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COMMENT

DAVEY JONES'S LOCKUP: CHANGING THE U.S. APPROACH TO PROSECUTION AND PUNISHMENT OF MARITIME PIRACY IN UNIVERSAL- JURISDICTION CASES

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I. INTRODUCTION

To the average American, the word “pirate” likely evokes images of Johnny Depp, Captain Hook, or other peg-legged scallywags plundering treasure-laden ships off the Spanish Main hundreds of years ago. For others, however, including thousands of mariners, their families, employers, national governments, and those relying on the timely delivery of precious food and supplies, the threat of pirates at sea is not merely a thing of the past.¹ Although attacks once again appear to be on the decline after reaching a staggering 445 reported incidents in 2010, the latest International Maritime Bureau (IMB) figures show pirates attacked 245 vessels in 2014, with more than 440 mariners taken hostage.² When coupled with the fact that over ninety percent of the world’s trade is con-

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¹ See generally ICC INT’L MAR. BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS: REPORT FOR THE PERIOD 1 JANUARY–31 DECEMBER 2014 (2015), available at <http://www.hellenicshippingnews.com/wp-content/uploads/2015/01/2014-Annual-IMB-Piracy-Report-ABRIDGED.pdf>.

² *Id.* at 5, 11. Although the number of reported incidents of piracy appears to be on the decline, there is a general consensus among those in the maritime community that a significant percentage of pirate attacks go unreported due to fears of lengthy investigations, costly delays, and increased insurance premiums. See DAVID F. MARLEY, *Modern Piracy: A Reference Handbook*, 66–67 (2010).

ducted by ship,³ it is no wonder this threat to human safety and the free flow of maritime commerce has emerged as a grave concern for governments and industry around the globe in recent years.⁴

The latest upsurge in incidents occurring in West Africa's Gulf of Guinea and the waters of Southeast Asia demonstrates that maritime piracy is not limited to any one region, but rather has reemerged as a viable criminal enterprise for coastal crime syndicates around the globe.⁵ Unfortunately, as the pirates of today often hail from some of the most lawless and under-resourced nations in the world, combating maritime piracy in the modern era has proved to be an exceedingly difficult task.⁶ In Somalia, for example, extensive corruption, widespread poverty, and the absence of a stable central government created an environment in which pirate gangs could carry out their operations largely unfettered, wreaking havoc on one of the world's most vital shipping routes.⁷ Similarly, increased conflict and "continued fragility in many West African governments [have] provided space for pirate groups to operate," threatening one of the largest oil-producing regions in the world.⁸ With such regions ill-equipped to combat the threat of piracy on their own, responsibility for addressing the problem has fallen largely on the international community, including national governments, international organizations, and members of the shipping industry.⁹

While the international response to piracy thus far, including the deployment of multinational naval task forces, increased vessel security measures, and various regional counter-piracy agreements has proved successful in reducing the threat in recent years,¹⁰ the importance of a comprehensive and consistent legal response to the piracy problem cannot be overlooked. According to a recent UN Secretary General report,

³ *Introduction to IMO*, INT'L MAR. ORG., <http://www.imo.org/About/Pages/Default.aspx> (last visited Feb. 18, 2015).

⁴ *See generally Piracy and Armed Robbery Against Ships*, INT'L MAR. ORG., <http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Pages/Default.aspx> (last visited Feb. 18, 2015).

⁵ *See generally* ICC INT'L MAR. BUREAU, *supra* note 1; Bryan Abell, *Return to Chaos: The 2013 Resurgence of Nigerian Piracy and 2014 Forecast*, GCAPTAIN.COM (Jan. 14, 2014), <http://gcaptain.com/nigerian-piracy-resurgence-bryan-abell/>.

⁶ *See* Eugene Kontorovich, "A Guantánamo on the Sea": *The Difficulty of Prosecuting Pirates and Terrorists*, 98 CALIF. L. REV. 243, 244–46 (2010).

⁷ *See* Christopher Alessi & Stephanie Hanson, *Combating Maritime Piracy*, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/piracy/combating-maritime-piracy/p18376> (last updated Mar. 23, 2012).

⁸ Brandon Prins, *What Drives Maritime Piracy in Sub-Saharan Africa?*, PIRACY-STUDIES.ORG (Nov. 11, 2014), <http://piracy-studies.org/2014/what-drives-maritime-piracy-in-sub-saharan-africa/>.

⁹ *See* Alessi & Hanson, *supra* note 7.

¹⁰ *See* Statement of Rear Adm. Joseph W. Kuzmick, U.S. Navy, Before the Subcommittee on Coast Guard and Maritime Transportation, Committee on Transportation and Infrastructure, U.S. House of Representatives, 3 (Apr. 10, 2013), available at http://www.navy.mil/ah_online/antipiracy/images/gallery/testimony.pdf.

nearly nine out of ten pirates captured by naval forces are released without facing prosecution, significantly undermining any deterrent effect such forces may have.¹¹ This is in part because, despite international law providing a “uniquely favorable framework for its suppression” by way of the universal-jurisdiction doctrine,¹² prosecution of pirates remains an expensive and often complicated task.¹³ Evidentiary issues and deficient domestic statutes are some of the most commonly cited obstacles to prosecution, but fears over lengthy incarcerations and potential asylum claims have also left many countries reluctant to exercise jurisdiction over suspected pirates to the full extent of the law.¹⁴

Recognizing the need for the United States government to take a leadership role in confronting and suppressing the resurging threat of maritime piracy, this Comment evaluates the current status of maritime piracy laws in the United States. Moreover, as the use of legal mechanisms will play a vital part in combating maritime piracy, this Comment seeks to demonstrate that the statutory system as it stands is both outdated and ill-suited for addressing the complexities of piracy in the modern era, and will only impede the achievement of current strategic objectives. More specifically, as the crime of piracy is no longer committed by just one rogue ship and its crew, this Comment highlights the need for a system that takes into account the evolution of piracy to include multiple actors both at sea and on shore, addressing varying degrees of culpability and imposing sentences fit for the crime. As evidenced by the recent decision striking down the sole U.S. universal jurisdiction piracy¹⁵ statute as unconstitutional as applied,¹⁶ the system as it stands is inconsistent with both U.S. and international standards, and limits use of the judicial system as a means to suppress the crime.

¹¹ U.N. Secretary-General, *Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia*, 2–3, UN DOC. S/2011/30 (Jan. 25, 2011), available at http://www.un.org/depts/los/piracy/piracy_documents.htm (follow “S/2011/30” hyperlink; then follow “English” hyperlink).

¹² Kontorovich, *supra* note 6, at 244.

¹³ See JONATHAN BELLISH, ONE EARTH FOUND., *THE ECONOMIC COST OF SOMALI PIRACY* 2012, at 27–30 (2013), available at http://oceansbeyondpiracy.org/sites/default/files/attachments/View%20Full%20Report_1.pdf.

¹⁴ See Yvonne M. Dutton, *Pirates and Impunity: Is the Threat of Asylum Claims a Reason To Allow Pirates To Escape Justice?*, 34 *FORDHAM INT’L L.J.* 236, 239–41 (2011).

¹⁵ The term “general piracy” refers to the crime of piracy as defined by international law and subject to universal jurisdiction, or subject to prosecution by any nation. In contrast, “municipal piracy” may include any act deemed as piracy by the enacting government, but it requires a jurisdictional nexus before that nation may prosecute. For example, in the United States, 18 U.S.C.A. § 1651 (Westlaw 2015) serves as the sole general piracy statute, incorporating by reference the international definition of piracy. Other statutes, including 18 U.S.C.A. §§ 1652 and 1655 (Westlaw 2015), enumerate certain acts amounting to municipal piracy. See *United States v. Hasan*, 747 F. Supp. 2d 599, 605 (E.D. Va. 2010).

¹⁶ *United States v. Said (Said II)*, 3 F. Supp. 3d 515 (E.D. Va. 2014).

Part II of this Comment provides an overview of the size and scope of the world's piracy problem in 2015, as well as a brief discussion of the responses taken by the international community to date. Part III discusses the current system of piracy laws in the United States, explained in light of what was learned from the first universal jurisdiction piracy cases to be tried in nearly 200 years. Part IV discusses the consequences of these most recent decisions, arguing that the current one-statute-fits-all approach is improper for addressing piracy in the twenty-first century, as it is over-inclusive and unreasonably exposes certain individuals to punishments unfitting for their crimes. Finally, Part V presents simple recommendations for updating the U.S. piracy statutory scheme, in accordance with the principles of universal jurisdiction, international law, and evolving standards of criminal punishment.

