Title
The Application of Nexus to Universal Jurisdiction: A Socio-Historical Study of the Relationship of Juridical Structures to Maritime Piracy

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The Application of Nexus to Universal Jurisdiction: A Socio-Historical Study of the Relationship of Juridical Structures to Maritime Piracy

A dissertation submitted in partial satisfaction of the requirements for the degree Doctor of Philosophy

in

Sociology

by

Jeffrey Todd Tirshfield

Committee in Charge:

University of California, San Diego
Professor Ivan Evans, Chair
Professor Thomas W. Gallant
Professor Kwai Hang Ng
Professor Jeremy Prestholdt
Professor Andrew Scull

2015
This Dissertation of Jeffrey Todd Tirshfield is approved, and it is acceptable in quality and form for publication on microfilm and electronically:

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Chair

University of California, San Diego

2015
DEDICATION

To the past, Mom and Dad; the present Brenda; and the future, Kira and Casey—Thank you, I love you, and Arrrgh!
Justice being taken away, then, what are kingdoms but great robberies? For what are robberies themselves, but little kingdoms? The band itself is made up of men; it is ruled by the authority of a prince, it is knit together by the pact of confederacy; the booty is divided by the law agree on. If, by the admittance of abandoned men, this evil increases to such a degree that it holds places, fixes abodes, takes possession of cities, and subdues peoples, it assumes more plainly the name of a kingdom, because the reality is now manifestly conferred on it, not by the removal of covetousness, but by the addition of impunity. Indeed, that was an apt and true reply which was given to Alexander the Great by a pirate who had been seized. For when that king had asked the man what he meant by keeping hostile possession of the sea, he answered with bold pride, “What thou meanest by seizing the whole earth; but because I do it with a petty ship, I am called a robber, whilst thou who dost it with a great fleet art styled emperor.

Augustine of Hippo in *The Works of Aurelius Augustine, Bishop of Hippo*  
Augustine of Hippo and Dods 1871:IV, 4)
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<thead>
<tr>
<th>Abbreviation</th>
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<tbody>
<tr>
<td>AU</td>
<td>African Union</td>
</tr>
<tr>
<td>ASEAN</td>
<td>Association of Southeastern Asian Nations</td>
</tr>
<tr>
<td>BIMCO</td>
<td>Baltic and International Maritime Council</td>
</tr>
<tr>
<td>BMP4</td>
<td>Best Management Practices Vol. 4</td>
</tr>
<tr>
<td>CGPCS</td>
<td>Contact Group on Piracy off the Coast of Somalia</td>
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<tr>
<td>COI</td>
<td><em>Commission De L'Ocean Indien</em></td>
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<tr>
<td>CMF</td>
<td>Combined Maritime Force</td>
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<tr>
<td>CTF-150</td>
<td>Combined Task Force – 150</td>
</tr>
<tr>
<td>CTF-151</td>
<td>Combined Task Force – 151</td>
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<tr>
<td>EC</td>
<td>European Commission</td>
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<tr>
<td>EEZ</td>
<td>Exclusive Economic Zone</td>
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<td>EU</td>
<td>European Union</td>
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<tr>
<td>EUCAP NESTOR</td>
<td>European Union Capacity Building Effort in the Horn of Africa and the Western Indian Ocean</td>
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<tr>
<td>EUNAVFOR</td>
<td>European Union Naval Force (Operation Atalanta)</td>
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<tr>
<td>FAO</td>
<td>Food and Agriculture Organization of the United Nations</td>
</tr>
<tr>
<td>ICC</td>
<td>International Chamber of Commerce</td>
</tr>
<tr>
<td>ICC-CCS</td>
<td>International Chamber of Commerce – Commercial Criminal Services</td>
</tr>
<tr>
<td>IGAD</td>
<td>Intergovernmental Authority on Development</td>
</tr>
<tr>
<td>IMB</td>
<td>International Maritime Bureau</td>
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<tr>
<td>IMB-PRC</td>
<td>International Maritime Bureau – Pirate Reporting Center</td>
</tr>
<tr>
<td>IMCO</td>
<td>Inter-Governmental Maritime Consultative Organization</td>
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<tr>
<td>IMO</td>
<td>International Maritime Organization</td>
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<tr>
<td>IMO GISIS</td>
<td>International Maritime Organization Global Integrated Shipping Information System</td>
</tr>
<tr>
<td>INTERPOL</td>
<td>International Criminal Police Organization</td>
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<tr>
<td>INTERTANKO</td>
<td>International Association of Independent Tanker Owners</td>
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<tr>
<td>IRTC</td>
<td>International Recommended Transportation Corridor</td>
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<tr>
<td>ITLOS</td>
<td>International Tribunal for the Law of the Sea</td>
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<tr>
<td>IUU</td>
<td>Illegal Unreported and Unregulated Fishing</td>
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<tr>
<td>MARAD</td>
<td>United States Maritime Administration</td>
</tr>
<tr>
<td>MARPOL</td>
<td>International Convention for the Prevention of Pollution from Ships (1973) – IMO</td>
</tr>
<tr>
<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
</tr>
<tr>
<td>NATO MARCOM</td>
<td>North Atlantic Treaty Organization Maritime Command (Operation Ocean Shield)</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-Governmental Organization</td>
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<tr>
<td>OBP</td>
<td>Oceans Beyond Piracy</td>
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<tr>
<td>OEF</td>
<td>One Earth Foundation</td>
</tr>
<tr>
<td>Acronym</td>
<td>Full Form</td>
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<tr>
<td>PERSGA</td>
<td>Regional Organization for the Conservation of the Environment of the red Sea and the Gulf of Aden</td>
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<tr>
<td>PMAESA</td>
<td>Port Management Association of Eastern and Southern Africa</td>
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<tr>
<td>SNA</td>
<td>Somali National Alliance (Aidid)</td>
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<tr>
<td>SNF</td>
<td>Somali National Front (Loyalists of Barre Regime)</td>
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<tr>
<td>SRRC</td>
<td>Somalia Reconciliation and Restoration Council (Successor to SNA (to oppose TNG))</td>
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<tr>
<td>RAPPICC</td>
<td>Regional Anti-Piracy Prosecutions Intelligence Coordination Centre</td>
</tr>
<tr>
<td>ReCAAP</td>
<td>Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia</td>
</tr>
<tr>
<td>ReCAAP-ISE</td>
<td>Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia – Information Sharing Centre</td>
</tr>
<tr>
<td>REFLECS3</td>
<td>Regional Fusion and Law Enforcement Centre for Safety and Security at Sea</td>
</tr>
<tr>
<td>RPG</td>
<td>Rocket Propelled Grenade</td>
</tr>
<tr>
<td>SHADE</td>
<td>Shared Awareness and Deconflation</td>
</tr>
<tr>
<td>TEU</td>
<td>Twenty-foot Equivalent Unit</td>
</tr>
<tr>
<td>TFG</td>
<td>Transitional Federal Government (Somalia 2004-2012)</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UN/DPKU</td>
<td>United Nations Department of Peacekeeping Operations</td>
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<tr>
<td>UNDP</td>
<td>United Nations Development Programme</td>
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<tr>
<td>UNEP</td>
<td>United Nations Environmental Programme</td>
</tr>
<tr>
<td>UNESCAP</td>
<td>United Nations Economic and Social Commission for Asia and the Pacific</td>
</tr>
<tr>
<td>UNODC</td>
<td>United Nations Office on Drugs and Crime</td>
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<tr>
<td>UNODC-CPP</td>
<td>United Nations Office on Drugs and Crime – Counter Piracy Programme</td>
</tr>
<tr>
<td>UNODC-MCP</td>
<td>United Nations Office on Drugs and Crime – Maritime Crime Programme</td>
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<tr>
<td>UNOSOM I and II</td>
<td>United Nations Operations in Somalia I and II</td>
</tr>
<tr>
<td>UNPOS</td>
<td>United Nations Political Office Somalia</td>
</tr>
<tr>
<td>UNSC</td>
<td>United Nations Security Counsel</td>
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<tr>
<td>UNSCR</td>
<td>United Nations Security Counsel Resolution</td>
</tr>
<tr>
<td>USD</td>
<td>United States Dollar</td>
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<tr>
<td>WFP</td>
<td>World Food Programme</td>
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With a project as all-consuming and all-demanding as a dissertation, the list of acknowledgements becomes considerable. In my case, as is probably the norm, there are two discrete groups of persons who have assisted in making this work possible. The first group consists of those individuals who have contributed to the academic pursuit that is the making of the dissertation. The second, is that group who have provided emotional support and thus are deserving of a “mea culpa” equal in ratio to the genuine appreciation I have for their contribution. In keeping with the socio-historical nature of this dissertation, I progress from the beginning—a beginning that predates the project.

