

PIRACY AND UNIVERSAL JURISDICTION

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This article will examine the history of piracy jure gentium and the law as it currently stands, showing that piracy does not lie within the realm of universal jurisdiction or international criminal law. The history component will separate the rhetoric of ‘pirates’ and ‘piracy’ from the legal definition, a practice that is often lacking in considerations of piracy jure gentium. The examination of the current law will explore the codification of piracy in UNCLOS, particularly the articulation of jurisdiction in Article 105 as it compares to the universal jurisdiction afforded other jus cogens crimes. From this it will be clear that piracy is not a crime of universal jurisdiction based on the heinousness of the crime, as is the case with international crimes, but rather a crime of concurrent municipal jurisdiction based on the stateless nature of the crime.

I INTRODUCTION

I need not tell you the heinousness of this offence ... Pirates are called ‘*Hostes humani generis*’ the enemies of all humanity.¹

Mindful that, during this last century, millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity...

Recognizing that such grave crimes threaten the peace, security and well-being of the world ...²

The above quotes are separated by 297 years; one is the pre-deliberation address to the jury in the trial for piracy of Capt William Kidd in 1701, and the other is part of the preamble to the *Rome Statute of the International Criminal Court* in 1998. These quotes address legal issues that are often considered to a part of the same body of law, a claim that is supported by the rhetoric, which is remarkably similar. In spite of the use of similar rhetoric, piracy and international criminal law possess distinctly different jurisdictional foundations and therefore different legal regimes. However, the differences in foundation and operation are often overlooked and it is often claimed that piracy exists within the umbrella of, and is a foundational basis for, international criminal law and universal jurisdiction. This claim is

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¹ *Rex v Kidd* (1701) 14 How St Tr 123.

² *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) Preamble.

based on the questionable notion that heinousness is the foundation of jurisdiction over piracy.³

A detailed history of the development of piracy from the Roman Empire, circa 60 BCE, to the present day has already been eloquently achieved by Rubin in his *The Law of Piracy*,⁴ which is regarded as the seminal work on this issue (a sentiment that is supported by the number of scholars who cite his work when writing on this topic).⁵ That said, this article will provide an examination of historical developments in the relevant law at the key points in history, namely during the Roman Empire, the 16th and 17th century British experience and the 19th century United States and British experiences. The purpose of these examinations is to illustrate the developmental shifts of the relevant law while also separating where piracy was used as a legal definition and where it existed as political or policy rhetoric. By separating the historical rhetoric from historical legal practice this article will argue that heinousness is not the basis of the crime of piracy *jure gentium*, as is often claimed by those linking crimes of piracy to other international crimes.

Following this examination of the historical development of the law, the current state of the law will be outlined, along with the debates surrounding its interpretation so as to provide a stable, working definition of what constitutes the crime of piracy *jure gentium*. Within this section the jurisdiction to enforce piracy law will be compared with universal jurisdiction to illustrate that piracy is not a crime of universal jurisdiction but rather a crime of concurrent municipal jurisdiction and that piracy does not belong within the realm of international criminal law.

II ROMAN EMPIRE CIRCA 60-70 BCE

There is widespread agreement that the term *hostis humani generis*, which is often cited as the basis for piracy *jure gentium* existing, was used by Cicero to describe pirates as the Roman Empire knew them and translates roughly to mean ‘enemies of all mankind’.⁶ However, what scholars do not agree on is the context and legal implications of this assertion. Some scholars note the difficulties of differentiating between the political and legal definitions of this phrase and its implications but decline to attempt to engage with the issue.⁷ Those who enquire generally fall into one of two camps.

³ Eugene Kontorovich, ‘The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation’ (2004) 45(1) *Harvard International Law Journal* 183, 205.

⁴ Alfred P Rubin, *The Law of Piracy* (US Naval War College Press, 1988).

⁵ Kontorovich, above n 3, 192; Ashley Roach, ‘Countering Piracy off Somalia: International Law and International Institutions’ (2010) 104 *American Journal of International Law* 397.

⁶ Rubin, ‘The Law of Piracy’, above n 4, 11–12; Milena Sterio, ‘Fighting Piracy in Somalia (and Elsewhere): Why more is needed’ (2009) 33 *Fordham International Law Journal* 372, 376; Donald P. Paradiso, ‘Come All Ye Faithful: How the International Community has Addressed the Effects of Somali Piracy but Fails to Remedy its Cause’ (2010) 29 *Penn State International Law Review* 187, 194; Douglas R. Burgess, ‘*Hostis Humani Generis*: Piracy, Terrorism and a New International Law’ (2005) 13 *University of Miami International & Comparative Law Review* 293, 302; Lucas Bento, ‘Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish’ (2011) 29 *Berkeley Journal of International Law* 399, 401; Joshua Michael Goodwin, ‘Universal Jurisdiction and the Pirate: Time for an old couple to part’ (2006) 39 *Vanderbilt University Journal of Transnational Law* 973, 978–979.

⁷ Ömer F. Direk, Martin D. A. Hamilton, Karen S. Openshaw and Patrick C. R. Terry, ‘Somalia and the Problem of Piracy in International Law’ (2010) 6(24) *Review of International Law and Politics* 115, 123;

The first camp argues that the Roman Empire branded individuals who engaged in piracy as criminals who were to be subject to the municipal jurisdiction of whosoever wished to engage in counter-piracy actions.⁸ Other scholars assert that this statement, as a legal definition when understood in the context of Roman counter-piracy action, refers to communities who by virtue of their conduct existed in a state of permanent, legal war without the need for a declaration.⁹ When the arguments are examined, the former is unconvincing.

Those who assert that the Roman Empire claimed dominion in a municipal criminal sense over pirates often do so without considering the historical context of the phrase *hostis humani generis*; they assume that the understanding of the phrase came into being during the 16th and 17th centuries¹⁰. Often this line of argument is linked to the inference that piracy and the jurisdiction afforded to it are based on the heinousness of the crime.

By contrast, those who hold the stance that pirates under Roman law were communities existing in a state of constant legal war with the world make this assertion on the basis of a detailed examination of the circumstances of counter-piracy actions undertaken by the Roman military. The most notable historical action was the campaign against the Cilician raiding communities by Pompey, circa 67 BCE. During this campaign the Roman armies engaged the pirates not as criminals to be punished but as a sovereign enemy to be conquered for the good of the Empire.¹¹ The argument that these pirate communities were viewed as sovereign nations to whom the laws of war applied is supported by the historical evidence that the campaign was ended not by prosecutions but a negotiated surrender and peace agreement.¹²

The other noteworthy instance of the Roman Empire's interaction with pirates, as they understood the term, was just prior to Pompey's campaign. One of the communities that he subdued and forced into vassalage had kidnapped Julius Caesar during his youthful exile from Rome.¹³ The Cilician pirates demanded a ransom for Caesar's safe passage, which he more than paid.¹⁴ Upon his release Caesar returned to the location of the pirates, resulting in their capture and execution.¹⁵ While Plutarch's brief account of Caesar's run in with pirates does not clarify whether they were engaged under the conditions of war (the tone seems to suggest they were dealt with in the manner of a personal vendetta), their execution was carried out in a manner that infers that their status was not one of criminals, but rather prisoners of war, rebels or the populace of a resisting city – groups of people who were legally subject to execution at the behest of the captor well into the middle ages.¹⁶

Rubin argues that the reason a state of permanent war existed within communities that were referred to as pirates was because they pursued an economic course of raiding and other

Niclas Dahlvang, 'Thieves, Robbers & Terrorists: Piracy in the 21st Century' (2006) 4 *Regent Journal of International Law* 17,19.

⁸ Sterio, above n 6, 376; Paradiso, above n 6, 194; Burgess, above n 6, 302; Bento, above n 6, 401.

⁹ James Kraska, *Contemporary Maritime Piracy International Law, Strategy, and Diplomacy at Sea* (Praeger Publishing, 2011) 6–7; Rubin, above n 4, 12; Goodwin, above n 6, 978–979.

¹⁰ Burgess, above n 6, 302; Bento, above n 6, 401.

¹¹ Rubin, above n 4, 5–7; Kraska, above n 9, 13.

¹² Rubin, above n 4, 6–7.

¹³ Plutarch, *The Life of Julius Caesar* (North's trans, George Gill & Sons, London, 1907) 2.

¹⁴ *Ibid* 2.

¹⁵ *Ibid* 2–3.

¹⁶ Theodor Meron, *Henry's Wars and Shakespeare's Laws: Perspective on the Law of War in the Later Middle Ages* (Clarendon Press, 1993) 109, 195.

warlike activity without any formal declaration of war,¹⁷ something that in the Empire required a formal, multi stage religious and political ceremony.¹⁸ It was in this context that Cicero defined them as *hostis humani generis* and it was their failure to formally declare war before engaging in warlike action which meant that the Empire was under no obligation to do so either.¹⁹ The argument that pirates in Roman times existed in a state of war and were dealt with according to the laws of war is supported by undated references in Justinian's Digest regarding the status of men captured by brigands, who remained free men, when by contrast those captured by enemies in the context of war legally became slaves. In this context it is understood that those who had been captured in marauding actions by piratical communities (such as those engaged by Pompey) became legal slaves, making it difficult to read *hostis humani generis* as referring to a municipal criminal jurisdiction.²⁰ The argument in support of reading Cicero's assertions as referring to a state of legal war is that Rome tended to attach the term 'pirate' to any state or community which opposed the empire.²¹ This makes it difficult to argue that they were asserting a municipal criminal jurisdiction over the world at large on the basis of a group's opposition to Roman rule.

The meaning of the definition *hostis humani generis* in relation to pirates has by no means remained static throughout history however; it is clear that in the context of its origin in the Roman Empire, via Cicero, it referred to a state of legal war rather than criminals who were subject to a universal jurisdiction of municipal law. This understanding would change as the phrase was revitalised in the late 16th century, as will be explored below. That said, the work and positions of those who assert that this later definition existed during the Roman Empire is called into question by their historical legal interpretation.