II. A BRIEF OVERVIEW: MARITIME PIRACY IN THE TWENTY-FIRST CENTURY

Although the crime of piracy has existed nearly as long as man has sailed the seas, pirates have reemerged in recent decades to once again pose a serious threat to mariners and marine transportation around the globe.¹⁷ As noted above, despite international efforts leading to a steady downturn since attacks reached a peak in 2010, the latest IMB reports show the threat remains far from eradicated. IMB figures place the total number of reported attacks at roughly 1700 since 2010,¹⁸ though some estimate the actual number of attacks to be closer to twice that amount, as incidents frequently go unreported.¹⁹ Moreover, it is not only the number of attacks that is alarming, but also the increasing success rate and level of violence against crews.²⁰ As piracy is no longer a new phenomenon in many parts of the world, pirate gangs have grown increasingly sophisticated and highly skilled in their operations, as well as more heavily armed and dangerous.²¹ In sum, although it is encouraging that

¹⁷ See generally ICC INT'L MAR. BUREAU, *supra* note 1; THE WHITE HOUSE, UNITED STATES COUNTER PIRACY AND MARITIME SECURITY ACTION PLAN 2 (June 20, 2014), available at http://www.whitehouse.gov/sites/default/files/docs/united_states_counter_piracy_and_maritime_security_action_plan_2014.pdf ("Piracy and related maritime crime continue to plague mariners throughout the world and will continue to pose obstacles to the lawful use of the maritime domain.")

¹⁸ ICC INT'L MAR. BUREAU, *supra* note 1, at 5.

¹⁹ See MARLEY, *supra* note 2, at 66–67.

²⁰ See Alan Cowell, *West African Piracy Exceeds Somali Attacks, Report Says*, N.Y. TIMES, June 18, 2013, http://www.nytimes.com/2013/06/19/world/africa/west-african-piracy-exceeds-so-mali-attacks-report-says.html?_r=0 (discussing the higher success rates of remaining Somali pirates as well as the greater level of violence experienced in the latest West African attacks).

²¹ See *id.*

the overall number of attacks appears to be on the decline, this decrease in volume can be misleading.

A. THE MODERN PIRATE

Comparing the two side by side, the pirates of today and those of centuries past share a number of similarities. Modern pirates still attack, loot, and hijack ships for ransom, and they still thrive in regions characterized by political instability, ineffective law enforcement, and advantageous geography.²² Many modern pirates are also the same kind of ruthless individuals, known for spending their loot on “bling” and bad habits rather than a new law-abiding lifestyle.²³ Instead, the major difference in piracy today is not *who* is carrying out the attack, but rather *how* they are doing it.

The first and perhaps most obvious difference in piracy operations today stems from the dramatic advancements in weaponry and technology, as well as the widespread availability of such equipment.²⁴ Most significantly, heavy machine guns, high-powered outboard engines, satellite phones, and GPS devices have all become commonplace in the modern pirate's outfit, giving them a significant advantage over their early counterparts, as well as their intended targets.²⁵ In a typical attack, pirates locate their target, set out from a “mother ship” in speedy skiffs armed with AK-47s, rocket-propelled grenades, grappling hooks, and ladders, board the ship and seize the crew.²⁶ Once on board, the pirates will either rob the ship and its crew of any cash, electronics, or other valuables, or in some instances, redirect the ship to a safe holding point to unload cargo or contact the vessel owner.²⁷ In cases of the latter, the pirates can then use the ship, its crew, or its cargo as leverage in ransom negotiations, or they can sell the ship's cargo on the black market.²⁸

A second major difference in maritime piracy today is the level of sophistication in piracy operations, or more specifically, the number of actors involved in the preparation and execution of any given attack, both

²² See Daniel Pines, *Maritime Piracy: Changes in U.S. Law Needed To Combat This Critical National Security Concern*, 36 SEATTLE U. L. REV. 69, 75–78 (2012).

²³ Faith Karimi, *African Pirates Use Millions of Dollars in Ransom on Drugs, Real Estate, Prostitutes*, CNN (Nov. 2, 2013), <http://www.cnn.com/2013/11/02/world/africa/horn-of-africa-piracy-loot/>.

²⁴ Neal Ungerleider, *Somali Pirates Go High Tech*, FAST COMPANY (June 22, 2011), <http://www.fastcompany.com/1762331/somali-pirates-go-high-tech>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See THE WHITE HOUSE, *supra* note 17, annexes A, B.

²⁸ *Id.*

at sea and on shore.²⁹ For example, in the case of Somali pirates, whose activities may entail weeks or even months at sea, significant capital is needed to fund piracy operations, often requiring as many as three to five financial backers.³⁰ Following a successful attack, additional players receiving a cut of the ransom include kingpins, negotiators, lawyers, and bankers, as well as local militias in control of the region's ports.³¹ According to some estimates, the pirates carrying out an attack receive as little as one tenth of a percent of the total ransom payment, with financiers and militias receiving the bulk of the payout.³² This multifarious system has made both capture and prosecution increasingly difficult, as the pirates at sea make up just one small part of the larger groups responsible for their attacks.³³

B. PIRACY HOTSPOTS

1. *Somalia and the Gulf of Aden*

Piracy in the Gulf of Aden first began in the early 1990's in response to the collapse of the Somali government and economy, as well as frequent toxic dumping and unauthorized fishing by foreign vessels.³⁴ However, as former fishermen soon discovered vessel owners' willingness to pay out large sums for the safe return of their crews and cargo, piracy in the region quickly evolved from "a fairly ad hoc, disorganized effort to a highly developed criminal enterprise."³⁵ As Somalia-based pirates grew increasingly experienced, incidents of piracy in the region grew to as many as 236 in 2011, accounting for more than half of all reported incidents worldwide that year.³⁶

Equipped with heavy machine guns and rocket-propelled grenades, Somali pirates set out in small outboard powered skiffs, tracking down slow-moving commercial vessels transiting the region.³⁷ Once aboard,

²⁹ See Christopher Harress, *Secret Flow of Somali Piracy Ransoms: 179 Hijacked Ships Generated Some \$400M in Payments Since 2005. So Where Has It All Gone?*, INT'L BUS. TIMES (Nov. 4, 2013, 3:58 PM), <http://www.ibtimes.com/secret-flow-somali-piracy-ransoms-179-hijacked-ships-generated-some-400m-payments-2005-so-where-has>.

³⁰ See *Somali Piracy: More Sophisticated Than You Thought*, ECONOMIST, Nov. 2, 2013, available at <http://www.economist.com/news/middle-east-and-africa/21588942-new-study-reveals-how-somali-piracy-financed-more-sophisticated-you>.

³¹ See *id.*; Harress, *supra* note 29.

³² Harress, *supra* note 29.

³³ *Somali Piracy: More Sophisticated Than You Thought*, *supra* note 30.

³⁴ See Michael Gagain, *Neglected Waters: Territorial Maritime Piracy and Developing States: Somalia, Nigeria, and Indonesia*, 16 NEW ENG. J. INT'L & COMP. L. 169, 186-88 (2010).

³⁵ Statement of Rear Adm. Joseph W. Kuzmick, *supra* note 10, at 2.

³⁶ ICC INT'L MAR. BUREAU, *supra* note 1, at 5.