I would be remiss, if I failed to acknowledge those long-gone, who had placed the interests of their children and their children’s children, above their own, and who prized the passing of accumulated knowledge above the passing of accumulated wealth (although my benefitting from the second, has contributed to the first). Having lost my parents and brother a number of years ago, I wonder what they would have thought about this endeavor, and this work. I hope they would be proud.

There are three academics who believed in me before they had any real evidence that I could succeed in this project, and to them I am grateful. Tania Provolotskaya and Perla Myers thank you for thinking enough of me to believe that I could one day join your ranks. And, Michael Rappaport, thank you for supporting me even though our understanding of social realities somewhat diverge; don’t worry, someday you will come around. To those of you at “Fish Camp,” more commonly known as the Scripps
Institution of Oceanography Center for Marine Biodiversity and Conservation's IGERT (Ph.D. Student) and MAS summer program (now you know why I call it Fish Camp), thank you for contributing to broadening my horizons. To my fellow campers, Misha Miller-Sisson, Jake Johnson, Lauren Linsmayer, Natasha Gallo, Erin Jacobson, Yassir Eddebbar, Farnaz Farhang, Daniel Conley, Tara Jain, Tony Shiao, Vanessa Van Zerr, Ralph Pace, and Sam Poon, thank you for letting me hang out with the “cool” (and brilliant) crowd. Thank you to the IGERT PIs, Dick Norris, Lisa Levin and Joel Watson for bringing IGERT to SIO and for selecting me to participate; to Kathryn Mengerink, if not for your discussion on UNCLOS this dissertation would never have been conceived; and, to Penny Dockry, who helped make both of my fieldwork projects possible.

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Commercial Crimes Services.

While the people as SIO/CMBC helped me formulate my project, and those in Mombasa, Nairobi, Seychelles, London and Washington, D.C. helped in informing my research questions, it was the legal scholars at the Rhodes Academy of Oceans Law and Policy who provided insight that, while it was not their intent, allowed to confidently challenge conventional legal theory and practice. I am indebted to instructors John Moore, J. Ashley Roach, Robert Beckman, Albert Hoffman, Emmanuel Roucounas, and attendees, Li Chen, Manuel Carmona-Yebra, Nelson Coelho, Dara In, Alexandre Pereira da Silva, Thorvaldur Yngvason and Andreas Kravik.

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To my Committee Chair, Ivan Evans, thank you for your efforts in cleaning up my prose,
dealing with my verbosity, for your guiding thoughts, your gentle criticisms, and mostly, for your friendship. You are a worthy role model.

Throughout my tenure at UCSD, I have benefitted from the kindness and competence of a number of staff in the UCSD Sociology Department. To Katrina Richards, Beverly Bernhardt, and Shannon Goodison, I offer a sincere thank you. And where would I be without Emmanuel dela Paz? Manny keeps the graduate program running, which is quite a feat when you consider that those running the department are quintessential academics… enough said.