III 16TH AND 17TH CENTURY BRITAIN

The experience of England in the 16th and 17th centuries significantly shaped how piracy is viewed today. During this period the use of letters of marque and reprisal were commonplace, allowing holders to recapture goods taken by foreign nationals unlawfully on behalf of the Crown.²² At the same time, the Barbary States engaged in marauding and slave taking with the blessing of the Ottoman Empire, a practice that branded them, in political rhetoric, as pirates.²³ During this period the term 'pirate' ceased to hold its historical legal meaning (a state or community in a state of perpetual war by virtue of its conduct) and first became synonymous with privateering,²⁴ then later to mean privateering without, or in excess of, a commission.²⁵ Rubin argues that this flexible use of the term 'pirate' in political rhetoric and everyday vernacular caused the erosion of its classical legal meaning.²⁶

Suggestions have been made that legal scholars discussing piracy in this period do so in a misleading way, implying that acts of attack and capture of goods under a letter of marque and reprisal were unlawful or acts of state-sanctioned terrorism, rather than a legitimate

¹⁷ Rubin, above n 4, 12.

¹⁸ Ibid 9–10.

¹⁹ Ibid.

²⁰ Ibid 11.

²¹ Kraska, above n 9, 12.

²² Rubin, above n 4, 22.

²³ Kraska, above n 9, 21.

²⁴ Rubin, above n 4, 15.

²⁵ Ibid 18.

²⁶ Ibid 17.

exercise of market control or warfare.²⁷ In fact, it was only plundering in excess of the commission or without a commission that caused privateering to slip from valid state practice to become piracy, and hence criminal.²⁸ Indeed some authors simply refer to privateers as merely state-sanctioned pirates,²⁹ or as state-sponsored terrorists.³⁰ However, when this period is examined in detail and the legal development of the term is separated from the political rhetoric and from careless use of the term pirate in everyday vernacular, it is easy to see that, while the line between privateering and piracy might be thin (and possibly not enforced for political reasons), the line was clear in the legal system, and the practice of courts reflected this clarity.

In 1569 piracy moved beyond the realm of rhetoric and began its re-entry into the legal sphere when Queen Elizabeth I proclaimed that all who practised piracy (in the context of actions in excess of a valid commission or without a commission) were beyond her protection and were to be lawfully taken and punished by whosoever should encounter them.³¹ This proclamation was followed in 1577 with the Warrant to the Warden of Cinque Ports which set out that English common law was to be followed by the Admiralty when goods changed hands as a result of said counter-piracy operations.³² Under the Warrant, pirates covered not only those who engaged in plunder on the seas without a commission but also to British subjects who took a foreign commission and smugglers.³³ From these developments it became a legal requirement to have a crown licence to hunt pirates, with most merchant vessels holding a licence in case they should be set upon, as such action was considered legal enforcement and to do so without crown authorisation would be unjust.³⁴ The result of these enforcement practices was routinely summary execution of the captured pirates by hanging.³⁵ As an extension of the rise in counter-piracy action at the end of the 16th century, it was declared in 1589 that all goods seized from pirates must be submitted to *in rem* proceedings in an Admiralty prize court to determine the lawful title; failure to do so resulted in the buyer receiving no title and the seizer having their commission revoked.³⁶

This surge of anti-piracy action from the Crown caused legal theorists to begin considering the legal status of pirates and piracy. While these theorists paved the way for the existence of the crime of piracy *jure gentium* (the British common law is where the modern day crime of piracy *jure gentium* finds its roots),³⁷ state practice at the time denied that either a crime of piracy *jure gentium*, or a universal jurisdiction to enforce municipal law without an

²⁷ Ibid 14.

²⁸ Kraska, above n 9, 7; Rubin, above n 4, 78.

²⁹ Lawrence Azubuike, 'International Law Regime Against Piracy' (2009) 15 *Annual Survey of International & Comparative Law* 43, 45; Michael Bahar, 'Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations' (2007) 40(1) *Vanderbilt Journal of Transnational Law* 1, 12.

³⁰ Burgess, above n 6, 302.

³¹ Queen Elizabeth I, 'A Proclamation Against the Maintenance of Pirates' (1569) Renaissance Editions <<https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/709/proclamation.pdf?sequence=1>>.

³² Queen Elizabeth I, 'Instruction for the better direction to Privateers for the taking of Pirates and Sea Rovers.' (1577).

³³ Ibid.

³⁴ Rubin, above n 4, 79.

³⁵ Ibid 79; Gerry J Simpson, *Law, War & Crime: War Crimes Trials and the Re-invention of International Law* (Polity Press, 2007) 168; Eugene Kontorovich, "'A Guantánamo on the Sea': The Difficulty of Prosecuting Pirates and Terrorists' (2010) 98 *California Law Review* 243, 257; Goodwin, above n 6, 990–993.

³⁶ Rubin, above n 4, 44.

³⁷ Kraska, above n 9, 105.

intersection of state interest, existed.³⁸ This position is confirmed at numerous points in the 1876 case of *The Queen v Keyn*³⁹ with Sir Robert Phillimore stating it most succinctly when he said: ‘I am not aware of any instance, none was cited to us, of the existence of criminal jurisdiction over a foreign vessel for an offence committed when she was not within a port or harbour of the inland waters of the realm.’

It was Gentili, circa 1598, who resurrected the *hostis humani generis* when considering pirates.⁴⁰ In this context he was not referring to communities or states who engaged in the economic practice of raiding and thus in a state of constant lawful war, but to individuals who were subject to summary execution for unlawful acts of plundering.⁴¹ Gentili’s reasoning for this position was that only a prince (or theoretically a sovereign by a different title) had the legal authority to go to war. Therefore, it was impossible for a pirate to be in a state of lawful war, making their actions criminal and synonymous with brigandage and robbery.⁴² This also had the effect of ending the concept of the ‘pirate state’ in a legal sense.⁴³ This is supported by the fact that goods captured by Barbary corsairs were considered to have transferred title legally in the same manner as a wartime capture,⁴⁴ although such a state remained in political rhetoric for some time.⁴⁵

In spite of the British adopting an approach that insisted on an intersection of British interests for jurisdiction to exist, the work of Grotius, Coke, and to a lesser degree Gentili through this period set up the jurisprudential framework for what is often termed universal jurisdiction over piracy (even though such a description is a misnomer). Coke, like Gentili, considered pirates to be *hostis humani generis*,⁴⁶ and like Gentili he used this as a description of criminal behaviour that, depending on the circumstances, was robbery *animo furandi*,⁴⁷ or petit-treason (should the offender be an English citizen)⁴⁸ within Admiralty jurisdiction. However, Coke began his consideration of piracy as a crime of universal jurisdiction through his approach to what constituted the jurisdiction of the British Empire. He considered that all vessels sailing under English colours were within the territory of the Empire and thus within its jurisdiction.⁴⁹ This has been used today to justify arguments of universal jurisdiction existing since the 17th century.⁵⁰ However the reasoning is closer to modern concepts of flag state jurisdiction as articulated in Article 92 of the *United Nations Convention on the Law of the Sea* (UNCLOS).⁵¹

Grotius on the other hand, paved the way for universal jurisdiction over piracy much more profoundly than either Coke or Gentili. He argued that the term ‘piratical’ could not apply to

³⁸ Rubin, above n 4, 42, 48 and 80–81.

³⁹ *R v Keyn* (1876) 2 ExD 63.

⁴⁰ Alberico Gentili, *Three Books on the Law of War* (John C Rolfe trans, Clarendon Press, 1931) 423 [trans of *De Iure Belli Libri Tres*].

⁴¹ *Ibid* 22.

⁴² *Ibid* 25.

⁴³ Rubin, above n 4, 20.

⁴⁴ *Ibid* 29.

⁴⁵ Kraska, above n 9, 20–27.

⁴⁶ Edward Coke, *The Third Part of the Institutes of the Laws of England*, (Garland Publishing Company, 1832 Ed, 1979) 113.

⁴⁷ *Ibid* 111.

⁴⁸ *Ibid* 113.

⁴⁹ *Ibid*.

⁵⁰ Kontorovich, ‘The Piracy Analogy’, above n 3, 190.

⁵¹ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art 92.

states unless the state existed for the primary purpose of engaging in wrongdoing. Given that states existed for many legitimate purposes, and the pirate-like activity was but a part of the activity, they could not be considered to be pirates in the legal sense.⁵² In this vein Grotius supported the notion that goods captured by states engaging in such activity amounted to a legal capture and legitimate transfer of title.⁵³ By inference from his arguments regarding states being legally considered pirates, Grotius consigned piracy to a crime committed by individuals in breach of natural law.⁵⁴ In *De Jure Belli ac Pacis* he then laid the framework for universal jurisdiction. In this work, Grotius argued that sovereignty on the high seas was gained in the same manner as it was on land – through the use of military force and the exercise of effective control. As an extension of this premise, navies could justifiably capture pirates and enforce their municipal law, acquiring jurisdiction through the sovereignty gained with an exercise of effective control through use of force.⁵⁵

The result of these arguments was that foreign individuals captured in counter-piracy actions who could not show a valid commission (entitling them to be treated as enemy combatants) became subject to the municipal law of England.⁵⁶ As noted above, in most cases this exercise of jurisdiction usually resulted in the captured pirates being summarily executed.⁵⁷ Kontorovich argues that the branding of pirates as *hostis humani generis* through this period in history was used to apply the legal disabilities of both combatants and civilian criminals to pirates while avoiding granting them the legal protections of either category.⁵⁸

This legal debate about piracy was revisited in the later part of the 17th century by Molloy and Jenkins, although by this stage the phrase *hostis humani generis* had become firmly embedded in the above noted concepts of English municipal law.⁵⁹ Molloy, as a general rule, argued that traditional concepts of jurisdiction must apply to piracy for it to fall within English jurisdiction. However, he qualified this position by arguing that, where acts of piracy occur beyond state jurisdiction, anyone who captures the perpetrators is legally justified in subjecting the pirates to summary execution by hanging on the basis that piracy was a breach of natural law.⁶⁰ The implication of Molloy's work is that the jurisdiction afforded to piracy is grounded in the notion of the heinousness of the crime. However, the case law of the time does not reflect this assertion.