³⁷ THE WHITE HOUSE, *supra* note 17, annex A, at 2.

pirates capture the crew and hijack the vessel, which are then used as leverage in ransom negotiations, often yielding multi-million-dollar payouts.³⁸ It is estimated Somali pirates have received hundreds of millions of dollars in ransom payments over the course of the past decade, which they used to fund further piracy operations and expand their criminal enterprises to include other illicit activities.³⁹ Factoring in additional on-board security, vessel rerouting, increased insurance rates, and other protective measures, piracy and related maritime crime in the region “cost[] the international community billions of dollars annually.”⁴⁰

Although incidents of piracy in the Gulf of Aden are now at their lowest levels since 2006, ships still do not transit the region peacefully, and “the conditions that allowed piracy to flourish still exist in Somalia today.”⁴¹ Moreover, as Somalia sits along one of the world’s most vital shipping corridors, the Gulf of Aden, piracy in the region has the ability to undermine confidence in global sea lanes of communication, threaten revenue and resources, increase maritime insurance rates and cargo costs, and endanger the lives of seafarers.⁴² It is for these reasons that anti-piracy efforts in the Horn of Africa have become a focal point of U.S. national security strategy in the region.⁴³

2. *Southeast Asia*

Southeast Asia was the most pirate-infested region in the world between 1992 and 2006, with more than 450 attacks occurring in the year 2000 alone.⁴⁴ This high incidence of piracy is partly attributable to the region’s pirate-friendly geography, as it is home to more than 20,000 islands and countless waterways, as well as some of the world’s busiest seaports and shipping lanes.⁴⁵ The Strait of Malacca, for example, is transited by nearly 25,000 containerships annually, linking the markets of Asia and Europe.⁴⁶ Such high-volume shipping provides pirates ample targets to carry out their attacks.

³⁸ *Id.*

³⁹ *Id.* (citing BELLISH, *supra* note 13).

⁴⁰ *Id.* annex A, at 1–2.

⁴¹ *Id.* annex A, at 1.

⁴² *Id.*

⁴³ *See generally id.* annex A.

⁴⁴ Carolin Liss, *The Roots of Piracy in Southeast Asia*, APSNET POLICY FORUM 1 (Oct. 22, 2007), <http://nautilus.org/apsnet/the-roots-of-piracy-in-southeast-asia/#axzz2wdyez05O>.

⁴⁵ *Id.*

⁴⁶ Marcus Hand, *Malacca Straits Transits Hit All Time High in 2013, Pass 2008 Peak*, SEATRADER GLOBAL (Feb. 10, 2014), <http://www.seatrade-global.com/news/asia/malacca-straits-transits-hit-all-time-high-in-2013-pass-2008-peak.html>.

Until recently, incidents of piracy occurring in Southeast Asia have been characterized as less organized and more opportunistic.⁴⁷ Attacks in the region are often carried out in a quick hit-and-run style, using small arms while vessels are anchored close to shore or tied up in one of the region's many ports.⁴⁸ More recently, however, the IMB Piracy Reporting Centre has noted an increase in hijackings of larger coastal tanker ships transiting the region, indicating a possible shift in pirate tactics.⁴⁹ According to IMB reports, at least six tankers were hijacked for their cargoes of diesel or gas oil between April and July 2014, "sparking fears of a new trend."⁵⁰

Irrespective of the tactics employed, it is evident that pirate activity is once again on the rise in Southeast Asia as of early 2015.⁵¹ In 2013 more than 125 incidents of piracy were reported throughout region, 106 of which occurred in Indonesian waters.⁵² This trend continued through 2014, with 141 attacks taking place in the region as a whole, and 100 in Indonesia alone.⁵³ Events in Indonesia accounted for nearly half of all vessels boarded by pirates in 2014, with pirates in the region experiencing some of the highest success rates in recent years.⁵⁴ Although piracy in Southeast Asia has been effectively managed by regional partnerships in the past, the region's high shipping traffic and critical shipping lanes render the resurgence of piracy in the region both a U.S. and a global concern.⁵⁵

3. *Nigeria and the Gulf of Guinea*

As of late, West Africa's Gulf of Guinea has emerged as the latest hotbed for incidents of maritime piracy.⁵⁶ Although piracy in Nigeria and surrounding nations is nothing new—piracy in the region has "waxed and waned" since the 1990's⁵⁷—larger attacks, including more-frequent hijackings and kidnappings, "are of growing concern for both mariners and the oil industry operating in the region."⁵⁸ IMB figures

⁴⁷ Liss, *supra* note 44.

⁴⁸ *Id.*

⁴⁹ *IMB Reports Worrying Trend of Small Tanker Hijacks in Southeast Asian Waters*, ICC (July 22, 2014), <https://icc-ccs.org/news/947-imb-reports-worrying-trend-of-small-tanker-hijacks-in-southeast-asian-waters>.

⁵⁰ *Id.*

⁵¹ ICC INT'L MAR. BUREAU, *supra* note 1, at 5.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 8.

⁵⁵ See The White House, *supra* note 17, annex B, at 1.

⁵⁶ *Id.*

⁵⁷ *Id.* annex B, at 2.

⁵⁸ *Id.* annex B, at 1.

show 51 reported incidents in 2013, accounting for roughly twenty percent of all attacks worldwide that year.⁵⁹ However, as incidents in the region often go unreported, members of the Nigerian Navy estimate actual numbers to be closer to 100 attacks annually, with some “ten to 15 attacks every month in recent years.”⁶⁰

While historically acts of piracy in and around the Gulf of Guinea typically took the form of low-level robberies carried out against vessels operating close to shore, hijackings for cargo theft, particularly petroleum products, now constitute a majority of incidents in the region.⁶¹ Pirates in the region are often more violent than their east African counterparts,⁶² and significant numbers of kidnappings also occur.⁶³ As outlined in the June 2014 U.S. Counter Piracy and Maritime Security Action Plan, “[w]hen maritime criminals focus on the high value cargo aboard oil tankers and general cargo vessels, with little regard for the operators, it becomes much more dangerous for mariners.”⁶⁴

Of particular concern in the Gulf of Guinea is the region’s vital role in the global energy market.⁶⁵ The region produces more than 3 million barrels of oil each day, roughly one third of Africa’s total output.⁶⁶ Nigeria is also one of the world’s top exporters of liquefied natural gas.⁶⁷ The United States plays a large role in the West African oil and gas industries, and some seventy U.S. registered offshore supply vessels currently service the region.⁶⁸ In October 2013 Nigerian pirates attacked one such American supply vessel and abducted the captain and chief engineer, leading to a three-week standoff concluded upon payment of an undisclosed ransom by the shipping company.⁶⁹ As further escalation of pirate activity in West Africa will increasingly put U.S. citizens and interests at risk, suppressing piracy in the region has become a focal point of U.S. strategy in the region.⁷⁰

⁵⁹ ICC INT’L MAR. BUREAU, *supra* note 1, at 5.

⁶⁰ U.N. OFFICE ON DRUGS & CRIME, MARITIME PIRACY IN THE GULF OF GUINEA, 51 (2012), available at http://www.unodc.org/documents/toc/Reports/TOCTAWestAfrica/West_Africa_TOC_PIRACY.pdf.

⁶¹ See THE WHITE HOUSE, *supra* note 17, annex B, at 2.

⁶² U.N. OFFICE ON DRUGS & CRIME, *supra* note 60, at 50.

⁶³ See THE WHITE HOUSE, *supra* note 17, annex B, at 1.

⁶⁴ *Id.*

⁶⁵ See *id.* annex B, at 2.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* annex B, at 2–3.

⁶⁹ Barbara Starr & Catherine E. Shoichet, 2 *Seized in Pirate Attack off Nigeria*, U.S. Official Says, CNN (Oct. 25, 2013), <http://www.cnn.com/2013/10/24/world/africa/nigeria-vessel-attack/index.html>.

⁷⁰ See generally THE WHITE HOUSE, *supra* note 17, annex B.

C. THE INTERNATIONAL RESPONSE TO PIRACY

As piracy has reemerged to threaten mariners and the lawful use of the maritime domain in recent years, resolving the issue has become a matter of increasing importance to the United States and throughout the international community.⁷¹ During this period a variety of antipiracy tactics have been employed, including the adoption of numerous international agreements, the deployment of naval task forces, and increased on-board security measures, including the adoption of best management practices.⁷² Additionally, prosecution efforts by a range of nations have increased in recent years, with the threat of judicial sentencing providing both a means of punishment as well as effective deterrence.⁷³ Together these measures have proved successful in reducing incidents of piracy in many of the most dangerous regions of the world, and their continued use will be critical to widespread eradication of the threat.⁷⁴

First, the United Nations and other regional organizations have enabled multinational antipiracy efforts through the adoption of partnership agreements and the creation of information-sharing centers.⁷⁵ This approach began with the 2004 Regional Cooperation Agreement on Combating Piracy and Armed Robbery (ReCAAP), entered into by twenty Asian nations, which played a critical role in reducing incidents of piracy in the Straits of Malacca and Singapore.⁷⁶ The agreement provided an opportunity for regional nations to collaborate in their efforts to patrol the waters of the region and established an information-sharing center to better facilitate cooperation.⁷⁷ This model was subsequently followed as the threat of piracy increased dramatically in Somalia and the Gulf of Aden, where the United Nations Security Council adopted several resolutions to enable similar coordination.⁷⁸ The resolutions, implemented by the so-called Djibouti Code, promote cooperation and information sharing amongst a range of participating nations, and authorize foreign ves-

⁷¹ See generally THE WHITE HOUSE, *supra* note 17.