Lastly, thank you to those who mean the world to me, Brenda, Kira and Casey. You may not have been able to help me in the act of becoming a professor, but you did let me know every step of the way, that you knew I could successfully finish the program. You believed in me when I did not (which was too often); AND, you allowed me to pursue a dream, at times, at your expense. While I was the person pulling the all-nighters, you three had to interact with the person who pulled the all-nighters. I hope that the positives far out weighed the negatives, and you are as proud of me as I am of the three of you. Kira and Casey, please use me as an example. Believe that knowledge is worth the effort, and that those who can, find a way to teach. You will both far-surpass me in both your intellectual and career pursuits, I am just glad I have been able to set the platform at a level worthy of your efforts (in one of those areas). Brenda, thank you!! I know you just don’t get it, and that makes it all the more special. None of this would be possible without you. I love you mucho, mucho, mucho.
VITA

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Dissertation
The Application of Nexus to Universal Jurisdiction: A Socio-Historical Study of the Relationship of Juridical Structures to Maritime Piracy
Chair: Ivan Evans; Members: Andrew Scull, Kwai Ng, Thomas Gallant and Jeremy Prestholdt

Defended June 2015

The construction of third-party jurisdictional piracy courts to address the problem of Somali piracy injected a sudden and unprecedented doctrine into—while simultaneously dismissing a canon of—international law. These courts dismissed the nexus requirement—or connection—between the seizing State and the legal apparatus used to prosecute those accused of piracy jure gentium, the original cognizable crime of universal jurisdiction. While the legal community does not appear to recognize this particular nexus requirement, its existence during over four hundred years of juridical practice and over two thousand years of social and juristic theory stands as a testament to its salience under international law. Given its history as a cornerstone of international law, the ability of powerful western States, and international organs working on behalf of those powerful western States, to delegate the prescriptive and adjudicative functions of the juridical apparatus to less-developed nations, while retaining the power of enforcement, is both remarkable and disturbing. This dissertation therefore poses two questions: First, what explains the emergence of third-party jurisdictional piracy courts in Kenya, Seychelles and Mauritius to address Somali piracy? Second, why did powerful States limit the jurisdiction of these courts to only cases of Somali piracy, when maritime piracy has been equally disruptive, and perhaps more costly, in other parts of the world? The central contention of this dissertation is that third-party jurisdictional piracy courts are a product of an international State system based on asymmetrical power relations that reflect the ability of hegemonic States to preserve their interests by selectively targeting subaltern actors. In this vein, this dissertation notes that alternatives to third-party jurisdictional piracy courts currently exist under both the law of nations and municipal law. However, extant juridical routes have the potential to expose and damage the dominance of hegemonic actors by, for example, opening them up to
violations of international human-rights laws. In this light, the emergence of third-party jurisdictional piracy courts can be understood as both an affront to modern conceptions of sovereignty and the law of nations, and the normative juridical outcome of the interactions between hegemonic States and subaltern social actors.

**Prospectus**

**Defended** 2012

**Field Papers**

Chair: Ivan Evans; Members: Andrew Scull, John Skrentny and Kwai Ng

**Sociology of Law:** A genealogical review of the sociological and jurisprudence theories of law

**Social Control and Deviance:** A genealogical review of sociological theory

**Awards and Grants**

**Rhodes Academy of Oceans Law and Policy - Diploma**

National Science Foundation IGERT Travel and Internship Grant (~$9,000)

Scripps Institution of Oceanography/Center for Marine Biodiversity and Conservation

United Airlines Scholarship Fund ($1,000)

National Science Foundation IGERT Fellowship ($40,000)

Scripps Institution of Oceanography/Center for Marine Biodiversity and Conservation

National Science Foundation Graduate Research Fellowship

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Summer 2015

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Law and Culture

fall 2014

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Associate Professor Isaac Martin  
winter 2012

**Undergraduate Teaching Assistantships:** Department of Sociology

The Practice of Social Research  
Professor David Phillips  
winter 2011

The Study of Society  
Professor Ivan Evans  
fall 2010

**Course Reader:** Department of Sociology

Sociology of Mental Illness  
Distinguished Professor Andrew Scull  
winter 2015

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Visiting Professor Valerie Summers  
fall 2013

Political Sociology  
Visiting Professor David Fisk  
spring 2012

Criminal Punishment  
Visiting Professor Valerie Summers  
spring 2012
Crime and Society  Visiting Professor Valerie Summers  fall  2011
Urban Sociology  Assistant Professor April Linton  spring  2010
Forms of Social Control  Visiting Professor Thomas Barton  winter  2010
Crime and Society  Visiting Professor Valerie Summers  fall  2009
Violence and Society  Professor Ivan Evans  spring  2009
Change in Modern South Africa  Professor Ivan Evans  winter  2009
Sociology of Law  Associate Professor Kwai Ng  fall  2008
Violence and Society  Professor Ivan Evans  spring  2008
Social Deviance  Lecturer Stephanie Chan  winter  2008

Research and Teaching Areas of Interest
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Social Control  Maritime Predation/Piracy
Deviance  Comparative-Historical Methods
Inequalities  Ethnography
Elite Deviance/Criminality  Violence
Enlightenment Social Theory  Contemporary Social Theory

Publications and Presentations
Works in Progress
Shifts in national economic policy and the study of deviance
While Keynesianism dominated United States economic policy from the Great Depression of the 1930’s to the Oil Embargo of 1973, the study of deviance was rooted in sociological theory. However with the rise of neoliberalism, a not so subtle shift took place and the study of deviance seems to have been co-opted by the science of criminology. In this paper, I investigate the social phenomena that may have been responsible for or hastened the shift; and additionally, why the study of deviance should again be brought back under the umbrella of sociology.

Cathartic violence: a new slant on the ‘Werther Effect’. The impact of mass media coverage of acts of violence and their effect on subsequent decreases in deviant violent behavior
Do certain types of violence lead to corresponding reductions in other types of societal violence? This paper explores the potential causal effects of extensive mass media coverage of violence (both deviant and non-deviant) on subsequent decreases in deviant domestic violence against women, as evidenced in the form of emergency room visits.