The first significant case demonstrating this is the trial of Capt. Vaughan in 1696.⁶¹ In this matter, Capt. Vaughan was tried for high treason on the high seas because of his conduct while sailing under a French commission. Even though the recounting of his conduct was consistent with acts of piracy, such a charge was never considered due to the existence of a valid commission.⁶² If heinousness were the basis of the crime, the validity of his French commission would have been unimportant. However, at no point was piracy raised as a valid

⁵² Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres* (Francis W. Kelsey et al. trans., 1925) 631.

⁵³ *Ibid* 673.

⁵⁴ Rubin, above n 4, 29–30.

⁵⁵ Grotius, above n 52, 214.

⁵⁶ Rubin, above n 4, 31.

⁵⁷ Goodwin, above n 6, 997; Kontorovich, *'The Piracy Analogy'*, above n 3, 190; Simpson, above n 35, 168.

⁵⁸ Kontorovich, *'A Guantánamo on the Sea'*, above n 35, 257.

⁵⁹ Rubin, above n 4, 84.

⁶⁰ Charles Molloy, *De jure maritimo et navali, or, A Treatise of Affairs Maritime, and of Commerce* (T Whieldon and T Waller, 1778).

⁶¹ *Rex v Vaughan* (1696) 13 How St Tr 485.

⁶² *Ibid* 493, 536.

charge because his guilt lay in his status as a subject of the British crown sailing for the French during a conflict with Britain.⁶³

The next case worth considering is that of Capt. Kidd in 1701.⁶⁴ The rhetoric used by the judge in this case has already been seen at the beginning of this article. However, the facts of the case and the nature of the charge do not reflect the rhetoric. Capt. Kidd was charged with, and convicted of, piracy conducted while under a commission as a pirate hunter and privateer for the British Crown. However, the charges were based upon Capt. Kidd's privateering in excess of his commission and his failure to submit goods to the prize courts for *in rem* proceedings.⁶⁵ While the charge of piracy is completely valid it is worth noting that, should Kidd have restricted his targets to those that were authorised under his commission and then submitted the captured goods to *in rem* proceedings, the very same conduct that caused him to be hanged for piracy would have been completely permissible at law, calling into question the suggestion that heinousness was the basis of jurisdiction to capture and prosecute pirates.

Jenkins adopted a different approach to Molloy, one that is very similar to the modern day law of piracy and consistent with the legal practice of the time. He argued that pirates were *hostis humani generis* and as such all peoples were commissioned to legally capture and punish pirates – an approach that was the norm at the time.⁶⁶ Where his views became progressive was that he argued first that the Admiralty had jurisdiction over all of the high seas, and that this jurisdiction was concurrent with other nations.⁶⁷ This view was supported by Sir Charles Hedge in *Rex v Dawson*,⁶⁸ creating a hierarchy of jurisdiction on the high seas based upon traditional standing, but one where jurisdiction was never absent. He then proceeded to argue that pirates by virtue of their actions have removed themselves from the protection of their sovereign, making them essentially stateless.⁶⁹ By contrast, privateers engaging in the same activity, but with a sovereign commission, are acting as an arm of the state, thus the state and not the individual is responsible.⁷⁰ When these two arguments by Jenkins are considered together we end up with a theory of concurrent municipal jurisdiction for each nation to enforce its municipal piracy laws based upon positivist notions of sovereignty and jurisdiction, rather than on the vaguer notions of natural law and heinousness which Molloy argued in favour of contemporaneously. It was the arguments of Jenkins that led to pirates occupying a unique position in international law as individuals who derived their legal personality in relation to their personal actions rather than as an extension of their state.⁷¹

By the end of this period it was clear than in a legal sense piracy was a crime under municipal law under the jurisdiction of the Admiralty. Regardless of the assertions of some scholars that universal jurisdiction existed over piracy at this point in time,⁷² historical evidence suggests that while the framework was laid during this period for the labelling of piracy as a

⁶³ Ibid 535–536.

⁶⁴ *Rex v Kidd* 14 (1701) How St Tr 147.

⁶⁵ Ibid 212–217.

⁶⁶ William Wynne, *The Life of Sir Leoline Jenkins: Judge of the High-Court of Admiralty* (Gale Ecco, Print Editions, 2010) vol. 1 xxxvi.

⁶⁷ Ibid xc.

⁶⁸ *Rex v Dawson* (1696)13 How St Tr 451, 454–455.

⁶⁹ Wynne, above n 66, 714.

⁷⁰ Rubin, above n 4, 89–90.

⁷¹ Simpson, above n 35, 162.

⁷² Burgess, above n 6, 302; Kontorovich, 'The Piracy Analogy', above n 3, 190; Paradiso, above n 6, 194; Sterio, above n 6, 378.

crime of so-called universal jurisdiction, this position did not actually become accepted custom until much later.⁷³ The crime itself was confined to robbery at sea *animo furandi*,⁷⁴ privateering in excess of the commission,⁷⁵ or failure to submit goods captured under a commission or pirate hunting licence to *in rem* proceedings in an Admiralty prize court.⁷⁶ The assertion that the existence of privateers negated the requirement for *animo furandi* in the crime of piracy is not supported by the historical evidence.⁷⁷

IV 19TH CENTURY UNITED STATES AND BRITAIN

The 19th century brought about an end of privateering as well as the cessation of piracy as a menace on the high seas. It was also a period where the rhetoric of pirates was more prevalent than any legal definitions, such definitions often becoming lost or languishing in obscurity. This period saw the United States at war with the Barbary States, the 1856 Paris Declaration banning the use of privateers and a naval dominance by the British Empire that was so overwhelming that it was used to justify British Imperial Law as International Law in regards to piracy.⁷⁸

Just prior to the beginning of the 19th century, Wooddeson expanded the definition of the law of nations to mean not only those laws that are common between all states (the classic natural law definition) but to also include the law between states inter se, which at the time was predominantly custom but also incorporated a degree of treaty law.⁷⁹ He then proceeded to define piracy as falling into this broad category, strengthening the conception of piracy being a crime *jure gentium* rather than simply a crime municipally with concurrent jurisdictions.⁸⁰ Concurrently, the Constitution of the United States (herein US) was drafted, with Article 1 §8 suggesting that the drafters did not consider piracy to be a crime *jure gentium*, but simply a municipal felony.⁸¹

A *United States*

Before the US courts dealt with any cases of piracy, it engaged in a conflict with the Barbary States, a conflict that is often called the Barbary pirate wars. The classification of this conflict as a war against pirates is problematic as it was conducted as a conflict against hostile states rather than as a policing action against criminals.⁸² When referring to this conflict, the majority of authors fail to distinguish between rhetoric that branded the Barbary States as pirates and the legal definition that dictated that the conflict was conducted *jure belli*. In the case of some authors this failure is incidental because the way in which they

⁷³ Tina Garmon, 'International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the wake of September 11th' (2002) 27 *Tulane Maritime Law Journal* 258, 259–260; Kraska, above n 9, 105–106; Rubin, above n 4, 48 and 80–81.

⁷⁴ Rubin, above n 4, 82, 92, 98.

⁷⁵ Ibid 98; Kraska, above n 9, 7.

⁷⁶ Rubin, above n 4, 100.

⁷⁷ Burgess, above n 6, 315–316.

⁷⁸ Rubin, above n 4, 201; Kraska, above n 9, 105.

⁷⁹ Richard Wooddeson, 'Of Captures by Sea', *Lectures on the Law of England*, vol 1, 434, 434.

⁸⁰ Ibid 437.

⁸¹ *The Constitution of the United States 1787*, art 1 §8; Rubin, above n 4, 122–126.

⁸² Benerson Little, *Pirate hunting the fight against pirates, privateers, and sea raiders from antiquity to the present* (2010) 219–220; Rubin, above n 4, 154.

write infers the difference,⁸³ but in the majority of cases there is a blurring of the line between the political rhetoric and legal definition of the day. For example, in the 2008 UN expert report on piracy off the coast of Somalia the ‘Barbary Coast wars’ are referenced in the development of extraterritorial law and universal jurisdiction over piracy *jure gentium*.⁸⁴ Sterio and Burgess refer to the Barbary wars whilst arguing that the basis of piracy as a crime is the heinousness of the act, omitting that the US engaged the Barbary States under conditions of war, not conditions of policing.⁸⁵ This failure has implications for modern interpretations of piracy *jure gentium*, as noted above, however, it is important to note that the US Barbary wars were just that – wars, not policing actions against pirates, thus rendering them irrelevant to the development of piracy as a legal term.

In the early part of the 19th century, US courts handled a number of cases dealing with the question of what constituted piracy, the ramifications of which are still being felt today. The first of these cases was tried under the 1790 *Act of Congress*,⁸⁶ and later under the 1819 Act (which was brought into being because Congress was unhappy with judicial interpretation of the 1790 Act),⁸⁷ which was then rewritten in 1820 into 18 USC §1651.⁸⁸ The first of these cases was *United States v Tully and Dawson* in 1812.⁸⁹ The accused had commandeered the schooner *George Washington* while the owner and captain was ashore, then proceeded to scuttle it off the coast of St. Lucia in an attempt to cover up their theft.⁹⁰ In the judgment it was determined that piracy was defined to be ‘acts of robbery and depredation upon the high seas, which, if committed on land would amount to a felony there’⁹¹, also noting that violence is not necessary for the crime of piracy to exist.⁹² Although Justice Story fails to clarify the basis of this definition (although it appears to be a paraphrasing of section 8 of the 1790 Act),⁹³ it forms the first judicial interpretation of US piracy law and the first significant case of piracy in the English speaking world since 1705.⁹⁴

The next significant case was *United States v Hutchings* in 1817.⁹⁵ Hutchings was accused of piracy for sailing an American registered vessel under a Buenos Aires commission and colours as a part of their independence struggle against Spain.⁹⁶ It was held that *animo furandi*, a necessary component of piracy, could be negated if it could be shown that the accused was acting under a commission or acting on government service without a commission, shifting actions to a *jure belli* character.⁹⁷ This position was affirmed in the case of *United States v Klintock* in 1820 where the court found that there was no middle ground between taking *jure belli* and taking *animo furandi*, with only taking *animo furandi*

⁸³ Kraska, above n 9, 23–27.