⁷² See THE WHITE HOUSE, *supra* note 17, annexes A, B.

⁷³ Eugene Kontorovich, *The Penalties for Piracy: An Empirical Study of National Prosecution of International Crime* 1–2 (Nw. Univ. Sch. of Law Scholarly Commons, Working Paper 211, 2012), available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1210&context=facultyworkingpapers>.

⁷⁴ See THE WHITE HOUSE, *supra* note 17, annex A, at 2–8.

⁷⁵ See *Djibouti Code of Conduct*, INT'L MAR. ORG., <http://www.imo.org/OurWork/Security/PIU/Pages/DCoC.aspx> (last visited Feb. 25, 2015); *Regional Information Sharing Centres*, INT'L MAR. ORG. (Dec. 3, 2014), <http://www.imo.org/OurWork/Security/WestAfrica/Pages/MTISC-Gulf-of-Guinea.aspx>.

⁷⁶ *About ReCAAP*, RECAAP.ORG, <http://www.recaap.org/AboutReCAAPISC.aspx> (last visited Feb. 25, 2015).

⁷⁷ *Id.*

⁷⁸ *Djibouti Code of Conduct*, *supra* note 75.

sels to enter Somali waters and use all means necessary to repress acts of piracy in the region.⁷⁹ Similar efforts are currently being implemented to address the burgeoning piracy situation in West Africa.⁸⁰

Second, several international naval fleets are dedicated to combating piracy in the Gulf of Aden and surrounding Indian Ocean.⁸¹ Following the adoption the Djibouti Code, the United States Navy established Combined Task Force 151 (CTF-151) to conduct antipiracy missions off the Somali coast.⁸² CTF-151 is a multinational force, with command rotated between participating nations every four to six months.⁸³ Additionally, NATO has deployed fleets to the region as part of Operation Allied Protector, and the European Union established Operation ATALANTA to fulfill the same role.⁸⁴ Together, these forces, along with support vessels contributed by other members of the international community, have engaged in a variety of distinct antipiracy missions, ranging from incident response and disruption to the establishment of patrol areas and protected transit corridors.⁸⁵

Third, the adoption of increased on-board security measures by shippers has also led to a significant reduction in pirate attacks.⁸⁶ For example, most have adopted the Maritime Safety Committee's Best Management Practice Guide (BMPs), which emphasizes the need for merchant vessels to take every possible measure to protect themselves from pirates.⁸⁷ The BMPs outline a number of on-board safety practices and precautions that have helped better identify high-risk areas and prevent attacks through communication with naval forces and defensive measures.⁸⁸ Additionally, the hiring of private armed security guards has grown increasingly popular with shippers frequently transiting high-risk areas.⁸⁹ To date, not a single vessel with armed security guards has been attacked; however, pirates have grown increasingly skilled at targeting

⁷⁹ *Id.*

⁸⁰ *Regional Information Sharing Centres*, *supra* note 75.

⁸¹ *CTF-151: Counter-Piracy*, COMBINEDMARITIMEFORCES.COM, <http://combinedmaritimeforces.com/ctf-151-counter-piracy/> (last visited Feb. 13, 2015).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*; THE WHITE HOUSE, *supra* note 17, annex B, at 2.

⁸⁵ W. Michael Reisman & Bradley T. Tennis, *Combating Piracy in East Africa*, 35 YALE J. INT'L L. ONLINE 14, 19 (2009).

⁸⁶ See Statement of Rear Adm. Joseph W. Kuzmick, *supra* note 10, at 3.

⁸⁷ See *id.*

⁸⁸ See *id.* ("BMPs include the use of concertina, razor wire, and water hoses; transiting at speeds above 16 knots; use of ship citadels; and avoiding high-risk areas.")

⁸⁹ See *Repelling Pirate Attacks: The Measures To Protect a Ship*, TELEGRAPH (Feb. 10, 2014), <http://www.telegraph.co.uk/sponsored/culture/captain-phillips-film/10367534/security-against-pirate-attacks.html>.

unprotected vessels, and many foreign states as well as some vessel types forbid the use of firearms on board.⁹⁰

Lastly, increased prosecution of pirates has become an integral part of the international strategy to combat the threat.⁹¹ Several nations have amped up prosecution efforts in recent years, with some 1400 pirates now held in more than twenty nations around the world.⁹² Prosecution provides an effective way to punish pirates for their actions, but it also plays an important role in deterring pirates, as well as future pirates, from pursuing the occupation.⁹³ Still, as many as ninety percent of captured pirates are released without facing prosecution, as evidentiary issues and deficient domestic statutes make conviction a difficult task.⁹⁴ As the United States continues to take a leadership role in the fight against piracy, insuring these obstacles do not impede prosecution as a means to achieve the strategic objective is of vital importance moving forward.

III. MARITIME PIRACY LAW IN THE UNITED STATES

A. THE CRIME OF PIRACY AND THE UNIVERSAL-JURISDICTION DOCTRINE

Throughout modern history, the term “piracy” has been used to describe two distinct offenses: (1) piracy as a violation of a nation’s domestic laws, known as “municipal piracy,” and (2) piracy as a violation of customary international law, known as “general piracy.”⁹⁵ At the domestic level, municipal piracy includes any act deemed as such by statute.⁹⁶ Violators of municipal piracy statutes may be prosecuted so long as there exists a jurisdictional nexus between the prosecuting nation and the crimes, such as acts occurring within a nation’s territorial waters or carried out against a nationally registered vessel.⁹⁷ For example, in the United States, 18 U.S.C. § 1655 provides that on a vessel, “whoever . . . lays violent hands upon his commander, to hinder and prevent his fighting in defense . . . is a pirate.” While violators of this statute may be considered “pirates” in the eyes of the U.S. government, such conduct may not necessarily satisfy the definition of piracy under customary in-

⁹⁰ See Statement of Rear Adm. Joseph W. Kuzmick, *supra* note 10, at 4–5; see also THE WHITE HOUSE, *supra* note 17, annex B, at 5.

⁹¹ Kontorovich, *supra* note 73, at 1.

⁹² THE WHITE HOUSE, *supra* note 10, annex A, at 2.

⁹³ *Id.* annex A, at 3, 6.

⁹⁴ See Dutton, *supra* note 14, at 239–41.

⁹⁵ United States v. Hasan, 747 F. Supp. 2d 599, 605–06 (E.D. Va. 2010) (citing Edwin D. Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334, 335–36 (1925)).

⁹⁶ *Id.* at 606.

⁹⁷ *Id.*

ternational law and would therefore require a jurisdictional nexus with the United States in order to subject violators to prosecution under the statute.

In contrast, general piracy, otherwise known as “piracy *jure gentium*,” or “the international crime of piracy,” refers to “those offenses that the international community agrees constitute piracy,” commonly referred to as customary international law.⁹⁸ Significantly, in a case of general piracy, *any* nation may assert jurisdiction over foreign nationals committing the crime, regardless of any jurisdictional connection.⁹⁹ For example, general piracy statutes may apply to incidents of piracy occurring in foreign countries in which no U.S. citizens or vessels were directly involved, as is often the case for incidents occurring off the coasts of Africa. This authority stems from the international law doctrine of universal jurisdiction.¹⁰⁰ The universal-jurisdiction doctrine provides an exception to the requirement of a jurisdictional nexus between a nation and the extraterritorial activities of non-nationals, allowing any nation to define and punish certain offenses recognized by the international community as a universal concern.¹⁰¹ General piracy is recognized as the first universal-jurisdiction crime; the nations of the world have long considered pirates to be universal enemies of mankind, “[b]ecause [they] commit[] hostilities upon the subjects and property of any or all nations, without any regard to right or duty, or any pretence of public authority.”¹⁰² Importantly, however, “it is only when a state proscribes piracy in a manner that mirrors the international consensus definition . . . that the state can assert the universal jurisdiction doctrine.”¹⁰³

B. THE DEVELOPMENT OF MARITIME PIRACY LAW IN THE UNITED STATES

Article I, Section 8, of the U.S. Constitution grants Congress the authority to “define and punish Piracies and Felonies committed on the High Seas, and Offences against the Law of Nations.”¹⁰⁴ As expressed by the language “piracies” *and* “offenses against the law of nations,” the so-called “Define and Punish Clause” grants Congress the power to

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 606–07.