The creation of meaning within the context of sportive violence
This paper provides context and meaning to actions of sportive violence experienced by participants of Brazilian Jiu-jitsu and No-Holds Barred Fighting. Further, the author investigates, through participant observation, and both structured and unstructured interviews, if the means of addressing social conflict resolution within the academy (training facility) are consistent with the participants’ means of social conflict resolution in non-training social situations.
Conference Presentations
University of California, San Diego May 2013
Sociology Department Graduate School Conference
“Maritime Piracy and the Social Construction of Juridical Ambiguity”

Scripps Institution of Oceanography/Center for Marine Biodiversity and Conservation Feb 2013
NSF IGERT Conference
“Maritime Piracy and the Social Construction of Juridical Ambiguity”

Scripps Institution of Oceanography/Center for Marine Biodiversity and Conservation Feb 2012
NSF IGERT Conference
“Power and Conflict: Hegemonic and Entrepreneurial Deviance under Conditions of Ecological Change”

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Sociology Department Graduate School Conference
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Law and Society Association

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Mitsui & Co. (Japan), Ltd. – New York, California & Texas
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Brazilian Jiu-jitsu Pan American Championships – 3x Champion - with kimono
Brazilian Jiu-jitsu Pan American Championships – Vice-Champion - no gi
ABSTRACT OF THE DISSERTATION

The Application of Nexus to Universal Jurisdiction: A Socio-Historical Study of the Relationship of Juridical Structures to Maritime Piracy

by

Jeffrey Todd Tirshfield

Doctor of Philosophy in Sociology

University of California, San Diego, 2015

Professor Ivan Evans, Chair

The construction of third-party jurisdictional piracy courts to address the problem of Somali piracy injected a sudden and unprecedented doctrine into—while simultaneously dismissing a canon of—international law. These courts dismissed the nexus requirement—or connection—between the seizing State and the legal apparatus used to prosecute those accused of piracy jure gentium, the original cognizable crime of universal jurisdiction. While the legal community does not appear to recognize this particular nexus requirement, its existence during over four hundred years of juridical practice and over two thousand years of social and juristic theory stands as a testament to its salience under international law. Given its history as a cornerstone of international
law, the ability of powerful western States, and international organs working on behalf of those powerful western States, to delegate the prescriptive and adjudicative functions of the juridical apparatus to less-developed nations, while retaining the power of enforcement, is both remarkable and disturbing. This dissertation therefore poses two questions: First, what explains the emergence of third-party jurisdictional piracy courts in Kenya, Seychelles and Mauritius to address Somali piracy? Second, why did powerful States limit the jurisdiction of these courts to only cases of Somali piracy, when maritime piracy has been equally disruptive, and perhaps more costly, in other parts of the world? The central contention of this dissertation is that third-party jurisdictional piracy courts are a product of an international State system based on asymmetrical power relations that reflect the ability of hegemonic States to preserve their interests by selectively targeting subaltern actors. In this vein, this dissertation notes that alternatives to third-party jurisdictional piracy courts currently exist under both the law of nations and municipal law. However, extant juridical routes have the potential to expose and damage the dominance of hegemonic actors by, for example, opening them up to violations of international human-rights laws. In this light, the emergence of third-party jurisdictional piracy courts can be understood as both an affront to modern conceptions of sovereignty and the law of nations, and the normative juridical outcome of the interactions between hegemonic States and subaltern social actors.
Introduction: The Arguments for Nexus, and the Law as the Reification of Asymmetric Power Relations and Instrumental Inequalities

I met United Nations Office of Drugs and Crime (UNODC) Programme Officer Shanaka Jayasekara at the brand new offices of the Regional Anti-Piracy Prosecutions Intelligence Coordination Centre (RAPPICC, now REFLECS3), situated on an old coast guard base in the Seychelles. Shanaka is an expert on the application of law to deviance that crosses national boundaries, and had spent the previous six years as a Lecturer at the Centre for Policy, Intelligence and Counter Terrorism at Macquarie University in Sydney, Australia. We were discussing the legal mechanisms by which Somalis were being tried in the Seychelles. Shanaka was explaining the lead role and the unique position taken by the United Nations Office of Drugs and Crime—Counter Piracy Programme (UNODC-CPP, now the UNODC-CMP (Maritime Crime Programme)). In referring to the jurisdictional issues inherent in the unique responses taken by the international community in addressing piracy off the coast of Somalia, he made reference to the word “nexus,” or more correctly “lack of nexus.” Suddenly, as if the subject of a Wittgensteinian primer, I could place meaning to action and object. While I had been researching the limits of the application of jurisdiction external to the territory of the State, I had not truly grappled with the question of the means of that application. Nexus is that means; it ties action to the sovereign. As I exited that meeting and placed what we had discussed into the broader context of social inequalities, I knew that the focus of my dissertation would shift from one investigating inequality as a subset of human rights
issues to one studying inequality in the application of law or, more correctly, inequality built into, and as a result of, the application of universal jurisdiction to maritime piracy off the coast of Somalia.

I met Shanaka through Charles Brown of the Crown Prosecution Service of the United Kingdom. Charles is currently on secondment to the Attorney General’s Office of the Republic of Seychelles where he serves as Senior State Council. I was invited by Charles to witness the trial and sentencing of six Somalis for maritime piracy. At the sentencing I met Shanaka and a number of individuals from military, police, and maritime security organizations with special interest in maritime piracy off the coast of Somalia. While they may have had interest in piracy in other areas of the world, their employers thought it prudent and resource-effective for them to be focusing on Somali piracy. Together we witnessed the sentencing and discussed the terms after it had been handed down. Most indicated that they felt justice had been served, yet the subject of inequality was not addressed.

Like a number of experts in the relationship of public international law and municipal law in the area external to the territory of any and all sovereigns, Shanaka was quite gracious in offering to discuss his work with me as a Programme Officer at the UNODC. He also gave me his impressions of the mission of the UNODC in Seychelles and throughout the Western Indian Ocean, RAPPICC, and about maritime piracy off the coast of Somalia in general. Prior to meeting with him, I had just exited a meeting with two officials of the Commission De L’Ocean Indien (COI) where it was explained to me

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1 The facts, as well as my impression of the facts, of the sentencing are discussed later in this dissertation.
that the COI’s mission and budget would be greatly expanded, thanks to its fulfilling the terms of an intermediate operations plan which focused on the coordination of efforts in addressing piracy off the coast of Somalia by the island nations of the Western Indian Ocean. While the COI is an intergovernmental organization of five Indian Ocean island nations—Comoros, France/Reunion, Madagascar, Mauritius and Seychelles—the commitment for the funding for their expanded mission in 2013, amounting to over EUR 37.5 million, came from the European Union. That mission was an expansion of maritime security operations in and around the island nations of the Indian Ocean. With Somali piracy then considered perhaps the single most significant international problem plaguing law enforcement, over a short period of time, the COI’s budget for maritime security coordination had increased ten-fold.\(^2\) While piracy off the coast of Somalia had come off its peak, powerful Western nations and organs of the international community still perceived maritime security in the Western Indian Ocean as a significant issue meriting the expenditure of billions of USD and the mobilization of resources from nearly all powerful maritime nations and related international coalitions. In meeting with these persons intimately involved in addressing Somali piracy, I was able to confirm my preliminary research findings that not only were there numerous players in the application of juridical apparatuses to maritime piracy game, there was both significant overlap and an extraordinary amount of resources being directed to remediating the social problem. Additionally, I was able to confirm that the manner in which powerful nations

\(^2\) Ethnographic research July 2013, Mahé, Seychelles.
and the international community were addressing the problem was from colonialist mentality, thus perpetuating ingrained structural and process inequalities.

