piracy.²⁷⁸ If mutiny had been part of the Geneva Convention's accepted definition of piracy, then there would have been no need for China to propose an amendment to add the offense of mutiny. Because China later withdrew the amendment, it would be natural to deduce that their proposal, the addition of mutiny, is not part of the current definition.²⁷⁹ This conclusion is further affirmed by other articles in the Geneva Convention that specifically address mutiny while excluding any discussion of piracy.²⁸⁰ As a result, mutiny would not be part of the definition of piracy accepted by most nations via both the Geneva Convention and UNCLOS.

Granted, scattered arguments claim mutiny is piracy; however, most of these are dismissible for the purposes of this inquiry because they do not appear to assert that mutiny is piracy specifically *under international law*.²⁸¹ One problematic exception (besides the Ninth Circuit's opinion currently at

²⁷⁴ See The Geneva Convention, *supra* note 90; UNCLOS, *supra* note 90; see also The Maritime Safety Convention, *supra* note 51.

²⁷⁵ See China: Proposal, *supra* note 121; see also discussion *supra* notes 116–25 and accompanying text.

²⁷⁶ China: Proposal, *supra* note 121.

²⁷⁷ U.N. Conference on the Law of the Sea, 29th Meeting, *supra* note 122.

²⁷⁸ *Id.*; see also The Geneva Convention, *supra* note 90, art. 15.

²⁷⁹ See 2A NORMAN J. SINGER & SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 48:4, at 563–64 (7th ed. 2007) (“[W]here the language under question was rejected by the legislature and thus not contained in the statute, it provides an indication that the legislature did not want the issue considered.”).

²⁸⁰ See The Geneva Convention, *supra* note 90, art. 16.

²⁸¹ See *Cameron v. H.M. Advocate* [1971] J.C. 50; 1 H. LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW § 273, at 608–09 (1955). *But see* REPORT OF THE 54TH CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION 708 (1970).

issue) is the assertion in a footnote of Wheaton's *Elements of International Law* that:

Crimes, therefore, of whatever character, committed on board by inmates of such vessels, are not justiciable of all nations. But, if such a vessel passes into the control of the robbers or murderers on board, and the lawful authority is in fact displaced, and she becomes an outlaw, any nation may seize the vessel and try the criminals.²⁸²

At first glance, under this rationale, because Shi was a murderer when he took control of the ship, any nation could have seized the vessel at that time.²⁸³ But concluding that Shi would be a pirate under Wheaton's definition is not inevitable. This is because the main text, to which this footnote was appended, clarifies that for a crime of murder to be considered piracy under international law, it would need to have been committed when the ship did not belong to "any foreign power or its subjects" but when the ship was "in possession of a crew acting in defiance of all law, and acknowledging obedience to no flag whatsoever"²⁸⁴ Because Shi committed murder while the ship was still under a legitimate authority, it seems unlikely that the murder itself would be considered a piratical act.²⁸⁵ That said, it does seem apparent that Shi's control of the ship for two days would be seen as piratical by Wheaton.²⁸⁶

Another notable exception comes from *Cameron v. H.M. Advocate*.²⁸⁷ As discussed previously, this case affirmed that mutiny was piracy under Scottish common law.²⁸⁸ Although the definition of piracy under historic common law has no bearing on the definition of piracy under current international law, the lower court in *Cameron* did assert that:

[W]hen a ship is feloniously taken out of the possession of the owner or those in whose charge the vessel has been placed, against their will and by means of violence . . . and, so taken, thereafter appropriated to the use of those who have done so, the crime so committed is piracy *jure gentium*.²⁸⁹

²⁸² WHEATON, INTERNATIONAL LAW 164 n.83 (Richard H. Dana ed., 8th ed. 1936).

²⁸³ *See id.*; *see also* United States v. Shi, 525 F.3d 709, 718 (9th Cir. 2008).

²⁸⁴ WHEATON, *supra* note 282, at 164.

²⁸⁵ *See id.*; *Shi*, 525 F.3d at 718.

²⁸⁶ WHEATON, *supra* note 282, at 164.

²⁸⁷ *Cameron v. H.M. Advocate* [1971] J.C. 50.

²⁸⁸ *Id.* at 62; *see discussion supra* Part III.A.1.

²⁸⁹ *Cameron v. H.M. Advocate* [1971] J.C. 50, 55.