¹⁰¹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 404 (1987).

¹⁰² *United States v. Ali*, 718 F.3d 929, 934 (D.C. Cir. June 11, 2013) (quoting *United States v. Brig Malek Adhel*, 42 U.S. 210, 232 (1844)).

¹⁰³ *Hasan*, 747 F. Supp. 2d at 609 (citing *United States v. Shi*, 525 F.3d 709, 722–24 (9th Cir. 2008)).

¹⁰⁴ U.S. CONST. art. I, § 8.

adopt both municipal and general piracy statutes.¹⁰⁵ Congress has enacted legislation pursuant to this authority on several occasions throughout history; however, “initial attempts by Congress to criminalize the international crime of piracy proved difficult” because of the need for statutory language that mirrored the customary international-law definition, which was susceptible to change over time.¹⁰⁶

Congress first attempted to proscribe acts of piracy in accordance with international law in section 8 of the Act of 1790.¹⁰⁷ The Act defined piracy as robbery, murder, or any other offense punishable by death, committed by any person or persons on the high seas.¹⁰⁸ This statute was first put to the test in the Supreme Court in *United States v. Palmer*, in which a group of suspected pirates was accused of attacking and capturing a Spanish vessel on the high seas.¹⁰⁹ The Court rejected the government’s position that Congress intended the Act of 1790 to apply to offenses committed by foreign nationals against foreign vessels and concluded the statute was insufficient for the United States to invoke universal jurisdiction over the suspected pirates.¹¹⁰ The following year, in response to the decision in *Palmer*, Congress passed the Act of 1819, this time clearly expressing its intent to proscribe acts of piracy as an international offense subject to universal jurisdiction.¹¹¹ Section 5 of the 1819 Act provided in part, “[I]f any person or persons whatsoever, shall, on the high seas, *commit the crime of piracy, as defined by the law of nations*, and such offender or offenders, shall afterwards be brought into or found in the United States, every such offender or offenders shall, upon conviction thereof, . . . be punished with death.”¹¹² Rather than attempting to specifically enumerate the types of piratical conduct forbidden by international law, Congress opted to reference the international definition so as to ensure the statute would proscribe exactly what is required to invoke universal jurisdiction. Just a year after the enactment of the Act of 1819, the Supreme Court in *United States v. Smith* upheld the statute as an acceptable exercise of authority by Congress and sufficient for purposes of invoking universal jurisdiction over captured pirates.¹¹³ Although section 5 of the 1819 Act was subsequently amended and

¹⁰⁵ See *Hasan*, 747 F. Supp. 2d at 603–06.

¹⁰⁶ *Id.* at 609.

¹⁰⁷ See *id.* at 612.

¹⁰⁸ Act of Apr. 30, 1790, § 8, 1 Stat. 112, 113–14.

¹⁰⁹ See *United States v. Palmer*, 16 U.S. 610 (1818).

¹¹⁰ *Palmer*, 16 U.S. at 633–34.

¹¹¹ *Id.*

¹¹² Act of Mar. 3, 1819, § 5, 3 Stat. 510, 513–14 (emphasis added).

¹¹³ *United States v. Smith*, 18 U.S. 153 (1820); see *Hasan*, 747 F. Supp. 2d at 616.

renewed by Congress in the Act of 1820, the language regarding acts of general piracy remained unchanged.¹¹⁴

Today, 18 U.S.C. § 1651 serves as the United States' sole general piracy statute authorizing the exercise of universal jurisdiction.¹¹⁵ Section 1651 provides, "Whoever, on the high seas, *commits the crime of piracy as defined by the law of nations*, and is afterwards brought into or found in the United States, shall be imprisoned for life."¹¹⁶ The statute, which can be traced back to section 5 of the 1819 Act of Congress, has retained the incorporation of the international definition by reference, with the only significant change being a mandatory sentence of life imprisonment as opposed to death.¹¹⁷ Although the U.S. District Court for the Eastern District of Virginia recently held that § 1651's mandatory sentence of life imprisonment as applied violated the Eighth Amendment,¹¹⁸ it remains the sole statute arguably capable of reaching acts of piracy lacking a jurisdictional connection to the United States.

C. "PIRACY AS DEFINED BY THE LAW OF NATIONS"

Because of § 1651's reference to "piracy as defined by the law of nations," discerning the precise definition of piracy according to international law is critical for the application of the statute. Fortunately, as the judges deciding the most recent batch of piracy cases have now discussed this issue at length, it is now established that Article 101 of the United Nations Convention of the Law of the Sea (UNCLOS) articulates the current definition of piracy for purposes of the statute.¹¹⁹ As set forth in UNCLOS Article 101, the following acts are prohibited by § 1651:

- (a) *any* illegal acts of violence or detention, or *any* act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) *any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;*

¹¹⁴ See *Hasan*, 747 F. Supp. 2d at 612.

¹¹⁵ See *id.* at 623–30.

¹¹⁶ 18 U.S.C.A. § 1651 (Westlaw 2015) (emphasis added).

¹¹⁷ *Hasan*, 747 F. Supp. 2d at 617.

¹¹⁸ *Said II*, 3 F. Supp. 3d 515, 519–26 (E.D. Va. 2014).

¹¹⁹ *Hasan*, 747 F. Supp. 2d 599; see *United States v. Ali*, 718 F.3d 929, 936–37 (D.C. Cir. 2013); *United States v. Dire*, 680 F.3d 446, 469 (4th Cir. 2012).

(c) *any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).*¹²⁰

U.S. courts first began applying the definition of piracy articulated in UNCLOS Article 101 in a recent series of cases resulting from two Somali pirate attacks carried out against U.S. Navy frigates, the USS Nicholas and USS Ashland, in 2010.¹²¹ Faced with discerning the definition of piracy for the sake of § 1651 for the first time in nearly 200 years, the U.S. District Court for the Eastern District of Virginia ultimately concluded that the number of parties to UNCLOS and widespread implementation of the agreement's provisions indicated sufficient international consensus.¹²² Although the United States has not yet signed or ratified UNCLOS because of disagreements over certain elements of the treaty, the United States has nonetheless accepted most elements of UNCLOS as reflective of customary international law, or "the law of nations."¹²³

IV. MODERNIZING THE U.S. APPROACH TO MARITIME PIRACY

As set forth in the recent United States Counter Piracy and Maritime Security Action Plan, increased prosecution of pirates is a critical component of the national strategy for combating maritime piracy, protecting U.S. citizens, and safeguarding interests abroad.¹²⁴ "[P]rosecution and long prison sentences have directly challenged the impression of impunity" surrounding the crime of piracy, and serve as a key deterrent to current offenders and future recruits.¹²⁵ However, as indicated in the most recent series of prosecutions, existing piracy laws on the books in the United States are at best poorly tailored to address acts of maritime piracy in the twenty-first century, if not unconstitutional. For example, although Congress has recognized varying degrees of offenders' culpability in several municipal piracy statutes, there remains just one catchall general piracy statute, encompassing an extremely broad scope of conduct yet imposing a mandatory sentence of life imprisonment regardless of the act.¹²⁶ Moreover, as that statute's sentencing requirement was recently found to violate the Eighth Amendment ban on cruel and unusual

¹²⁰ United Nations Convention on the Law of the Sea art. 101, Dec. 10, 1982, 1833 U.N.T.S. 3, 346, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201833/v1833.pdf> (emphasis added).

¹²¹ *United States v. Said (Said I)*, 757 F. Supp. 2d 554 (E.D. Va. 2010), *vacated*, 680 F.3d 374 (4th Cir. 2012); *United States v. Hasan*, 747 F. Supp. 2d 599 (E.D. Va. 2010).

¹²² *See Hasan*, 747 F. Supp. 2d at 633–34.

¹²³ *Id.* at 634.

¹²⁴ *See THE WHITE HOUSE*, *supra* note 17.