⁸⁴ Ahmedou Ould-Abdallah, *Piracy off the Somali Coast: Workshop commissioned by the Special Representative to the Secretary General of the UN to Somalia - Final Report: Assessment and Recommendations* (2008) 13.

⁸⁵ Burgess, above n 6, 314; Sterio, above n 6, 379.

⁸⁶ *An Act for the Punishment of Certain Crimes Against the United States 1790*, §8.

⁸⁷ *An Act to Protect the Commerce of the United States and Punish the Crime of Piracy 1819*.

⁸⁸ *Crimes and Criminal Procedure* 18 USC § 81(1651).

⁸⁹ *United States v Tully et al* 28 F Cas (1 Gall) 226 (Circuit Court, D Massachusetts, 1812).

⁹⁰ *Ibid* 226–227.

⁹¹ *Ibid* 228 (per Story J).

⁹² *Ibid* 228–229.

⁹³ *An Act for the Punishment of Certain Crimes Against the United States 1790*, §8.

⁹⁴ *R v Green and Ors* (1705) 14 How St Tr 1199.

⁹⁵ *United States v Hutchings* 26 F.Cas. (Brunn.Coll.C) 440 (Circuit Court, D. Virginia, 1817).

⁹⁶ *Ibid* 440.

⁹⁷ Rubin, above n 4, 159–160.

constituting piracy.⁹⁸ The case of *Hutchings* also held that the punishment for a crime committed on land did not have to be death for it to amount to piracy when committed on the high seas,⁹⁹ overcoming arguments that mere robbery could not constitute piracy because piracy carried a death sentence whereas robbery did not.

It was the case of *United States v Palmer* in 1818,¹⁰⁰ where the accused were US citizens who had engaged in piracy against the Spanish merchant vessel *Industria Raffaelli* on the high seas,¹⁰¹ which arguably led to the piracy being consciously characterised as a crime *jure gentium*, requiring no nexus of jurisdiction, rather than simply a municipal felony occurring on the high seas requiring traditional notions of standing for jurisdiction to exist. This case drove this shift not by affirming the existence of such law, but rather by denying that such law existed. While this case affirmed the definition of piracy as being robbery on the high seas committed *animo furandi*,¹⁰² it denied that universal or concurrent municipal jurisdiction existed, rather, requiring that there be an intersection of US interests for US courts to have jurisdiction,¹⁰³ to the point of denying even a perpetrator personality jurisdiction.¹⁰⁴ Congress, as a response to the restriction placed upon the 1790 Act¹⁰⁵ by *US v Palmer*, passed the 1819 Act,¹⁰⁶ section 5 of which made piracy a crime, punishable by death, which the US had jurisdiction over on all of the high seas, the substantial offence being defined by the law of nations.¹⁰⁷ This had the effect of forcing the US courts to treat piracy as a crime *jure gentium* as Congress had chosen to use that as the definition of its own municipal criminal definition.

This new statute was interpreted in the case of *United States v Smith*¹⁰⁸ in 1820 in which Thomas Smith stood accused of engaging in piracy, due to the absence of a commission (one from Buenos Aires was claimed but could not be produced), against unnamed Spanish vessels while on board the *Creollo* in conjunction with the *Irresistible*, an Artigas vessel captured in the port of Margarita.¹⁰⁹ In this case the court, as directed by the statute, considered the substantive content of piracy *jure gentium* and found that ‘robbery or forcible depredations upon the sea, *animo furandi*, is piracy’.¹¹⁰ It was also held that when considering piracy *jure gentium*, no nexus of jurisdiction was necessary by virtue of pirates being enemies of the human race.¹¹¹ However, it is unclear whether this is an assertion of universal jurisdiction, based upon heinousness or concurrent municipal jurisdiction based upon statelessness. This was the last significant case until 2010 in the US considering the charge of piracy *jure gentium*; the vast majority of later US cases of piracy in this period dealt with the question of the validity of privateering commissions issued by unrecognised belligerents and are of little relevance to the development of piracy law.¹¹²

⁹⁸ Ibid 146–147.

⁹⁹ *United States v Hutchings* 26 F Cas (Brunn Coll C) 440, 442 (Circuit Court, D. Virginia, 1817).

¹⁰⁰ *The United States v Palmer et al* 16 US (3 Wheat) 610 (Supreme Court of the United States, 1818).

¹⁰¹ Ibid 611–612.

¹⁰² Ibid 627–630, 637–640, 643.

¹⁰³ Ibid 630–634, 641–642, 643.

¹⁰⁴ Ibid 633–634.

¹⁰⁵ *An Act for the Punishment of Certain Crimes Against the United States 1790*.

¹⁰⁶ *An Act to protect the commerce of the United States and punish the crime of piracy 1819*.

¹⁰⁷ Ibid, §5.

¹⁰⁸ *The United States v Smith* 18 US (5 Wheat) 153 (Supreme Court of the United States, 1820).

¹⁰⁹ Ibid 154–155.

¹¹⁰ Ibid 161.

¹¹¹ Ibid.

¹¹² Rubin, above n 4, 160–183.

B *Britain*

As noted above, throughout this period of British naval dominance, the distinction between British assertions of international law and actual international law was negligible.¹¹³ Although the justification was unclear, Britain's prolific Navy adopted the stance that it had the authority to protect shipping lanes on the high seas and thus capture and execute pirates when no direct link to British interests existed. The uncontested nature of this policy and approach by Britain had a profound impact on the development of piracy law.¹¹⁴ Part of the justification used by the British Admiralty was the argument put forward by Marshall CJ of the US Supreme Court and also by Jenkins in 1675 that pirates by virtue of their acts become stateless.¹¹⁵ This notion of concurrent municipal jurisdiction for piracy on the high seas had been the only exception to flag state jurisdiction over vessels for centuries (UNCLOS now provides much broader rights of visit to foreign vessels¹¹⁶).¹¹⁷

In 1825 (retroactive to 1820) the British government offered a bounty on all pirates engaged. Under the *Bounty Act*,¹¹⁸ there was no requirement for the prosecution of pirates (in fact the payments were based predominantly on pirates killed),¹¹⁹ only the return of captured property for *in rem* procedures.¹²⁰ This act became the basis of most of British antipiracy action throughout the 19th century.¹²¹ It blurred the legal definition of piracy *jure gentium* because of court cases dealing with piracy under the *Bounty Act* rather than piracy as a municipal crime. The only significant case of piracy *jure gentium* within the British Commonwealth during this period is the 1840 case of Mohamed Saad.¹²² In this matter the British courts held they did have jurisdiction over piracy *jure gentium* but that the actions of the accused were on behalf of the Sultan of Kedah, thus the requirements of the crime had not been met.¹²³

In 1850 the *Bounty Act* was repealed and replaced with a much narrower statute in the wake of Dr Lushington's findings on what constituted a pirate under the Act in the matter of *Serhassan (Pirates)*. This case considered whether or not a raid made on a shore-based emplacement by the Royal Navy would constitute an antipiracy action. For the purpose of the *Bounty Act*, Dr Lushington concluded that shore-based persons could be classified as pirates when engaged by British naval or amphibious forces.¹²⁴ It is important when considering the crime of piracy *jure gentium* through history to note that this was not a criminal definition of the law but an interpretation of a bounty statute.

The other major case where the definition of pirate was considered under bounty statutes was the 1853 case of the *Magellan Pirates*. This case was related to a bounty claim under the

¹¹³ Ibid 201.

¹¹⁴ Ibid 202–203.

¹¹⁵ *The United States v Palmer et al.* 16 US 610, 614 (Supreme Court of the United States, 1818); Wynne, *The Life of Sir Leoline Jenkins*, above n 66, 714.

¹¹⁶ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art 110.

¹¹⁷ José Luis Jesus, 'Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects' (2003) 18 *International Journal of Marine & Coastal Law* 362, 374.

¹¹⁸ *An Act for encouraging the Capture or Destruction of piratical Ships and Vessels 1825*, 6 Geo 4 c 49.

¹¹⁹ Ibid, s2.

¹²⁰ Ibid, s3.

¹²¹ Rubin, above n 4, 205–206.

¹²² *Regina v Tunkoo Mahomed Saad and ors (1840)* 2 *Kyshe (Cr)* 18 Commonwealth International Law Cases 31.

¹²³ Ibid 78, 86–87.

¹²⁴ *Serhassan (Pirates)* (1845) 166 ER 788, 790.

modified statute that replaced the 1825 *Bounty Act* and considered whether insurgents could be classified as pirates under this statute. In this matter it was held that it was not necessary for piracy *jure gentium* to have taken place for the bounty to be payable. The basis of this argument was that the statute relied on piratical acts (as defined by British government policy), and used the phrase ‘persons alleged to be pirates’ for the application of the statute, rather than on piracy in a criminal sense.¹²⁵ Thus it was held that the Chilean insurgents could be classified as pirates under the statute for the purpose of the bounty.¹²⁶ As with the *Serhassan (Pirates)* case definition of pirates, this represents a definition under a bounty statute rather than a definition of piracy at municipal criminal law, giving it the same weight as a policy rhetoric definition when considering the legal historical definition of piracy *jure gentium*.