Although the highest court reviewing this case did not explicitly adopt this definition, it did not refute it either.²⁹⁰ Accordingly, this case could be construed as one of the few assertions that mutiny is piracy under international law. Further, this opinion seems to guard against the counter-argument that Shi might not be deemed a pirate because he lacked a “blood thirsty” intent, by quoting an advocate who claimed that “the gravity” of a crime of piracy should not change the fact that it is still piracy, nonetheless.²⁹¹ Instead, the gravity of the crime should only be reflected in the penalty imposed.²⁹²

Still, despite Wheaton, a contrary source from the mid-nineteenth century, and a single case discussing Scottish common law, the overwhelming weight of authority suggests that mutiny and piracy are separate crimes.²⁹³ Alternatively, at the very least, when mutiny is compared with the definitions of piracy espoused by international law, the type of mutiny committed by Shi would not be of sufficient character and intent to be called a “piracy.” Accordingly, this is further proof that Shi’s actions would not warrant universal jurisdiction.

CONCLUSION

Although international law’s vast number of sources and ever-changing composition make articulating a precise definition of piracy difficult, it is much easier to articulate the conclusion that almost none of these authoritative sources would characterize Shi’s actions as piracy. Thus, in failing to comply with the conclusion of these established sources of international and domestic law, the Ninth Circuit’s ruling, if accepted, would create an entirely new ground for defining piracy and asserting universal jurisdiction. This, in turn, would have adverse effects far beyond simply taking away thirty-six years of one man’s life. Instead, by eroding a firm principle of law on which both our country and the world’s legal systems rely, this ruling endangers all people to possible prosecution at the hands of governments seeking to abuse the principles of universal jurisdiction. It further makes a mockery of constitutional due process by creating an imaginative work-around to evade traditional nexus requirements, while ignoring “*the exclusive jurisdiction of the*

²⁹⁰ *Id.* at 56–57.

²⁹¹ *Id.* at 57.

²⁹² *Id.*

²⁹³ *See, e.g., supra* notes 253–81 and accompanying text.

flag State over its vessels on the high seas”—one of the fundamental foundations of international law.²⁹⁴

Accordingly, in surveying the results of *Shi*, three conclusions are important to consider.

The first is that the question of whether Shi's actions were piratical, and thus whether they could confer universal jurisdiction, should have easily been decided in the negative. All three major international accords,²⁹⁵ the majority of commentators,²⁹⁶ and U.S. case law²⁹⁷ all favored dismissing this case. The Ninth Circuit's decision to go against this tidal wave of authority was not only incorrect, but it was brazen.

For example, after surveying relevant authority it should have been apparent to the court that even though the sources of international law describe piracy in different ways, each definition nonetheless requires the pertinent act to be heinous enough to threaten *all* nations.²⁹⁸ This is because it is the threat that then justifies asserting universal jurisdiction.²⁹⁹ Applying this to *Shi*, it would be near impossible to prove that Shi's actions meet this requirement. Shi's actions were committed onboard a single ship by and against foreigners of the same nationality.³⁰⁰ Just because these actions took place in international waters does not also mean they were committed against the entire world.³⁰¹ Exclusive jurisdiction over actions should have only been available to the ship's flag nation.³⁰² Even the addition of Shi's mutinous conduct would not confer universal jurisdiction because, to be a pirate, international law still required Shi to take subsequent actions to make the ship a danger to the rest of humankind,³⁰³ or at least to another ship.³⁰⁴ Considering that Shi's subsequent actions only involved an attempt to sail home to safety, the court had no grounds rightfully to call him a pirate under international law.

²⁹⁴ Fisheries Jurisdiction (U.K. v. Ice.), 1998 I.C.J. 432 (Dec. 4).

²⁹⁵ See *supra* Part III.A.

²⁹⁶ See *supra* Part III.B.

²⁹⁷ See *supra* Part III.C.

²⁹⁸ See *supra* Part III.

²⁹⁹ See *supra* notes 88–90 and accompanying text.

³⁰⁰ United States v. Shi, 525 F.3d 709, 718 (9th Cir. 2008).

³⁰¹ See, e.g., *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 24 (1826) (ruling that no piracy was present even though aggressive action between ships occurred in international waters).

³⁰² See *supra* Part III.C.

³⁰³ See *supra* note 90 and accompanying text.

³⁰⁴ See The Geneva Convention, *supra* note 90, art. 15.