An examination of the social problem and the inequality inherent in its design was the initial direction of my dissertation. That dissertation was concerned with examining the framing of Somali piracy as a unique social problem and the overwhelming allocation of resources to that social problem that at its height, over an eight year period, cost the maritime transportation industry less than USD 400 million in total ransoms paid. In comparison, militarization of the maritime transportation corridors of the Western Indian Ocean have averaged over USD 1 billion per year for over a decade, not to mention the billions in capacity-building and other costs aimed at reining in maritime depredation in this one particular area; especially when over a longer time frame other areas have experienced incidence of maritime piracy that are just as, if not more, significant. Additionally, it was my aim to discuss the inherent inequality in the transportation industry benefiting from a militarized protection scheme worth USD billions, with no financial contribution, and the unique treatment Somalis accused of piracy received at the hands of powerful Western States and the international organs who work on their behalf. I still believe that this is a project worthy of empirical research, but for a variety of reasons, it became not as meaningful as the one I have chosen to pursue.

The single word “nexus” changed the focus of the dissertation because I found that the single largest inequality, inherent and constructed, in Somali piracy was in the application of the law and, as Émile Durkheim understood it, the “… law [was] a prime example of the consecration or objectification of social norms and values[,]”… “…a visible symbol of all that essentially social[.]” (Hunt 1978:65) Yet, just because I sensed
the inequality in the application of the law, did not mean that it existed. Further, if I could convince myself that it did exist, I still had to provide evidence of its existence in order to convince others. In order to prove that norms, values and inequalities are in fact reified as not only “the law,” but also as treaty, resolution, enforcement action, adjudication and sanction, I had to show that deviant sub-trajectories of the creation and application of the law existed alongside the normative trajectories of the creation and application of the law. This was the socio-historical part of this dissertation; however, I had to go three steps further. First I had to show that there was a theoretical argument that supported my thesis. Second, I had to show that the case of Somali piracy was similar in design and implementation to other pathological historiographic trajectories. Finally, I had to show that throughout recorded Western history a particular type of actor was responsible for creating and applying legal or juridical inequalities, and that that particular actor benefitted from the inequalities as created and applied. This dissertation substantiates my initial assertions.

On the surface it may appear that this dissertation is merely a two-part exploration of the relationship of the law to a particular form of social deviance. On the one part it is a socio-historical examination of the relationship of the law to maritime piracy; on another, an investigation of how the law has changed to address a particular iteration of piracy. Yet like the surface of the high seas, where criminal acts of depredation are labeled piracy, that which is visually perceivable belies the complex nature of what lies beneath. It is perhaps most telling to describe the nature of this study by making clear the questions that it addresses. The first three among these questions are the ones most fundamental to understanding the relationship of the law to maritime piracy: First, is
maritime piracy, as President of the International Court of Justice, Gilbert Guillaume states, the “one true case of universal jurisdiction” (Guillaume 2002:42) under international law? Second, as defined and from a standpoint of theory, can universal jurisdiction be applied to acts of maritime piracy absent a nexus between the seizing and the adjudicating State? And third, in practice, have there been, prior to 2006,3 cases where universal jurisdiction has been applied to maritime piracy where a nexus between the seizing and the adjudicating State is absent?

I argue that the answers to these questions are yes, no, and no. Yet it is not the answers that are interesting, although they are from the standpoint of a juristic science provocative, it is the unpacking of those answers and the tensions that exist between a sociology of law and a juristic science that are of interest. Whereas the answer to question one is clearly “yes”, the answers to the second and third questions are counter to accepted legal scholarship. Section 404 of the Restatement of the Law (Third): The Foreign Relations Law of the United States says:

[A] state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in §402 is present. [Comment (a) further states] international law permits any state to apply its laws to punish certain offenses although the state has no links of territory with the offense, or of nationality with the offender (or even the victim). Universal jurisdiction over the specific offenses is a result of universal condemnation of those activities and general interest in cooperating to suppress them, as reflected in widely-accepted international agreements and resolutions of international organizations. These offenses are subject to universal

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3 As I will discuss later in this dissertation, the year 2006 is significant because after that year Kenya began to apply universal jurisdiction to maritime piracy absent any and all nexuses. This, as I will prove in opposition to juristic scholarship stating otherwise, is unique both in its very application and its application to Somalis accused of piracy, and only Somalis accused of piracy.
jurisdiction as a matter of customary law. (The American Law Institute 1987:254-255)

International law, as dictated and agreed to by treaty and through custom, finds certain offenses, such as piracy, to be universally condemned to such a degree that it allows for a State to not only define and prescribe punishment, but also, since there is no international penal tribunal to serve an adjudicative function, to leave the punishment for such crimes to the State that “seizes that offender” (The American Law Institute 1987:255). As I will explain, not only do States lack a mandate under international law to apply adjudicative jurisdiction without nexus (and that nexus, is minimally, between the seizing and the adjudicating State), there is a complete absence of historical precedent and a complete lack of support during the period of over four hundred years of juristic scholarship that addresses the subject. Additionally, there is no provision for the application of universal jurisdiction to piratical acts absent nexus within legal theory. Finally, there is the extremely clear wording of the above statement that “the punishment of piracy is left to any state that seizes that offender.” There is no provision for the establishment of third-party jurisdictional piracy courts to adjudicate cases of maritime piracy where no nexuses exist, only for the seizing State to punish or not to punish.