The vast majority of other British case law through this period, much like the US, deals with the acts of unrecognised belligerents issuing commissions or exercising blockade rights.¹²⁷ However, it is also worth noting that in the early 19th century in Southeast Asia, British colonies often couched military action as antipiracy action to circumvent the Act of 1784 prohibiting the colonies from engaging in warlike activity without prior approval from London.¹²⁸ Such rhetoric can be seen in discussions of Britain’s failed attempt to annex the Island of Pankour, circa 1819, which was justified as an antipiracy action.¹²⁹ Around the same time, similar use of rhetoric was also engaged in by the Dutch in relation to the British acquisition of territory, with Col. Nahuijs referring to the British acquisition of Singapore as the treaty made with ‘the head of the pirates’.¹³⁰ The liberal use of the term piracy within the British Empire both in terms of policy and in bounty statutes clouds historical legal definition. What is clear about the 19th century British experience of antipiracy is that policy and rhetoric were rife but legal definition scarce. Indeed it has been argued that by the end of the 19th century the terms ‘piracy’ and ‘pirates’ were used in such an undisciplined manner that they became completely unsupportable by any legal or historical scholarly analysis,¹³¹ although by this time piracy was virtually non-existent.¹³²

Within the context of this prolific antipiracy activity by the British Navy, the issuing of letters of marque and reprisal, and thus privateering, became an internationally wrongful act. Under the 1856 Declaration of Paris (which has been ratified by some fifty states and is now considered custom) it was agreed that privateering would no longer be a legitimate method of war.¹³³ Some authors argue that this was an agreement by nations to stop using state sanctioned terrorism (in order to support a heinousness argument).¹³⁴ However such claims

¹²⁵ *The Madgellan Pirates* (1853) 164 ER 47, 47–48.

¹²⁶ *Ibid* 50.

¹²⁷ Rubin, above n 4, 241–266.

¹²⁸ *An Act for the better Regulation of the Affairs of the East India Company, and of the British Possessions in India; and for establishing a Court of Judicature for the speedy and effectual Trial of Persons accused of Offences committed in the East Indies 1784*, 24 Geo 3 s 2 c 25, s35; Rubin, above n 4, 222–223.

¹²⁹ Letter from the Secretary of Prince of Wales Island to the Chief Secretary of the Government, Fort William, 22 January 1819 in C D Cowan, ‘Early Penang and the Rise of Singapore 1805-1832’ (1950) 23(2) *Journal of the Malaysian Branch of the Royal Asiatic Society* 1, 88–89.

¹³⁰ Col Nahuijs in the fifth letter of this series, dated Penang, 10 June, 1824 in H Eric Miller, ‘Extracts from the Letters of Col. Nahuijs’ (1941) 19(2) *Journal of the Malaysian Branch of the Royal Asiatic Society* 169, 192.

¹³¹ Rubin, above n 4, 292.

¹³² Jesus, above n 117, 364; Kraska, above n 9, 27–33; Joshua Ruby, ‘An Evolutionary Theory of Universal Jurisdiction’ (2009) 14 *UCLA Journal of International Law and Foreign Affairs* 567, 581.

¹³³ *Paris Declaration Respecting Maritime Law* (signed and entered into force 16 April 1856).

¹³⁴ Burgess, above n 6, 298–299; Sterio, above n 6, 379–380; Paradiso, above n 6, 190–191.

again fail to recognise that privateering was considered a legitimate act of war and thus not akin to piracy in a legal sense as privateers were considered enemy combatants.¹³⁵ This treaty is often cited as the point at which piracy *jure gentium* began to truly exist as a *jus cogens*.¹³⁶

Twenty-one years later the *Huascar* incident clearly indicated that the international community required that any enforcement of piracy *jure gentium* occur only on the high seas, with any attempt to enforce purported acts of piracy in the territorial sea constituting a gross breach of state sovereignty.¹³⁷ This supports arguments that jurisdiction afforded piracy *jure gentium* is one based on the notion that it is a crime that occurs beyond territorial jurisdiction of any state.¹³⁸ Thus all states have a concurrent municipal jurisdiction, rather than a universal jurisdiction, highlighting that the nature of jurisdiction to capture and prosecute pirates is based upon this premise rather than on the premise of the heinousness of the crime, which is the argument used as the basis of links between piracy and international criminal law.¹³⁹

V THE CURRENT STATE OF PIRACY LAW

The current law of piracy is found in UNCLOS articles 100 to 107,¹⁴⁰ which were directly inserted, verbatim, from the Geneva High Seas Convention of 1958 (GHSC).¹⁴¹ It is acknowledged that by the time the GHSC was drafted, piracy was considered an historical throwback and sections governing it were included as a matter of historical propriety rather than out of any genuine need.¹⁴² This was made clear in the 288th meeting of the ILC (10 May 1955) where Scelle commented that issues of piracy and the slave trade were exceptional in modern times.¹⁴³ Before the GHSC was drafted there were a number of unsuccessful attempts to codify customary law on piracy *jure gentium*. However, these attempts were considered to be *de lege ferenda* rather than merely a codification of the existing state of the law.¹⁴⁴

The GHSC drew heavily on these prior attempts to codify custom,¹⁴⁵ and also by virtue of the language adopted, cemented the prohibition on privateering from the 1856 Paris

¹³⁵ Kraska, above n 9, 27–33; Simpson, above n 35, 173.

¹³⁶ Azubuike, above n 29, 46; Bahar, above n 29, 12–13; Bento, above n 6, 402; Burgess, above n 6, 298–299; Garmon, above n 73, 259–260; Kraska, above n 9, 27–33; Paradiso, above n 6, 190–191; Sterio, above n 6, 379–380.

¹³⁷ The *Huascar* was a Peruvian warship that had been seized by belligerents who proceeded to exercise blockade rights. The British navy engaged the vessel in Peru's territorial waters under the guise of piracy enforcement resulting in a diplomatic incident centring on Britain's encroachment on Peru's sovereignty; Rubin, above n 4, 261–266.

¹³⁸ Bahar, above n 29, 18–19 and 21–22; Direk et al., 'above n 7, 131; Kontorovich, 'The Piracy Analogy', above n 3, 185; Kraska, above n 9, 106.

¹³⁹ Kontorovich, 'The Piracy Analogy', above n 3, 205; Simpson, above n 35, 162.

¹⁴⁰ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) arts 100–107.

¹⁴¹ *Geneva Convention on the High Seas*, opened for signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962) art 14–22.

¹⁴² Azubuike, above n 29, 44; Bahar, above n 29, 13; Robin Geiss & Anna Petrig, *Piracy and Armed Robbery at Sea: the Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (2011) 51–52; Kontorovich, 'A Guantánamo on the Sea', above n 35, 246; Rubin, above n 4, 298.

¹⁴³ *Yearbook of the International Law Commission 1955: Summary of records of the seventh session*, (1960) 27.

¹⁴⁴ Geiss and Petrig, above n 142, 38–39; Rubin, above n 4, 305–307.

¹⁴⁵ Geiss and Petrig, above n 142, 39–41; Kraska, above n 9, 117–122; Rubin, above n 4, 318–337.

Declaration.¹⁴⁶ Articles 100 to 107 of UNCLOS are widely regarded as both the relevant authority defining the crime of piracy *jure gentium* and as a codification of custom on this issue,¹⁴⁷ although some deny that UNCLOS is custom.¹⁴⁸ Denials of UNCLOS's customary nature hold very little weight when considered in light of the 1989 Jackson Hole joint statement by the US and the USSR, in which both governments stated that with regard to traditional ocean uses, UNCLOS represents custom.¹⁴⁹ Before the substantive definition of piracy law is explored it is worth noting that Article 100 of UNCLOS only requires states to cooperate with piracy suppression, with all other counter piracy action being voluntary.¹⁵⁰

A Definition of Piracy

Article 101 of UNCLOS outlines a substantive offence of piracy *jure gentium* as follows:

Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).¹⁵¹

This definition has been the source of much debate as to its meaning. The first point of debate is the meaning of the phrase 'private ends' in subsection (a) of article 101. This debate hinges

¹⁴⁶ Kraska, above n 9, 117–122.

¹⁴⁷ Azubuike, above n 29, 49–50; Bahar, above n 29, 10; Diana Chang, 'Piracy Laws and the Effective Prosecution of Pirates' (2010) 33 *Boston College International and Comparative Law Review* 273, 274; Omer Elagab, 'Somali Piracy and International Law: Some Aspects' (2010) 24 *Australia & New Zealand Maritime Law Journal* 59, 60–61; Jill Harrelson, 'Blackbeard meets Blackwater: An analysis of International Conventions that address Piracy and the use of Private Security Companies to protect the shipping industry' (2010) 25 *American University International Law Review* 283, 286, 292; James Kraska and Brian Wilson, 'The Pirates of the Gulf of Aden: The Coalition is the Strategy' (2009) 45 *Stanford Journal of International Law* 243, 266–267; Ved P. Nanda, 'Maritime Piracy: How Can International Law and Policy Address This Growing Global Menace?' (2010) 39 *Denver Journal of International Law & Policy* 177, 180–181; Ould-Abdallah, above n 84, 23; Paradiso, above n 6, 198; Sterio, above n 6, 387; *United States v Hasan et al.* 747 F. Supp. 2d 599, 619 (US District Court for the Eastern District of Virginia, Norfolk Division, 2010); Brian Wilson, 'The Somali Piracy Challenge: Operational Partnering, The Rule of Law, and Capacity Building' (2011) 9(1) *Loyola University Chicago International Law Review* 45, 55.

¹⁴⁸ Bento, above n 6, 423; Matthew C Houghton, 'Walking the Plank: How United Nations Security Council Resolution 1816, While Progressive, Fails to Provide a Comprehensive Solution to Somali Piracy' (2008) 16 *Tulsa Journal of Comparative & International Law* 253, 270; *United States v Said et al.* 757 F. Supp. 2d 554, 563–565 (US District Court for the Eastern District of Virginia, Norfolk Division, 2010).

¹⁴⁹ 'Joint Statement by the United States of America and the Union of Soviet Socialist Republics', 28 *International Legal Materials* 1444 (1989).

¹⁵⁰ Houghton, above n 148, 154; Roach, above n 5, 405; Simpson, above n 35, 163; *United Nations Convention on the Law of the Sea* 1982, 100.