The court might argue that it was Shi's acts of murder and mutinous conduct together that caused his piratical characterization, and thus this combination of crimes equaled the sufficient threat to all humankind. Consequently, universal jurisdiction could be asserted because this combination created a state of anarchy on the sea. But this argument would also be lacking for two reasons. First, Shi was only in control of the ship for two days, and by the time he was taken into U.S. custody, order had already been reestablished on the ship.³⁰⁵ Accordingly, the ship was firmly under the control of its flag nation, so only the flag nation should have had jurisdiction.³⁰⁶ Second, even when Shi was in control of the ship, it is doubtful he was ever a true threat to any other nation.³⁰⁷ There is no evidence that he had anything close to a piratical intent to plunder or maliciously injure other ships.³⁰⁸ To the contrary, his sole purpose was to return home.³⁰⁹ Surely, the court should have rationalized that this was not the sufficient *mens rea* of a pirate.

In the end, what makes the outcome of this case so troubling is that even if the weight of authority was not so adamantly against the Ninth Circuit's ruling, the court still should have hedged against applying universality to this case because of universal jurisdiction's extreme deviation from normal nexus requirements. "When a court seeks to exercise 'extreme rights'³¹⁰ like universal jurisdiction, or when it issues a ruling on 'aspects of international law [that] touch more sharply on national nerves than do others,'³¹¹ it 'is bound to apply to the case the *strict technical rules of international law*.'"³¹² This means that the Ninth Circuit should have erred on the side of caution when deciding whether to deem Shi a pirate. And caution would have mandated adherence to precedents laid down by previous U.S. opinions, all of which rejected the idea of Shi being a pirate under international law.³¹³ Maintaining this continuity ought to have been of "the utmost importance," because, when dealing with rules of international law, "the same construction should be

³⁰⁵ *Shi*, 525 F.3d at 718.

³⁰⁶ See *supra* note 178 and accompanying text.

³⁰⁷ This is supported by the fact that Shi's sole intention was to return home to China. *Shi*, 525 F.3d at 718.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *The Ambrose Light*, 25 F. 408, 442 (S.D.N.Y. 1885).

³¹¹ See *First Nat'l City Bank v. Banco Nat'l de Cuba*, 406 U.S. 759, 786 (1972).

³¹² *The Ambrose Light*, 25 F. at 442 (emphasis added).

³¹³ See *supra* Part III.C.

placed upon them by all courts”³¹⁴ The Ninth Circuit, however, inexplicably ignored principles fundamental to the rule of law, including those of application, discretion, and precedent.

The second conclusion that can be drawn from this analysis is that international law intended universal jurisdiction to be very difficult to obtain, and by lowering the barriers of access to it, the Ninth Circuit’s ruling opens a Pandora’s box of potential harms. As discussed throughout this Comment, obtaining universal jurisdiction over piracy is difficult—it likely takes (i) a severely heinous crime, with (ii) a similarly malicious intent, combined with (iii) an action against other ships so that the crime is seen as (iv) a threat to all nations. Some might argue that requiring an action to be a threat to all nations, before deeming it piratical, would pose too high a barrier for courts to meet with any regularity. In turn, universal jurisdiction would only be reserved for a small set of the worst criminal acts. But this argument proves the point it argues against—universal jurisdiction is supposed to be of limited application.

To explain, labeling a crime as piratical under international law to obtain universality confers a radical power upon domestic courts. It essentially sanctions the abrogation of one of the most fundamental principles of international law, state sovereignty, by allowing a state to prosecute a defendant to whom it has no connection. Thus, it makes perfect sense that the definition of piracy, which grants such imperium, would only allow the most terrible and sweepingly impactful acts to take hold of that power. Accordingly, isolated incidents, like those only affecting one ship and one nation, should not pass universality’s barriers to entry.

Consider the ramifications that would arise without such stringent requirements. States could then target certain nationalities by asserting universal jurisdiction over lesser, more common crimes to which they have no connection. This would break the legal dam created by nexus requirements and due process, potentially endangering everyone to floods of abuse. In short, by lowering the barriers to universal jurisdiction, the *Shi* ruling puts every accused criminal in danger of prosecution at the hands of potentially hostile foreign powers.