Whereas a legal scholar might suggest that the formation of third-party jurisdictional piracy courts fulfill the mandate of a formal rational rule of law, a socio-legal theorist might suggest that there are socio-legal problems, both theoretical and practical, that are not addressed via the application of a formal rational rule of law. It is precisely at the point where a legal scholar draws conclusions based on legal interpretations and legal efficacy, that a socio-legal scholar notes the consequence of
structural and/or instrumental inequalities in the formulation and application of the law. The legal scholar notes a social pathology and addresses it with the construction and application of the law, finding little value in addressing questions of social meaning. In contrast, the socio-legal scholar notes the construction and application of the law, and questions both if they were created in response to a pathology and if they were the pathology, as well as the social and cultural meanings the pathology and its response engenders. Socio-legal scholars understand that deviance (e.g. social pathology) and social control (law) are social constructs that are dependent on social meaning and context, and not a priori “rights” and “wrongs.” In this light we ask, are maritime pirates “hostis humani generis?” Or are those hegemonic actors who created the social structures and processes that led to the inequalities that may be causally related to one becoming a maritime pirate “hostis humani generis?”

This problem of the application of legal knowledge and legal remedies to social issues goes beyond the subsuming of social knowledge as a by-product of a juristic science. In analysis of the juridical remedies applied to the social problem of piracy off the coast of Somalia, there is not a lag of building a systemic social history around a juristic history, there is a misconnect. In fact, the social history of juridical remedies surrounding piracy off the coast of Somalia has yet to be written; this dissertation is but a start. Yet, this social history is an incomplete one in a number of respects. First, while it provides a sociological lens, or more aptly a sociological perspective to a juridical history, due to the depth of the historical complexities surrounding maritime piracy and universal jurisdiction, and the comparative breadth of the background material required to
support certain important assertions regarding the relationship between maritime piracy and universal jurisdiction, the discourse on the social history of that relationship is limited. Second, because there is not a singular “social history” within the social sciences, what has heretofore been considered a legal history is presented as a number of sociological histories and their inter-relationships. Third, because this is perhaps the first sociological examination of the relationship of maritime piracy and questions of jurisdiction, I must leave it to others to unpack some of the other myriad relationships that have existed, or do exist, between the two. Finally, while maritime piracy is the first true case of universal jurisdiction, it is no longer the only case. Further, while expanding the number of crimes under which universal jurisdiction is applicable does not limit the study of the relationship of maritime piracy and universal jurisdiction, it may be responsible for changing conceptions of universal jurisdiction under international law. This is true for two reasons. First, it is my contention that universal jurisdiction under international law developed around maritime piracy for two, and only two, reasons: the location of the act—the high seas—and the relationship of the accused pirate to the sovereign. With regard to maritime piracy, these variables are co-related; in the absence of one or the other, piracy *jure gentium* (piracy on the high seas, outside the jurisdiction of any and all sovereign nations) has not been committed. Since piracy was first recognized under international law as a crime of universal jurisdiction, some four hundred years ago, until the beginning of the second decade of the twenty-first century, crimes subject to universal jurisdiction have been added due to the heinousness of the crime and not the location of the crime and the relationship of the accused to the sovereign. These crimes include slavery, war crimes, crimes against peace, crimes against
humanity, genocide, and torture. Second, a certain subset of crimes subject to universal jurisdiction cannot, from a theoretical standpoint and should not, from a practical standpoint, truly be construed as crimes subject to universal jurisdiction. The application of universal jurisdiction to these crimes confounds meaning under both international and municipal law and, within the socio-legal communities it also creates ambiguity in the application of universal jurisdiction to true crimes subject to universality. These crimes are usually termed “terrorism” or “crimes of enemy combatants.” International law is clear in this area, as there is both significant juristic scholarship and jurisprudence addressing jurisdiction and crime. In fact, Section 402 Restatement of the Law (Third): Foreign Relations Law of the United States provides support for extraterritorial prescriptive jurisdiction based on the principles of territoriality, nationality, the protective principle and passive personality principle. Universality need not be invoked. A more recent subset of cyber-crimes is similar to piracy, if and only if, that subset of acts takes place in amorphous space, akin to the high seas, and does not touch the sovereign directly via territory, nationality or security. In cases such as these, juridical structures surrounding maritime piracy are applicable.

This dissertation comprises seven chapters, the first two are theoretical in nature, the third and fourth chapters provide some historical context to Somalia and piracy, the fifth and sixth chapters provide historical context to the formation of legal structures, and the final chapter is an empirical examination. Ultimately, the first six chapters provide historical structure to support the empirical evidence provided in the final chapter.

The primary purpose of Chapter 1 is to provide a theoretical framework to support the socio-historical work in the third through the sixth chapters and the empirical project
that is the seventh chapter. The first chapter begins by addressing important issues relevant not only to this dissertation, but also to all social science research in general, the inter and intra-theoretical/empirical tensions of research within the social sciences. The first tension examines the discourse of territoriality and socio-specialization, how certain social science sub-fields have laid claim to specialist knowledge, and how that specialist knowledge lends support to claims of expertise. For example, legal scholars have completed the vast majority of research surrounding the relationship of law to maritime piracy, while scholars from other branches of the other social science tree seem hesitant to contribute to that important social problem. Within this discourse is a discussion concerning the related phenomenon of intra-discipline dueling that takes place over methodological differences, data interpretation and meaning attribution, and the damage toll it takes on research and researchers.

This discussion is followed by an analysis of the product of the concurrent staking of claims of expertise and the ceding of areas of socio-specialization to particular social science sub-specialties: reductionism. Reductionism is problematic because it trades explanatory power for parsimony, demanding *a priori* structured and static definitions of social behaviors and interactions that give preference to existing power structures and the maintenance of existing social status relationships between hegemonic elites and subaltern actors. I assert that quality research in the social sciences is dependent on structurally sound research methodologies that can account for both symmetrical and asymmetrical power relations, and answerable research questions that are relevant and applicable within, tangential to, and external to the field of inquiry. I contend that reductive methodologies lead scientists to arrive at not only poor conclusions, but
conclusions that are dubious at best.