¹²⁵ *See id.* annex A, at 3.

¹²⁶ 18 U.S.C.A. § 1651 (Westlaw 2015); *see id.* §§ 1652–1661.

punishment,¹²⁷ it remains uncertain whether the United States is even capable of actively prosecuting suspected pirates in the absence of a clear jurisdictional nexus if the circumstances do not warrant a life sentence.

A. THE CRIME OF PIRACY AS DEFINED BY THE LAW OF NATIONS HAS EXPANDED TO ENCOMPASS A WIDE VARIETY OF CONDUCT

18 U.S.C. § 1651 is a unique statute in that it proscribes the offense known as general piracy by reference to the definition of piracy according to “the law of nations.” Rather than specifically enumerating any particular kinds of conduct, the statute directs prosecutors to ascertain the prohibited conduct by looking to codifications of customary international law.¹²⁸ Furthermore, although generally criminal statutes are to be interpreted according to their meaning when written, several courts recently considering the application of § 1651 have concluded that the reference to the “law of nations,” a changing body of law, demonstrates a clear congressional intent to incorporate any subsequent developments in the international definition of piracy within its proscription of the crime.¹²⁹ Such an approach is ideal for purposes of exercising universal jurisdiction, as it eliminates the need for constant amendments to ensure the statute mirrors the international consensus definition. However, as the nature of piracy operations,¹³⁰ as well as the international definition of piracy, has evolved to encompass various forms of ancillary or facilitative conduct,¹³¹ § 1651 is now capable of reaching a significantly expanded scope of criminal activity compared to when it was originally adopted. As a result of this expansion, a wide variety of offenders are subject to the statute’s mandatory sentence of life in prison, many of whom would receive a significantly lesser punishment had their conduct occurred on land or where a jurisdictional nexus could be established.¹³²

In the past, the crime of piracy was generally defined as an act of robbery on the high seas.¹³³ This was the definition incorporated in the first U.S. piracy statutes and used by the Supreme Court in 1820 in *Smith*.¹³⁴ Relying on *Smith*, the robbery element was cited as recently as 2010 when used as a basis for granting the defendant’s motion to dismiss

¹²⁷ *Said II*, 3 F. Supp. 3d 515 (E.D. Va. 2014).

¹²⁸ 18 U.S.C.A. § 1651 (Westlaw 2015).

¹²⁹ See *United States v. Hasan*, 747 F. Supp. 2d 599, 629–30 (E.D. Va. 2010).

¹³⁰ See *Somali Piracy: More Sophisticated Than You Thought*, *supra* note 30.

¹³¹ United Nations Convention on the Law of the Sea art. 101, *supra* note 120, at 436.

¹³² See 18 U.S.C.A. § 1657 (Westlaw 2015) (imposing a maximum sentence of three years).

¹³³ See *Hasan*, 747 F. Supp. 2d at 621–23.

¹³⁴ *United States v. Smith*, 18 U.S. 153, 160–62 (1820); see *United States v. Said*, 757 F. Supp. 2d 554, 559–61 (E.D. Va. 2010), *vacated*, 680 F.3d 374 (4th Cir. 2012).

a piracy charge based on a failed attack, in *United States v. Said (Said I)*.¹³⁵ Because the crime included the element of robbery, the number of individuals within the reach of § 1651 was necessarily limited, and individuals suspected of other maritime related crimes had to be prosecuted under different statutes.

Modernly, as discussed above, the definition of piracy for purposes of § 1651 is set forth in UNCLOS Article 101 and is substantially broader.¹³⁶ Although UNCLOS Article 101 retains acts of high seas robbery within the scope of the definition, a variety of other activities are also included as constituting piracy.¹³⁷ Most significantly, acts of intentional facilitation of the more traditional piratical conduct are included within the UNCLOS definition under subdivision (c),¹³⁸ thereby rendering facilitative conduct equal to principal acts under § 1651. Additionally, subdivision (b) defines as piracy any voluntary participation in the operation of a pirate ship.¹³⁹

The issue of facilitative conduct under § 1651 was addressed directly in two recent cases, *United States v. Ali* and *United States v. Shibin*.¹⁴⁰ In *Ali*, faced with the question whether a ransom negotiator, whose conduct occurred almost entirely within Somalia's territorial waters, could be charged with piracy under § 1651, a panel of the D.C. Circuit answered in the affirmative, finding such conduct was the functional equivalent of aider-and-abettor liability.¹⁴¹ The Fourth Circuit, in *Shibin*, subsequently relied on the DC Circuit's decision in *Ali*, convicting a second ransom negotiator under § 1651 based on his involvement in securing the release of the German merchant ship *Marida Marguerite* in exchange for \$5 million.¹⁴² These cases provide a perfect illustration of the new expanded scope of § 1651, as neither defendant took part in any physical attack on the vessels but rather came aboard once the seizure had occurred.

Aside from the fact the defendants in *Ali* and *Shibin* were convicted under § 1651 as negotiators rather than principal actors in the attacks, these holdings are significant because of where the defendants' conduct occurred. Notably, in each case the defendant's conduct took place al-

¹³⁵ *Said I*, 757 F. Supp. 2d at 559–61.

¹³⁶ See *United States v. Dire*, 680 F.3d 446, 469 (4th Cir. 2012); United Nations Convention on the Law of the Sea art. 101, *supra* note 120, at 436.

¹³⁷ United Nations Convention on the Law of the Sea art. 101, *supra* note 120, at 436.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *United States v. Ali*, 718 F.3d 929 (D.C. Cir. 2013); *United States v. Shibin*, 722 F.3d 233 (4th Cir. 2013).

¹⁴¹ *Ali*, 718 F.3d at 936–41.

¹⁴² *Shibin*, 722 F.3d 233.

most entirely within Somali territorial waters as opposed to the high seas,¹⁴³ which is required for conviction as a principal under UNCLOS Article 101(a).¹⁴⁴ In holding that § 1651 authorizes the U.S. prosecution of piracy facilitators whose conduct occurs within a foreign territory, the courts in *Ali* and *Shibin* emphasized the lack of explicit geographical language in UNCLOS Article 101(c).¹⁴⁵ The *Ali* court pointed to the absence of the language “on the high seas” and “outside the jurisdiction of any state” that appears in Article 101(a), and concluded that facilitative conduct prohibited by Article 101(c) is not subject to the same geographical restrictions, so long as the conduct facilitated does occur on the high seas.¹⁴⁶ Although such an interpretation appears in line with settled principles of statutory construction,¹⁴⁷ the breadth of this holding becomes more apparent when such a reading is applied to UNCLOS Article 101(b).

Much like UNCLOS Article 101(c), subdivision (b) of the same Article also lacks the explicit geographical language included in subdivision (a).¹⁴⁸ Subdivision (b) provides that “any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft” constitutes piracy.¹⁴⁹ Applying the same rules of construction, voluntary participation in the operation of a pirate ship, no matter where such participation occurs, is sufficient to support a charge of piracy under § 1651. When read in tandem with the UNCLOS Article 103 definition of a pirate ship, it is only necessary that one voluntarily participate in the operation of a ship “*intended* by the persons in dominant control to be used for the purpose of committing *one of the acts referred to in article 101*” to be within the statute’s reach and its mandatory sentence of life imprisonment.¹⁵⁰

Although the courts provided no guidance on Article 101(b) and the definition of “voluntary participation in the operation of” a pirate ship, one can imagine how this vague language encompasses an extremely broad scope of activities. In addition to sailing aboard a ship seeking to carry out an attack, activities such as standing watch or preparing meals

¹⁴³ See *Ali*, 718 F.3d at 934; *Shibin*, 722 F.3d at 236.

¹⁴⁴ United Nations Convention on the Law of the Sea art. 101(a), *supra* note 120, at 436.

¹⁴⁵ *Ali*, 718 F.3d at 937–41; United Nations Convention on the Law of the Sea art. 101, *supra* note 120, at 436.

¹⁴⁶ *Ali*, 718 F.3d at 939–41.

¹⁴⁷ *Id.* at 937 (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (quoting *Dean v. United States*, 556 U.S. 568, 573 (2009))).