Shi’s crimes were just too limited in scope and intent to overcome the barriers imposed by universal jurisdiction under international law. For that reason, only China or Taiwan, the nations of the entire crew, or the Republic of

³¹⁴ See *The Britannia*, 153 U.S. 130, 150 (1894).

the Seychelles, where the *Full Means No. 2* was registered, should have been able to prosecute Shi. By asserting jurisdiction in spite of this, the Ninth Circuit not only violated international law but also potentially opened the door to future diplomatic crises involving over-zealous or malicious foreign courts.

Finally, the third conclusion is a synthesis and expansion of the harms outlined in the first two conclusions—that the Ninth Circuit’s ruling could negatively affect every person accused of a crime while on the high seas. To illustrate this point, consider the following two hypotheticals.

Hypothetical #1: A U.S. citizen, taking a vacation on a U.S. cruise ship composed entirely of passengers of U.S. nationality, steals a wallet from one of his fellow passengers. Our thief’s crime was committed while the cruise ship was sailing on the high seas. Although the crime affected no other nation, under *Shi*, a foreign ship—say a Cuban cruiser angry at the U.S. economic embargo—could technically stop the cruise ship, apprehend this thief, haul him off to Havana, label him a pirate, and legitimately prosecute him using universal jurisdiction.

This scenario exemplifies how *Shi*’s outcome could remove traditional nexus requirements and a sovereign’s right to exclusively prosecute crimes that only relate or are only directed at that sovereign. *Shi*’s ruling would allow the ridiculous result in Hypothetical One, where third party nations unaffected by a crime could prosecute a foreign-national under the guise of universal jurisdiction for the sole purpose of antagonizing a rival state. The unfairness of this is not only grounded in legal principles discussed previously, but in general notions of logic and fairness as well.

Granted, in response, the Ninth Circuit could argue that the results from Hypothetical One would not be justified by *Shi* because the basis for characterizing Shi’s actions as piracy and conferring universal jurisdiction was not a single criminal act, like the stealing of a wallet in Hypothetical One or the murder of the captain in Shi’s case. But instead, the basis for labeling Shi a pirate was the combination of the criminal act with Shi’s subsequent taking control of the ship. Even if this is true, Hypothetical Two, which considers this rebuttal, shows that this is also littered with serious ramifications.

Hypothetical #2: A U.S. citizen, a law student in fact, in need of a cheap mode of transportation to Brazil accepts an offer from a local merchant to sail on his vessel to South America for half the cost of riding on a commercial vessel. When the ship has reached the high seas, the American captain and crew become violent and lock the

helpless passenger in a small room while subjecting him to frequent beatings. After two days of this treatment, the student gets hold of a heavy piece of wood and bludgeons his guard and captain to death. In an attempt to escape, the passenger-turned-murderer takes control of the ship for two days in an attempt to sail back to the United States, until the crew overpowers him. Upon landing in the Bahamas to stock up on supplies, under *Shi*, the Bahamian authorities would be justified in taking the student into custody, charging him with piracy, prosecuting him using universality to gain jurisdiction, and then, upon a guilty verdict, sentencing him to death.

It is offensive here to think that a third party nation could sentence a U.S. citizen to death without some connection with the underlying crime. Still, under the Ninth Circuit's definition of piracy, the law student's actions would sufficiently confer universal jurisdiction upon any court that could gain control over him. Once again, this outcome is contrary to principles of justice, sovereignty, and logic.

Although both the example about the cruise ship and the example of the law student are extreme, they each give an idea of abuses that would be possible if other countries adopted the Ninth Circuit's rationale. *Shi* would provide any nation with the legal firepower to prosecute foreign nationals for crimes unrelated to that country. As illustrated, the ultimate irony would thus transpire. Instead of universal jurisdiction accomplishing what it was originally intended to do, namely protect people from the most heinous, lawless, and stateless criminals on the high seas, it would itself become a specter of danger, inviting a kind of lawlessness effectuated through groundless prosecutions.

In conclusion, the Ninth Circuit should not have prosecuted *Shi* out of respect for fairness, legal precedent, and guarding against the serious international repercussions that could ensue from ignoring the parameters of universal jurisdiction. As a result, to cabin the definition of piracy, and thus universal jurisdiction, to its intended bounds and to ensure conformity with international law, future courts addressing similar issues should treat the Ninth Circuit's ruling in *Shi* as an aberration. Further, the holding in *Shi* should be seen as nothing more than a reminder of the importance of taking special care

before unsheathing a weapon as powerful as universality. Otherwise, a casual and improper approach could be at the expense of not just a worthy criminal, but also of due process and the foundational legal order.

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