Chapter 1 continues with a discussion on the theoretical underpinnings of law. Informal social controls are juxtaposed against the formal rational social control apparatus of the State, and it is argued that social conditions, both political and the division of labor, account for the methods of social control employed by a given society. A discussion of power relations follows this discussion of law. A number of theories of power are discussed, as is how power contributes to inequality.

I ultimately make the assertion that the formal rational law is a reification of power asymmetries and instrumental social inequalities, and that the creation of juridical structures and the application of universal jurisdiction to maritime piracy off the coast of Somalia lacking any and all nexuses is empirical evidence of that reification.

In Chapter 2, maritime depredation as part of a moral economy is appraised. A background of the development of the concept of the moral economy is presented, as are a number of definitions. Further, examples of maritime depredation are placed within the theoretical framework of the moral economy. Finally, constructions of piracy and privateering are examined and the question is asked: If, in practice, piracy and privateering involve essentially the same functional acts—the expropriation of goods and commodities using, or under the threat of, violence—is it merely the denunciation of the act by a legitimate authority, thereby ascribing to the former a label of deviant and imposing a sanction, or the approbation of the act by the same legitimate authority, thereby conferring on the latter legitimacy and praise, that which differentiates the two?

In the following chapter, a historical analysis of Somalia and Somali relations is
presented. It is my hope that presenting Somalia’s unique social history and social structure, along with its post-colonial socio-political structure, will assist in interpreting not only why piracy can be construed as a normative outcome of circumstance, but also how powerful actors within the international community have justified the expenditure of enormous resources and the mobilization of significant numbers of personnel in the waters off the Somali coast, along with the creation of third-party jurisdictional piracy courts to address specifically Somali piracy, and only Somali piracy.

This section of the chapter is followed by an analysis of the relationship of the aforementioned Somali exceptionalism to the characterization of maritime piracy off the coast of Somalia as a global social problem that was itself a consequence of the twenty-five year-long socio-political quagmire resulting from the clash of the effects of colonization and clan-structures versus an aggrandized moral panic engineered by powerful States and the multinational corporations that drive foreign and defense policy within those States. Finally, the origins of Somali piracy and the unique response to it by members of the international community are discussed.

Information concerning the social costs of Somali piracy, the fungible nature of the estimates of those costs, and the placing of those costs in relation to other social costs is presented in Chapter 4. The conclusion drawn from that information is that Somali piracy is no more virulent a form of piracy than any other form of piracy, yet powerful actors have managed to construct Somali piracy as unique. This has resulted in the providing of ideological support for the *sui generis* response by the international community, as presented in a number of UNSCRs and manifest in practice as the militarization of the maritime transportation corridors surrounding the Horn of Africa
(Internationally Recommended Transit Corridor – IRTC) and the huge swaths of the Western Indian Ocean by powerful Western States and the construction by those States of third-party jurisdictional piracy courts in Kenya, Seychelles and Mauritius.

This section is followed by a primer on maritime shipping and a presentation of the military and State-sponsored organizations that have not only militarized the waters of the Western Indian Ocean, but have poured billions of USD into protection and capacity-building efforts in the area. While it appears that at least for the present the militarization efforts have yielded a significant reduction in maritime piracy off the Horn of Africa, during this time other locations that have a rich history of piratical activity have concurrently experienced increases in piracy. Given the huge expenditure of resources, it appears that Somali piracy holds a special place in the hearts of those who create and apply law and policy to the world’s oceans; but one must ask why? Sadly the capacity-building schemes for the countries of the Horn of Africa have not experienced the same positive results as the militarization schemes. While there exists a plethora of research in this area as referenced throughout this dissertation, research from a multi-disciplinary focus needs to be applied to this particular area in order to better determine relationships and ways of mitigating the negative effects that long-term socio-political, legal, social and economic structures, both indigenous and imposed, have had on the area. It appears that control of spaces is one of the most important variables. Militarization schemes costing billions of USD have yielded results because these forces have been able to exert control over vast areas of ocean, whereas capacity-building schemes, also costing billions, have not yielded positive results because control over areas has not resulted in control over populations. A review of Chapter 3 will help shed light on some of the
reasons for this failure.

Current international law, in the form of the United Nations Convention on the Law of the Sea (1982), is quite clear on the nexus requirements for applying jurisdiction extraterritorially on the oceans’ common. Article 105 states that

[O]n 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 person 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.

To clarify, Article 105 states that any State may seize a pirate ship and decide on the penalties to be imposed upon those who acted piratically. *The seizing State may decide on the penalties imposed.* This exacting language is used purposefully in the most acceded-to treaty after the United Nations Charter, the all-encompassing treaty that delineates boundaries, dictates uses, responsibilities, obligations and privileges in the maritime environments. It is a fact that certain areas within the treaty are nebulous and open to interpretation, but that is by design. Also by design are those areas punctuated by exacting legal language. In other words, where the framers of the Convention saw fit to leave room for interpretation or for changes in social and socio-political formations and relations, it used words to reflect this intent. This “fuzzy language” is absent from Article 105. So if the language of Article 105 of UNCLOS is so clear, how is it possible that third-party jurisdictional piracy courts exist? Addressing this question from a socio-historical perspective is the focus of Chapters 5 and 6.

While Chapter 5 appears to be a detour from the investigation of the relationship of maritime piracy to the law, in actuality it contains the presentation of a structural
framework that is vital to my argument. The chapter includes a discussion on conceptions of sovereignty and forms of extraterritoriality (jurisdiction) based on certain conceptions of sovereignty. I assert that constructions of the State, State power, and State relations are integral to juridical functions as exercised by the State. This is especially true in cases where the exercise of State power is external to its borders. This framework is a socio-historical project. Using this socio-historical methodology allows social commentary to build on social commentary as I construct an argument that, with regard to the construction and application of universal jurisdiction, social commentary has been reified into juridical practice.