¹⁴⁸ United Nations Convention on the Law of the Sea art. 101(b), *supra* note 120, at 436.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 437 (emphasis added).

while ransom negotiations are on going may also be included. As such activities may occur anywhere, it is easy to see how the connection between those voluntary participants and actual pirate attacks may grow increasingly attenuated. Yet because § 1651 draws no distinction between Article 101(a) and 101(b), offenders fitting either definition are susceptible to the same charge and consequently the same punishment.

In sum, the use of UNCLOS and the interpretation provided by the courts in *Ali* and *Shibin* results in a dramatic expansion of who may be considered a pirate within the scope of 18 U.S.C. § 1651 and thus susceptible to the exercise of universal jurisdiction. Although negotiating ransoms and other intentional acts facilitating piracy are far from innocent conduct, proscribing all such conduct under a single statute and imposing a mandatory sentence of life imprisonment without regard to culpability is the precise reason the constitutionality of § 1651 was called into question. Even if it is the position of both the United States and the international community that ancillary acts contributing to pirate activities are acts of piracy in and of themselves, relying on a single statute without allowing courts sentencing discretion to punish such acts runs the risk of unconstitutionality under the Eighth Amendment, and as discussed further below, seemingly conflicts with the original intent of Congress.

B. CONGRESS HAS ALREADY RECOGNIZED SEVERAL ACTS THAT AMOUNT TO PIRACY, SOME OF WHICH CARRY LESSER PENALTIES THAN LIFE IMPRISONMENT

Apart from the need to account for the recently expanded scope of conduct now falling within the international definition of piracy and therefore § 1651, a second reason for amending the current statutory system is to more accurately reflect Congress's intent regarding the punishment of ancillary acts of piracy. More specifically, Congress's decision to adopt several other municipal piracy statutes, which expressly enumerate certain ancillary acts of piracy such as those covered by UNCLOS Article 101(b) and (c) discussed above, suggests a view that not all "pirates" are deserving of the same punishment.¹⁵¹ As stated by the district court in *United States v. Said (Said II)*, "Congress has . . . expressed its intent to punish lesser conduct of piracy by enacting other pirate statutes," all of which include corresponding punishments that generally are less than mandatory life imprisonment.¹⁵² However, because these other piracy statutes are *municipal*, rather than *general*, they cannot be applied

¹⁵¹ See 18 U.S.C.A. §§ 1652–1661 (Westlaw 2015).

¹⁵² *Said II*, 3 F. Supp. 3d 515, 521 (E.D. Va. 2014).

in cases requiring the exercise of universal jurisdiction. Thus, under the current system, whether a suspected offender will face § 1651's mandatory sentence of life imprisonment, or a lesser punishment imposed by a municipal statute, may depend not on the conduct, but simply whether the vessel attacked was registered in the United States or had U.S. citizens on board.

Said provides an example of the overlap between § 1651 and an on-point municipal statute incapable of use in a universal-jurisdiction case.¹⁵³ In *Said*, the defendant took part in an unsuccessful attempt to attack a U.S. Navy frigate; the issue in the case was whether attempted attacks amounted to piracy under § 1651.¹⁵⁴ The court in *Said I* looked to other sections of Title 18 during its analysis and concluded that, because 18 U.S.C. § 1659 criminalizes the exact conduct—attempted attacks—the government sought to include under § 1651, the latter should be read more narrowly so as not to overlap.¹⁵⁵ The court deemed it illogical, “in light of the ten year imprisonment penalty Congress promulgated for a violation of § 1659,” that a defendant who committed such a minor act was meant to be exposed “to the penalty of life in prison for piracy under § 1651.”¹⁵⁶ Although this decision was later vacated on appeal,¹⁵⁷ the glaring inconsistency in punishment later arose in *Said II*, as the defendant challenged the constitutionality of imposing life imprisonment for the incident in which no harm occurred.¹⁵⁸

Similarly, facilitative conduct, now within the scope of § 1651, has a municipal counterpart in 18 U.S.C. § 1657, which provides as follows:

Whoever attempts to corrupt any commander, master, officer, or mariner to yield up or to run away with any vessel, or any goods, wares, or merchandise, or to turn pirate or to go over to or confederate with pirates, or in any wise to trade with any pirate, knowing him to be such; or

Whoever furnishes such pirate with any ammunition, stores, or provisions of any kind; or

Whoever fits out any vessel knowingly and, with a design to trade with, supply, or correspond with any pirate or robber upon the seas; or

Whoever consults, combines, confederates, or corresponds with any pirate or robber upon the seas, knowing him to be guilty of any piracy or robbery; or

Whoever, being a seaman, confines the master of any vessel—

¹⁵³ *Said I*, 757 F. Supp. 2d 554 (E.D. Va. 2010), *vacated*, 680 F.3d 374 (4th Cir. 2012).

¹⁵⁴ *Id.*

¹⁵⁵ *See id.* at 563, 567.

¹⁵⁶ *See id.* at 563.

¹⁵⁷ *See United States v. Said*, 680 F.3d 374, 375 (4th Cir. 2012).

¹⁵⁸ *Said II*, 3 F. Supp. 3d 515 (E.D. Va. 2014).

Shall be fined under this title or imprisoned not more than three years, or both.¹⁵⁹

Confederating, “furnish[ing]. . .with. . .provisions of any kind” and “correspond[ing] with any pirate or robber upon the seas,” are all the functional equivalent of the sort of facilitative conduct—negotiating ransoms—at issue in *Ali* and *Shibin*. However, because § 1657 is but a municipal statute, and is therefore restricted in application to those acts sharing a jurisdictional nexus with the United States, it cannot be used for cases requiring the exercise of universal jurisdiction. This creates a situation in which prosecutors must instead rely on the broader § 1651, rather than the more appropriate § 1657, which imposes a significantly lesser punishment of “not more than three years.”

Congress’s decision to enact numerous statutes proscribing various forms of piracy and ancillary acts is evidence of its intent that these crimes are distinct and deserve different punishments. Although in the past such ancillary acts may have not fit within the definition of piracy under customary international law, UNCLOS makes clear that view has changed.¹⁶⁰ Thus, because the international community now recognizes these other forms of piracy, they may provide a basis for the exercise of universal jurisdiction, so long as the domestic statutes are worded in a manner that reflects customary international law. Rather than creating a scenario such as *Said II*, in which § 1651 could be ruled unconstitutional as applied because of the grossly disproportionate sentence of life in prison for a crime Congress has stated deserves three years, Congress should adopt statutes to reflect the language of UNCLOS Article 101(b) and (c), allowing for commensurate punishment, so that universal jurisdiction may be exercised to the full extent permitted under international law.

C. THE CURRENT PRACTICE OF IMPOSING MANDATORY SENTENCES OF LIFE IMPRISONMENT IS INCONSISTENT WITH CONTEMPORARY STANDARDS AND RUNS AFOUL OF THE EIGHTH AMENDMENT

The final reason to amend the statutory scheme in place in the United States for addressing acts of piracy in universal-jurisdiction cases is to comply with the Eighth Amendment, which prohibits punishment

¹⁵⁹ 18 U.S.C.A. § 1657 (Westlaw 2015).

¹⁶⁰ See United Nations Convention on the Law of the Sea art. 101, *supra* note 120, at 436.

beyond what is proportional to the crime.¹⁶¹ As discussed above, when a suspected pirate is charged under § 1651, he or she is subject to the statute's mandatory sentence of life imprisonment regardless of the specific circumstances of the conduct. Previously such harsh sentencing was in line with the rest of the international community, in part because of the more narrow definition of piracy, but sentencing practices have since changed as the crime has evolved.¹⁶² Moreover, as seen in the case of *Said II*, a statute that prevents courts from considering the actual harm caused yet imposes a sentence life imprisonment may run afoul of the Eighth Amendment ban on cruel and unusual punishment.¹⁶³

Although there is no international standard for the punishment of piracy, comparing U.S. practices to those of other nations is particularly useful for establishing the current disparity in sentencing. According to a recent empirical study comparing piracy prosecutions around the globe during the 2006–2010 period, the average sentence among pirate-prosecuting nations was sixteen years.¹⁶⁴ At the low end of the spectrum are Kenya, Holland, and Yemen, with minimum jail terms of 4.5 or 5 years.¹⁶⁵ At the far opposite is the United States, imposing life sentences as both the minimum and maximum. Although other nations imposed a variety of sentence lengths in between the two extremes, the study pointed out that excluding the U.S. cases from the data set drops the mean to 12.6 years.¹⁶⁶

Aside from the great disparity in sentence length between the United States and other prosecuting nations, however, the most significant flaw with the current approach of applying § 1651 is the failure to take into account the specifics of the crime at issue. There are undoubtedly situations in which offenders are deserving of life in prison for their actions, and all acts of piracy contribute to what is a serious threat to the free flow of global commerce. Moreover, “the U.S. has a reputation for relatively strict criminal punishment” compared to more lenient European nations, and a disparity alone is not a reason to change sentence lengths.¹⁶⁷ However, a significant reason for this disparity stems from the fact the United States does not take into account mitigating factors, or a particular pirate's culpability, and instead uses a life sentence for every

¹⁶¹ U.S. CONST. amend. VII; *see also* *United States v. Said*, 3 F. Supp. 3d 515, 519 (E.D. Va. 2014).