¹⁵¹ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art 101.

on whether the phrase simply excludes acts conducted with state sponsorship or whether *animo furandi* is still a required element of crime, thus denying acts that are politically motivated as piracy. The ILC drafts have been used to argue that acts done with a political motivation cannot constitute piracy,¹⁵² but also to argue that *animo furandi* is no longer necessary and that ‘private ends’ was used so that acts of hatred and vengeance were also covered by the definition.¹⁵³ These arguments find their basis in examinations of the Harvard draft of 1932 conducted by the ILC in its 290th meeting (12 May 1955), which included acts beyond taking *animo furandi* but distinguishing those of a political motivation as not being covered by the phrase.¹⁵⁴ The ILC clearly supported this view when the commentary of article 39 of the draft *Articles concerning the Law of the Sea* is examined.¹⁵⁵ On the basis of traditional understandings of the phrases ‘public’ and ‘private’ in international law a number of scholars have argued that in this context the phrase ‘private ends’ should be understood as merely lacking state sponsorship.¹⁵⁶

Others argue on the basis of a traditional understanding of piracy *jure gentium* that ‘private ends’ in the context of article 101 still requires that actions be taken *animo furandi*.¹⁵⁷ Several scholars suggest that the phrase constitutes a middle ground between these two positions, in line with Kraska's view that *animo furandi* is no longer necessary, but acts of political and religious motivation are excluded,¹⁵⁸ a view which as noted above is implied in the ILC draft articles. Simpson clarifies the issue by arguing that the phrase ‘private ends’ in UNCLOS was most likely intended by the drafters to mean mercenary ends, but it was deliberately left open to broader interpretation.¹⁵⁹ However, he suggests that what makes a pirate a pirate is his lack of political motivation; pirates are ‘enemies of mankind because they are not enemies of only one particular sovereign’.¹⁶⁰

Minutes from the ILC drafts, which formed the basis of UNCLOS, support both of Simpson's arguments. At the 326th meeting (4 July 1955) the drafters declined to expand upon the meaning of ‘private ends’,¹⁶¹ and at the 343rd meeting (9 May 1956) they dismissed objections about the failure to include politically motivated acts within piracy.¹⁶² While both Garmon and Dahlvang agree that ‘private ends’ excludes acts done with a political or religious motivation, they argue strongly in favour of expanding the meaning to bring it into line with those who argue it means ‘not state-sanctioned’.¹⁶³ Regarding dual-purpose piratical

¹⁵² Simpson, above n 35, 167.

¹⁵³ Kraska, above n 9, 130.

¹⁵⁴ *Yearbook of the International Law Commission 1955*, above n 143, 40–43.

¹⁵⁵ *Yearbook of the International Law Commission 1956: Documents of the eighth session including the report of the Commission to the General Assembly*, (1957) 282.

¹⁵⁶ Bahar, above n 29, 27–28; Bento, above n 6, 418; Burgess, above n 6, 320; Direk et al, above n 7, 124–125; Douglas Guilfoyle, ‘Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts’ (2008) 57 *International and Comparative Law Quarterly* 690, 693; Douglas Guilfoyle, ‘The Laws of War and the Fight Against Somali Piracy: Combatants or Criminals?’ (2010) 11 *Melbourne Journal of International Law* 141, 149; Houghton, above n 148, 263–264; Paradiso, above n 6, 195–197.

¹⁵⁷ Chang, above n 147, 281; Kontorovich, ‘*The Piracy Analogy*’, above n 3, 191; *United States v Said et al.* 757 F. Supp. 2d 554, 559–562 (US District Court for the Eastern District of Virginia, Norfolk Division, 2010).

¹⁵⁸ Garmon, above n 73, 258, 263, 265; Jesus, above n 117, 377–378; Dahlvang, above n 7, 21; Kraska, above n 9, 130; Simpson, above n 35, 167.

¹⁵⁹ Simpson, above n 35, 164–165.

¹⁶⁰ *Ibid* 166.

¹⁶¹ *Yearbook of the International Law Commission 1955*, above n 143, 266–267.

¹⁶² *Yearbook of the International Law Commission 1956*, above n 155, 47.

¹⁶³ Dahlvang, above n 7, 27; Garmon, above n 73, 275.

acts, Direk et al convincingly argue that the primary motivation of the crime should be examined to determine whether or not it constitutes an act of piracy. In this vein they suggest that, where the piratical act is directly intended to achieve a political aim, it is beyond the scope of piracy. However, when the primary aim is to procure funds, and any political statement is subsequent or incidental, then it falls within the scope of piracy.¹⁶⁴

When considering the high seas requirement of Article 101 it must be recognised by virtue of Articles 33 and 58 that both the contiguous zone and the exclusive economic zone are considered part of the high seas for the purposes of piracy law.¹⁶⁵ With the exception of Burgess, scholars agree that for piracy *jure gentium* to have occurred, the attack must have taken place outside the 12 nautical mile territorial sea.¹⁶⁶ By contrast Burgess argues that, provided the attack descended from the sea, it can still be classified as piracy even if the attack takes place within the 12 nautical mile territorial sea or on land. To arrive at this position he makes use of the 2001 edition of the 1924 text *A Treatise on International Law* by William Hall, possibly because it assists his argument that piracy and terrorism are intertwined.¹⁶⁷ While this interpretation may have had merit when it was first written, superseding treaty law (in the form of the GHSC and UNCLOS) and state practice – historical and contemporary – suggest that this is not good law.

There are those who argue that the high seas requirement of piracy *jure gentium* is an absurd fetter to the law and serves as a deterrent to enforcement.¹⁶⁸ There have been suggestions that the UNCLOS definition of piracy, specifically the high seas requirement, should be abolished in favour of using the broader International Maritime Bureau (IMB) statistical definition that incorporates all the acts of violence or theft against ships regardless of whether they occur within territorial, archipelagic or internal waters or on the high seas.¹⁶⁹ Such a shift would be dangerous and inappropriate (why the high seas requirement is important when considering piracy *jure gentium* will be explored in more detail when considering universal jurisdiction). Bahar summed it up most simply when he said ‘the answer: “Nebraska”’,¹⁷⁰ likening the removal of the high seas requirement to France policing crime in Nebraska.¹⁷¹ What is clear though is that, with the exception of Burgess, even those who do not like the high seas requirement agree it exists, supporting the view that the foundation of piracy is the stateless nature of the crime and not the heinousness of the crime.

There has been a measure of debate as to whether or not Article 101 actually requires two vessels to be involved for piracy to exist. Bahar argues strongly that the two ship requirement that is implied in Article 101(a)(i) is mythical.¹⁷² The basis for this argument hinges on the 17th century conception that mutiny is a form of piracy and is punishable in the same manner.

¹⁶⁴ Direk et al, above n 7, 128.

¹⁶⁵ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) arts 33 and 58.

¹⁶⁶ Bahar, above n 29, 18–19 and 21–22; Bento, above n 7, 419–421; Direk et al, above n 7, 131; Geiss and Petrig, above n 142, 64; Kontorovich, ‘The Piracy Analogy’, above n 3, 191; Sterio, above n 6, 388–390; Wilson, above n 147, 56.

¹⁶⁷ Burgess, above n 6, 322.

¹⁶⁸ Bento, above n 6, 419–421; Garmon, above n 73, 266–267; Houghton, above n 148, 273; Jesus, above n 117, 379–380.

¹⁶⁹ Bento, above n 6, 424; Garmon, above n 73, 266–267; ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Report for the period 1 January - 30 June 2013* (2013) 3.

¹⁷⁰ Bahar, above n 29, 21.

¹⁷¹ *Ibid* 21.

¹⁷² *Ibid* 38–39.

He also refers to the *Achille Lauro* incident in 1985, in which an Italian cruise ship was hijacked by members of the Palestinian Liberation Front who then held the passengers hostage, killing a US citizen when their demands were not met.¹⁷³ This incident led to the drafting of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) after the United States claim that it constituted piracy was rejected by the international community.¹⁷⁴ Bahar's argument is problematic because while Articles 101 (b) and (c) have no such requirement, Article 101(a)(i) clearly states 'against another ship or aircraft',¹⁷⁵ which *prima facie* must require two vessels to satisfy that requirement. The requirement for two ships to be involved is the predominantly accepted view.¹⁷⁶

B Jurisdiction

The concept of the concurrent municipal jurisdiction to enforce piracy law was codified in Article 105 UNCLOS as follows:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.¹⁷⁷

As is evident, this concept of jurisdiction hinges upon the crime being committed beyond the territory of any State. While some assert jurisdiction is based upon the notion of pirates being *hostis humani generi*,¹⁷⁸ this is a flawed supposition. As explored previously in this article, notions of jurisdiction to capture and punish pirates have always hinged upon the presupposition that the high seas are beyond the territory of any one sovereign, thus all sovereigns have a concurrent municipal jurisdiction over it. Unlike war crimes, genocide and other crimes of universal jurisdiction that are clearly based on the heinousness of the actions (and usually occur within an area of territorial sovereignty), such an argument regarding piracy is deeply flawed, ignoring both historical and current state practice regarding the question of piracy enforcement.¹⁷⁹ To understand the reasons for the importance of this, Bahar's statement above about Nebraska can be deconstructed and then contrasted with that of war crimes. In summary, Bahar argues that to include the territorial sea in the definition of piracy would be akin to France sending its military to police an act of armed robbery in Nebraska. Not only would such an action be ridiculous, it would be a gross breach of state sovereignty.¹⁸⁰ In the same way, sending warships into another state's territorial sea to chase

¹⁷³ Geiss and Petrig, above n 142, 42–43.

¹⁷⁴ Azubuike, above n 29, 53; Dahlvang, above n 7, 28; Elagab, above n 147, 62–63; Sterio, above n 6, 386–387.

¹⁷⁵ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art 101(a)(i).

¹⁷⁶ Azubuike, above n 29, 53; Elagab, above n 147, 62–63; Jesus, above n 117, 376–377.

¹⁷⁷ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art 105.

¹⁷⁸ Burgess, above n 6, 314; Harrelson, above n 147, 291; *United States v Hasan et al.* 747 F. Supp. 2d 599, 602 (US District Court for the Eastern District of Virginia, Norfolk Division, 2010).

¹⁷⁹ Direk et al, above n 7, 131; Kontorovich, 'The Piracy Analogy', above n 3, 210–211; Wilson, above n 147, 56.

¹⁸⁰ Bahar, above n 29, 21.

criminals who have committed their crimes within the exclusive jurisdiction of that coastal state would constitute a gross breach of state sovereignty. International agreement on this point is clear. For example, UN Security Council resolutions authorising the entry of foreign navies into Somali territorial waters, contingent upon the Transitional Federal Government's permission, clearly indicate that such an arrangement is not evidence of custom and is specific to the situation in Somalia.¹⁸¹

These jurisdictional requirements raised questions as to whether the crimes under Article 101 (b) and (c), in particular 101(c), had to be committed on the high seas as well. The recent cases of *US v Ali* and *US v Shibin* clarify this issue with regard to Article 101(c) by finding that, so long as the act facilitated occurs on the high seas, then concurrent municipal jurisdiction exists through an aiding and abetting charge.¹⁸² Oddly, the court in *US v Ali* held that the language of Articles 101(c) with Article 105 did not provide a jurisdiction for conspiracy to commit charges on two separate grounds.¹⁸³

The first ground was that Article 101 of UNCLOS,¹⁸⁴ while broad enough to give rise to aiding and abetting liability, was silent on the questions of attempted piracy and conspiracy to commit piracy.¹⁸⁵ As such they found that 'facilitating' under Article 101(c)¹⁸⁶ did not extend to conspiracy to commit piracy, and thus the court did not have jurisdiction under Article 105 of UNCLOS.¹⁸⁷ The other reason the court declined to uphold the offence of conspiracy to commit piracy was that the municipal criminal code of the United States required the crime committed be an 'offence against the United States'.¹⁸⁸ As the crime of piracy for which the accused was charged had no nexus of jurisdiction in the United States, the court held that a §371 offence had not occurred.¹⁸⁹ However, given that this is a US criminal case, it is unclear how other jurisdictions will interpret and apply this precedent.

C Concurrent Municipal Jurisdiction v Universal Jurisdiction

When piracy is juxtaposed with the concept of war crimes, we see a breach of international law that almost exclusively occurs within territorial jurisdiction but is held by the international community to be universally justiciable on the basis of its heinousness,¹⁹⁰ as

¹⁸¹ Resolution 1816 (2008); Resolution 1838 (2008); Resolution 1846 (2008); Resolution 1851 (2008); Resolution 1897 (2009); Resolution 1950 (2010); Resolution 2020 (2011).

¹⁸² *United States of America v Ali Mohamed Ali, aka Ahmed Ali Adan, aka Ismail Ali*, 10–20 (United States Court of Appeals for the District of Columbia Circuit, 2013); *United States of America v Mohammad Saaili Shibin, aka Khalif Ahmed Shibin, aka Mohammad Ali, aka Ali Jama*, 12–22 (United States Court of Appeals for the Fourth Circuit, 2013).

¹⁸³ *United States of America v Ali Mohamed Ali*, 21–23 (United States Court of Appeals for the District of Columbia Circuit, 2013).

¹⁸⁴ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art101.

¹⁸⁵ *United States of America v Ali Mohamed Ali*, 21–22 (United States Court of Appeals for the District of Columbia Circuit, 2013).

¹⁸⁶ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art 101(c).

¹⁸⁷ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art105; *United States of America v Ali Mohamed Ali*, 23 (United States Court of Appeals for the District of Columbia Circuit, 2013).

¹⁸⁸ *Crimes and Criminal Procedure* 18 USC §371.

¹⁸⁹ *United States of America v Ali Mohamed Ali*, 22–23 (United States Court of Appeals for the District of Columbia Circuit, 2013).

¹⁹⁰ *Kontorovich, 'The Piracy Analogy'*, above n 3, 194–195; *Ruby*, above n 132, 583–585.

opposed to one that is subject to concurrent municipal jurisdiction on the basis of statelessness. The basis of these *jus cogens* crimes being universally justiciable is that they are considered grave breaches of international law — the crime is so abhorrent that all states possess jurisdiction to try and punish the perpetrator based on its heinousness.¹⁹¹ That heinousness is the basis for war crimes and crimes against humanity prosecution, which is clear from statements by the ICTY about the role of such trials:

The International Tribunal sees public reprobation and stigmatisation by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators, as one of the essential functions of a prison sentence for a crime against humanity.¹⁹²

Ruby notes that the structure for dealing with such jurisdiction is generally articulated by treaties in a ‘prosecute or extradite’ manner.¹⁹³ This was explored in the 2012 case of *Belgium v Senegal*¹⁹⁴ regarding the extradition of individuals suspected of perpetrating torture. In this case the ICJ held that where a country held a suspect that it was bound under treaty to prosecute for crimes against humanity (in this instance the relevant treaty was the *United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*)¹⁹⁵ it could absolve itself of this duty by extraditing the suspect to a country that was willing to prosecute.¹⁹⁶

Similar frameworks can be seen in the *Convention on the Prevention of Punishment of the Crime of Genocide*,¹⁹⁷ and the various Geneva Conventions.¹⁹⁸ A prosecute or extradite framework can also be seen in Article 16 of the *United Nations Convention against Transnational Organised Crime* (UNTOC). However, this can be distinguished from the treaty provisions pertaining to *jus cogens* crimes as it only applied to State parties of the convention and crimes covered by the convention that have been sufficiently criminalised in each State.¹⁹⁹ The prosecute or extradite framework of the SUA can be distinguished for the same reasons.²⁰⁰

Customary universal jurisdiction for war crimes and crimes against humanity on the basis of heinousness was explored in the case of *Israel v Eichmann*.²⁰¹ The District Court of

¹⁹¹ Kontorovich, ‘The Piracy Analogy’, above n 3, 194–195; Ruby, above n 132, 583–585.

¹⁹² *Prosecutor v Erdemović (IT-96-22) ‘Pilica Farm’*, *Sentencing Judgment*, 65 (International Criminal Tribunal for the Former Yugoslavia, 1996).

¹⁹³ Ruby, above n 132, 583–585.

¹⁹⁴ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (International Court of Justice, 2012).

¹⁹⁵ *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, signed 10 December, 1465 UNTS 85 (entered into force 26 June 1987) art 5–8.

¹⁹⁶ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, 94–95 (International Court of Justice, 2012).

¹⁹⁷ *Convention on the Prevention and Punishment of the Crime of Genocide*, signed 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) art 1, 7.

¹⁹⁸ *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva 1949 49–50; *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Geneva 1949 51 & 52; *Convention (III) relative to the Treatment of Prisoners of War*, Geneva 1949 129 & 130; *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, Geneva 1949 146 & 147; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* 1977 88.

¹⁹⁹ *United Nations Convention against Transnational Organized Crime and the Protocols Thereto* 2000 16.

²⁰⁰ *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* 1988 10.

²⁰¹ *The Attorney-General of the Government of Israel v. Eichmann* Vol. 56, No. 3, July 1962 *The American Journal of International Law* 805 (The District Court of Jerusalem, 1961).

Jerusalem held that under international law jurisdiction to prosecute for war crimes was exercisable by any judicial and legislative authority in the absence of a competent international tribunal due to the heinousness of the crimes.²⁰² On this point the court found that it was ‘the moral duty of every sovereign state ... to enforce the natural right to punish, possessed by the victims of the crime, whoever they may be, against criminals whose acts have “violated in extreme form the law of nature or the law of nations”.’²⁰³ Further it was held in *Eichmann* (after an examination of a great deal of case law) that an illegal arrest, in the form of abduction from the sovereign territory of a foreign state in this matter, did not negate the jurisdiction provided to the Israeli courts under international law.²⁰⁴ In spite of the examinations of piracy law in paragraph 13 of the judgment the conclusions drawn by the court draw on the rhetoric of piracy and the phrase *hostis humani generis* rather than the legal history of piracy.²⁰⁵

By contrast Article 105 UNCLOS and customary piracy *jure gentium* simply provide standing to exercise municipal jurisdiction in areas where no territorial sovereignty exists.²⁰⁶ For this reason it is argued in this article that piracy *jure gentium* is not a crime of universal jurisdiction but a crime which occurs outside the sovereign territory of any state and thus all states have a concurrent municipal jurisdiction. This view is supported by historical and current state practice, and the language of Article 105 UNCLOS. Thus, it is also argued that piracy cannot be considered to fall within the ambit of international criminal law as the jurisdiction and basis of jurisdiction are foundationally different. This view is supported by Boister’s recent considerations of the possibility of an International Piracy Court, where he rightly refers to piracy as a transnational crime.²⁰⁷ However, his earlier work on the differences between international criminal law and transnational criminal law suggest that piracy fits into neither category. This is because it does not require a nexus for a state to exercise jurisdiction in the same way that transnational criminal law does.²⁰⁸

It is important to recognise that the basis of piracy being a crime of concurrent municipal jurisdiction, combined with the fact that it occurs beyond territorial sovereignty of any nation, does not mean that it exists in a jurisdictional void. Even should concurrent municipal jurisdiction cease to exist, jurisdiction to capture and prosecute pirates will still be present in traditional notions of standing, such as flag state jurisdiction.²⁰⁹

D Sentencing and Due Process

There have been arguments that the definition of piracy articulated by the GHSC and UNCLOS is actually irrelevant when considering the crime piracy *jure gentium*, on the basis that Article 101 undermines concepts of universal jurisdiction (as articulated by Article 105 and as understood historically). The basis of this argument is that UNCLOS does not provide

²⁰² Ibid 11–12.

²⁰³ Ibid 14.

²⁰⁴ Ibid 41–52.

²⁰⁵ Ibid 13.

²⁰⁶ Direk et al., above n 7, 131; Jesus, above n 117, 374; Kraska, above n 9, 106; Wilson, above n 147, 58.