¹⁶² *See* Kontorovich, *supra* note 73, at 6–8.

¹⁶³ *Said II*, 3 F. Supp. 3d 515.

¹⁶⁴ Kontorovich, *supra* note 73, at 11.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 13–14.

offender charged under § 1651.¹⁶⁸ Thus nonviolent negotiators who satisfy the definition of a pirate under international law face the same punishment as those who attack, endanger, and harm or kill mariners. Although nations are free to impose whatever punishments they see fit,¹⁶⁹ and such a practice certainly achieves the U.S. objective of deterrence, such a policy is incompatible with the Eighth Amendment.

When analyzing whether a sentence is “grossly disproportionate for a particular defendant’s crime” as prohibited by the Eighth Amendment, a court must compare the gravity of the offense and the severity of the sentence.¹⁷⁰ Significantly, as pointed out by the court in *Said II*, “what is critical [in the analysis] is the gravity of the conduct of the individual defendant.”¹⁷¹ The Supreme Court has listed several factors to be considered when assessing the gravity of a defendant’s conduct, including harm caused, culpability, and the magnitude of the crime.¹⁷² Considering that a mandatory sentence of life imprisonment is the second most severe sentence possible in our criminal justice system, it follows that a defendant’s actions deserving of such punishment must be of a serious nature and cause grave harm. Again, although there are undoubtedly acts of piracy falling within this category, the broad scope of piracy in the modern era includes a variety of deeds, some of which cause more harm than others. For example, negotiators and other facilitators, while contributing to the larger attack, are less culpable on an individual basis than those actually attacking ships, particularly if no victim experiences physical harm.

The international community views piracy as a grave crime, with the potential to seriously threaten the lives of mariners while disrupting the freedom of the seas, and rightfully so. Moreover, as piracy in the modern era depends on a variety of actors, both at sea and on shore, one cannot ignore the fact that without facilitators the actual attacks cannot happen. In fact, it is for this reason much of antipiracy strategies focus on taking out the support systems that allow the attacks to happen.¹⁷³ With that said, the crime is also committed by several individuals, each of whom plays a separate role in any given attack. The current system in place in the United States for universal-jurisdiction cases instead relies on an umbrella statute, grouping all pirates together and imposing mandatory sentences of life imprisonment on all of them. With the term “piracy”

¹⁶⁸ 18 U.S.C.A. § 1651 (Westlaw 2015).

¹⁶⁹ Kontorovich, *supra* note 73, at 6 (“[T]he courts of the capturing state shall ‘decide’ on the penalties.” (citing United Nations Convention on the Law of the Sea art. 106, *supra* note 120, at 437)).

¹⁷⁰ *Said II*, 3 F. Supp. 3d 515, 519 (E.D. Va. 2014).

¹⁷¹ *Id.* at 521–22.

¹⁷² *Solem v. Helm*, 463 U.S. 277, 292–93 (1983); *see Said II*, 3 F. Supp. 3d at 522.

¹⁷³ *See generally* THE WHITE HOUSE, *supra* note 17.

now encompassing such a broad scope of activities, the one-punishment-fits-all approach is no longer appropriate, given the restrictions placed by the Eighth Amendment ban on cruel and unusual punishment. Instead, establishing a series of statutes imposing commensurate punishments, or at least allowing judicial discretion by removing § 1651's life imprisonment mandate, will improve prosecutorial efficiency while incorporating the evolving standards of punishment, as Eighth Amendment jurisprudence commands.

V. RECOMMENDATIONS AND CONCLUSION

As explained above, the legal framework in place in the United States to address acts of piracy, particularly in cases requiring the exercise of universal jurisdiction, has failed to keep up with the evolution of the crime in the modern era. "Pirates," as defined by UNCLOS, now include a wide variety of actors, ranging from the traditional principals who attack and plunder, to translators, negotiators, and other facilitators.¹⁷⁴ As a result of this expansion, the crime of piracy can no longer be adequately addressed using just one statute mandating life in prison, as is the current approach to all universal-jurisdiction cases. Not only does such a practice raise concerns of unconstitutionality under the Eighth Amendment, it is also inconsistent with contemporary international standards of punishment.¹⁷⁵ Moreover, because life sentences are extremely costly, as is the litigation process in cases of such magnitude, amending this system can lessen this burden while also improving efficiency.¹⁷⁶ Making the prosecutorial process more straightforward, with clear statutes imposing appropriate punishments, can lessen the likelihood of lengthy appeals, including those based on the sort of constitutional challenge raised in the case of *Said II*.¹⁷⁷

Fortunately, the necessary changes can be made rather simply. First, Congress could continue to use the language of § 1651—"piracy as defined by the law of nations"—but replace the mandatory minimum sentence of life imprisonment with a range of, for example, ten years to life. Doing so would ensure that the law would continue to incorporate developments in customary international law with respect to the crime of piracy and permit the exercise of universal jurisdiction, but provide prosecutors and judges with discretion in asking for and imposing punish-

¹⁷⁴ United Nations Convention on the Law of the Sea art. 101, *supra* note 120, at 436.

¹⁷⁵ See generally Kontorovich, *supra* note 73.

¹⁷⁶ See Marie Gottschalk, *Days Without End: Life Sentences and Penal Reform*, PRISON LEGAL NEWS, Jan. 15, 2012, available at <https://www.prisonlegalnews.org/news/2012/jan/15/days-without-end-life-sentences-and-penal-reform/> (discussing the costs associated with life sentences).

¹⁷⁷ *Said II*, 3 F. Supp. 3d 515.

ment. This would allow for the consideration of mitigating or aggravating factors in each individual case, including actual harm caused by the defendant's conduct. Of course, prosecutors could still seek the maximum punishment of life in prison when they see fit, but in cases involving less severe acts of piracy, seeking a lesser sentence would lessen the likelihood of facing an appeal, or even increase the possibility of securing a plea. While the United States may continue to pursue a policy of imposing relatively strict punishments for all forms of piracy as a means of deterrence, those goals may still be achieved without imposing a life sentence in every instance.

The second option is to adopt additional statutes proscribing acts of piracy as defined in UNCLOS Article 101(b) and (c), or piracy facilitation. As it is now established, UNCLOS serves as a codification of customary international law on piracy,¹⁷⁸ and universal jurisdiction may be asserted in all cases involving conduct that UNCLOS defines as piracy. Adopting statutes that mirror the language of UNCLOS Article 101(b) and (c) will permit the United States to exercise universal jurisdiction over such conduct, but also to impose punishment in accordance with the original intent of Congress, as expressed in the several existing municipal piracy statutes. Doing so would similarly make sentencing more proportional to the specific crime as is required by the Eighth Amendment, while lessening the burden that comes with lengthy trials, appeals, and incarcerations.

As the United States has now established its intention to take a leadership role in the international fight against piracy,¹⁷⁹ adopting a statutory system that ensures efficient and just prosecution of pirates to the full extent permitted by international law is a necessary component of achieving strategic goals. Prosecution is an effective tool for deterring those considering future piracy operations, as well as punishing those who harm U.S. citizens and interests, both directly and indirectly. However, the current one-statute-fits-all approach is ill suited for addressing the complex nature of piracy in the modern era, and is incompatible with the commands of the Constitution. Congress should amend this system to account for the evolution of piracy in the modern era, as well as contemporary standards of criminal punishment.

¹⁷⁸ See *United States v. Dire*, 680 F.3d 446, 469 (4th Cir. 2012).

¹⁷⁹ THE WHITE HOUSE, *supra* note 17, at 2.