²⁰⁷ Neil Boister, ‘International Tribunals for Transnational Crimes: Towards a Transnational Criminal Court?’ (2012) 23 *Criminal Law Forum* 295–318, 307.

²⁰⁸ Neil Boister, “‘Transnational Criminal Law’?” (2003) 14(5) *European Journal of International Law* 953–976, 964.

²⁰⁹ Bahar, above n 29, 15–16; Goodwin, above n 6, 1002; *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994, 92).

uniform punishment for the crime it defines.²¹⁰ In the case of *US v Said*, Justice Jackson held that the GHSC and UNCLOS were lacking in authority and thus irrelevant when considering the charge of piracy under 18 USC §1651. As a result, he applied the much narrower definition of piracy *jure gentium* found in the 1820 case of *US v Smith*, being sea robbery *animo furandi* (of which the defendants were found not guilty).²¹¹ Similarly, Goodwin argues that, because piracy is a different charge in most municipal jurisdictions when considering the sentence it carries, the exercise of universal jurisdiction precludes notice and thus due process.²¹²

Goodwin and Justice Jackson are correct that piracy does not have uniform international sentence; the disparity of sentencing globally is clear, with punishments ranging from between three years in prison to a death sentence.²¹³ While the Rome Statute does provide guidelines for sentencing for the International Criminal Court,²¹⁴ this is by no means uniform sentencing; one need only look at the variety of sentences handed down by the ICTY to see that, even when war crimes are considered judicial, discretion on sentence severity is exercised taking into account the facts of the case.²¹⁵ However, while arguments about a lack of sentencing guidelines might have some weight if piracy was truly a crime of universal jurisdiction, because it is a crime of concurrent municipal jurisdiction (defined by Article 101 UNCLOS), the lack of uniform sentencing standards does not undermine the authority of relevant treaty law and custom defining the offence. Nor does it *prima facie* stand in opposition to the due process rights articulated in Article 14 of the International Covenant on Civil and Political Rights (herein the ICCPR).²¹⁶ This is because at no point in Article 14 is it necessary for the jurisdiction in which a crime will be tried to make clear to the offender before a charge is brought, nor does it require that the state that effects the arrest to exercise judicial jurisdiction over the offence. Further the wording of Article 105 of UNCLOS in effect provides notice as to legal consequences to potential pirates for all jurisdictions as it specifies that every nation may exercise criminal jurisdiction over such acts on the high seas.

E *Applicable use of force during enforcement*

Since UN Security Council resolutions began making reference to relevant international humanitarian law, there have been questions as to what is applicable regarding the use of force in counter piracy operations. Kontorovich argues that historically the definition of pirates as *hostis humani generi* gave pirates the legal disabilities of the combatants and civilians without the protections of either, usually resulting in summary execution upon capture.²¹⁷ Simpson argues that in the same way current attempts to link terrorism and piracy

²¹⁰ Goodwin, above n 6, 1004–1005; *United States v Said et al.* 757 F. Supp. 2d 554, 563–565 (US District Court for the Eastern District of Virginia, Norfolk Division, 2010).

²¹¹ *United States v Said et al.* 757 F. Supp. 2d 554, 563–565 (US District Court for the Eastern District of Virginia, Norfolk Division, 2010).

²¹² Goodwin, above n 6, 1004–1005.

²¹³ Bahar, above n 29; Chang, above n 147, 280; Dahlvang, above n 7, 39–40; Goodwin, above n 6, 997 and 1008.

²¹⁴ *Roman Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002), 77–78, 110.

²¹⁵ International Criminal Tribunal for the Former Yugoslavia, Completed Cases, <<http://www.icty.org/action/cases/4>>.

²¹⁶ *International Covenant on Civil and Political Rights*, signed 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

²¹⁷ Goodwin, above n 6, 990–993; Kontorovich, ‘A Guantánamo on the Sea’, above n 35, 257; Rubin, above n 4, 78; Simpson, above n 35, 168.

through the use of historical and political rhetoric are an attempt to justify summary execution without the protections of humanitarian law or criminal due process.²¹⁸ When considering whether the laws of war have a role to play in suppressing piracy "the simple answer is "no".²¹⁹ The reason for this is that UNCLOS provides for constabulary enforcement, not warlike enforcement, against piracy.²²⁰ Further, it is generally accepted that under international humanitarian law pirates are classified as civilians and not combatants, meaning they are to be fired upon only in self-defence, defence of another or to prevent the commissioning of each crime.²²¹ The ITLOS case of the *M/V Saiga (No. 2)* clarifies that the use of force must be avoided as far as possible.²²² On this note Judge Anderson made the position very clear when he said:

Force must be resorted to only in the last resort and after warnings (including shots across the bow) have been given. Even then, any live shots must be fired in such a way as to avoid endangering the lives of those aboard. In order to ensure respect for these standards, law enforcement officers should receive adequate training and maritime practices and, if armed, should be provided with specific rules of engagement.²²³

There have been arguments that the inability of navies either to treat pirates as hostile combatants or to engage in summary execution upon capture is a fetter upon enforcement efforts.²²⁴ The problem with permitting the summary execution of captured pirates (as was the custom historically)²²⁵ is that it would amount a grave breach of due process and the right to not be arbitrarily deprived of life, violating Articles 6 and 14 of the ICCPR.²²⁶ The issue with classifying pirates as enemy combatants in an armed conflict is that such a definition is a question of fact,²²⁷ not a question of convenient rhetoric. So while some may find treating pirates as civilians and affording them due process distasteful, especially since historical rhetoric places pirates in a grey area between combatants and civilians, thus affording them the legal protections of neither group,²²⁸ pirates are civilians,²²⁹ and in this day and age that means they are afforded due process for their crimes.²³⁰ While Kontorovich makes a case that Somali pirates fit all of the factual requirements to be classified as an irregular militia, classifying them as combatants rather than civilians,²³¹ Guilfoyle rightly points out that the

²¹⁸ Simpson, above n 35, 170–171.

²¹⁹ Guilfoyle, 'Piracy off Somalia', above n 156, 142.

²²⁰ Ibid 150.

²²¹ Elagab, above n 147, 66; Geiss and Petrig, above n 142, 130–135; Kontorovich, 'A Guantánamo on the Sea', above n 35, 257; Kraska, above n 9, 92.

²²² *The M/V 'Saiga' (No.2) Case (Saint Vincent and the Grenadines v. Guinea) (Main Judgment)*, 155–156 (International Tribunal for the Law of the Sea, 1999).

²²³ *The M/V 'Saiga' (No.2) Case (Saint Vincent and the Grenadines v. Guinea) (Separate Opinion of Judge Anderson)*, 6–7 (International Tribunal for the Law of the Sea, 1999).

²²⁴ Bento, above n 7, 410; Elagab, above n 147, 66; Mario Silva, 'Somalia: State Failure, Piracy, and the Challenge to International Law' (2009) 50 *Virginia Journal of International Law* 553, 577; Sterio, above n 6, 390.

²²⁵ Goodwin, above n 6, 990–993; Kontorovich, 'A Guantánamo on the Sea', above n 35, 257; Rubin, above n 4, 79; Simpson, above n 35, 168.

²²⁶ *International Covenant on Civil and Political Rights, signed 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976 art .6, 14.*

²²⁷ *Prosecutor v Dusko Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, 70 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, 1995).

²²⁸ Kontorovich, 'A Guantánamo on the Sea', above n 35, 257; Simpson, above n 35, 170–171.

²²⁹ Elagab, above n 147, 66; Geiss and Petrig, above n 142, 131–135; Guilfoyle, 'Piracy off Somalia', above n 156, 142; Kontorovich, 'A Guantánamo on the Sea', above n 35, 257; Kraska, above n 9, 92.

²³⁰ *International Covenant on Civil and Political Rights, signed 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.*

²³¹ Kontorovich, 'A Guantánamo on the Sea', above n 35, 259–262.

actions of the Somali pirates have no connection to the protracted civil war in Somalia, causing any attempt to classify them as combatants to fail.²³²

F *Summary of the current law*

Piracy *jure gentium* can be defined as an act of violence, depredation or detention committed for private ends on the high seas, involving two or more vessels. While the offence no longer requires *animo furandi*, it is questionable whether acts committed for a political or religious reason meet the private ends requirement. Because of the requirement that the crime occur on the high seas (with similar acts occurring within the territorial sea, archipelagic or internal waters being armed robbery at sea and within the exclusive jurisdiction of the relevant state) the crime attracts the concurrent municipal jurisdiction of all states to enforce and prosecute, distinguishing it from other *jus cogens* crimes which attract a universal jurisdiction. Any engagement in enforcement must be done using constabulary force rather than warlike force, resulting in due process for the offenders by virtue of their status as civilians committing a crime rather than as enemy combatants in an armed conflict.

VI CONCLUSION

What is clear from this article is that the crime of piracy *jure gentium*, as well as the terms 'pirate' and 'piracy' are steeped in a rich history where legal definition and political rhetoric are often confused. The liberal use of political rhetoric, historically and recently, has caused a great deal of confusion around the substantive content of the law, and in particular the meaning of universal jurisdiction in the context of piracy. It is suggested that when the current treaty law, which is considered to codify custom, and historical state practice are examined, piracy *jure gentium* cannot be classified as a crime of universal jurisdiction but must be considered as one afforded a concurrent municipal jurisdiction. The differences between universal jurisdiction and concurrent municipal jurisdiction are clear when piracy is juxtaposed with other *jus cogens* crimes such as war crimes or torture. Therefore the inclusion of piracy within the canon of international criminal law, both foundationally and contemporarily, is based upon a flawed understanding of the history of piracy law, the jurisprudential foundation of the current law and the misleading use of the term 'universal jurisdiction'. As a crime, piracy is more akin to transnational criminal law frameworks, but even this is problematic due to the ability for states to exercise jurisdiction without a nexus.

²³² Guilfoyle, 'Piracy off Somalia', above n 156, 144–146.