Chapter 6 picks up the socio-historic methodological framework of Chapter 5 in examining socio-historical constructions of specifically universal jurisdiction. The analysis progresses temporally from Cicero to Bassiouni. The works of Belli, Ayala, Gentili, von Pufendorf, Bacon, Coke, Selden, Blackstone, and Vattel are discussed, yet the chapter focuses on certain important structural arguments presented by Grotius. And while due to the breadth and depth of his treaties on the law among nations, Grotius can arguably be considered the father of the law of nations, it is his writings on navigational freedoms and jurisdictional rights on the high seas that are most germane to this dissertation. The arguments he presents are discussed, rationalized, juxtaposed against other theorists, and placed within the “thesis support scaffold” that has served as a framework for the prior chapters. Ultimately, this framework is used to support the analysis and findings in the following chapter.

It is the aim of Chapters 5 and 6 to present arguments that question if the roots of universal jurisdiction are grounded in jurisprudence dating back over two-thousand years,
are a comparatively recent social construction based social relations or, like the act of piracy itself, are amorphous and temporally constructed to support existing power relations. These legal constructs are examined within the social space of the oceans’ common, and against the backdrop of piratical deviance. Additionally, the relationship of the law, the high seas, international trade, current conceptions of “the hegemony,” and piracy are addressed. These examinations punctuate a schemata that provides support for the assertion that, given the divergent paths between the rhetoric behind and the actual historical development and exercise of universal jurisdiction in cases of piracy and other forms of deviance, that nexus must be present for all applications of extraterritoriality, including modern constructions of universality.

With the methodological framework constructed over the course of the prior six chapters nearly complete, Chapter 7 first focuses the construction of the legal language and how those constructions in turn affect the construction and application of the law. Theoretical arguments are presented alongside empirical examples. It is the goal of this section of the chapter to support not only a contention that the law is both created by and creates social interactions and relations, but also that the law is an instrumental tool. And further that the instrumental nature of the law as a tool is not confined to restricting behavior, but is also one of allowing for the interpretations of behavior. As Stroup states the

[L]aw is language - not only language, but a very special kind of language, for law is an attempt to structure the realities of human behavior though the use of words. When a legislature passes a law or a court hands down a decision, it is altering the status of individuals, changing their relationship to other individuals, to possessions and objects, to the state. Legal language does not merely describe these relationships; it affects what it describes. (Stroup 1984:331-332)
In reading Stroup’s comments, it seems obvious to one not schooled in the juristic science that because the language of law serves as an instrument of law, legal language transmits meaning not only by what is stated, but also by what is not stated; not only by what is done, but also what is not done. This dichotomy of the legal language and of the interpretation of the legal language is further discussed. This analysis provides further support for my assertion that the application of universal jurisdiction to maritime piracy requires a nexus between the seizing State and the State of the adjudicating body.

This discussion of theory is followed by an examination of the use of language with regard to the nexus requirement in a number of piracy cases brought before the federal courts of the United States. Again, review of these cases provides support for my assertion that the application of universal jurisdiction to maritime piracy requires a nexus between the seizing State and the State of the adjudicating body.

The final section of this chapter and the dissertation is an analysis of each and every known case of the application of universal jurisdiction to piracy. The analysis spans the courts of all nations known to have asserted universal jurisdiction in prosecuting cases of maritime piracy: the United Kingdom, the United States, Seychelles and Kenya.\(^4\) In total, seventy cases are presented.\(^5\) The goal of this final section is to elucidate the seizing State/State of the adjudicating body nexus requirement for the application of universal jurisdiction to maritime piracy.

\(^4\) Mauritius has since been added to this list as of October 2013.

\(^5\) Including appeals, there have been seventy cases of the application of universal jurisdiction to maritime piracy. The initial prosecution of two cases, one Kenyan and one Seychellois, are not included within my analysis and therefore absent from Appendix I because information on the trials was not available. Information on the appeals is included.
Chapter 1: Methods and Theory—From the Pitfalls of Reductionism to Power, Law and the Reification of Inequalities: What Maritime Piracy Tells Us about the Law

Methodology and methodological limitations

The primary purpose of this dissertation is to address a number of important issues with regard to the juridical structures and practices surrounding maritime piracy. However, because scholarly research is theory-driven it is first necessary to make a statement concerning methodology. In contrast to the largely opinion-driven, decades-long, qualitative (historical) versus quantitative (statistical) debate within the social sciences writ large (King, Keohane and Verba 1994:4), it has been the norm that certain sub-disciplines within the social sciences cede entire swaths of research territory to other sub-disciplines based on the assumption of the possession of a particular territorial knowledge held by the latter.¹ These later “specialists” have both defined and homogenized research within these areas that is a result of, and results in, a tautology, the right to make proprietary claims because of the ability to explain the workings of the sub-discipline (knowledge) and the right to explain the workings of the sub-discipline (knowledge) because of the ability to make proprietary claims, in short “We are experts because we can explain particular phenomena, and we can explain particular phenomena because we are experts.” For example, much socio-economic work has come under the purview of economists, the vast majority of socio-legal work has been co-opted by legal scholars, criminologists have laid claim to the examination and punishment of

¹ It is also true that many of these social science sub-disciplines maintain a preference for either qualitative (e.g. anthropology) or quantitative (e.g. economics) research. I assert that while this preference for a particular research modality fosters group think and produces like-minded disciples, it is a function of the primary issue as discussed above, and not the primary issue in and of itself.
“nuts, sluts and perverts,”¹ and political scientists have claimed the territory of socio-politics as their playground. What is perhaps strangest about this co-opting/ceding of territorial knowledge is that these same scholars who tread so lightly across sub-disciplines often engage in intra-sub-discipline warfare based on research methodology, data interpretation, and the meaning of research findings (Biernacki 2012; Durkheim, Lukes and Scull 1983:76-101; Fusari 2014; Heberlein 1988; Reed and Alexander 2009; Sumner 1994.ix).² What prompts this territorial knowledge deference by the same scholars so eager to metaphorically duel with their sub-discipline brethren, and why should academics, policy wonks and lay people alike care?

I suggest that these sub-discipline claims of expertise in territorial knowledge, and the associated sub-field deference, are the result of the hundred-year march for socio-specialization: the carving out of ‘socio-niches’ by sub-field specialists who, in the circular fashion laid out above, use their ‘specialist knowledge’ to reinforce their claims of expertise.³ Further, I suggest that intra sub-discipline dueling may be the result of similar forces: the laying of claim to sub-territorial knowledge, meaning interpretation

² See Liazos (1972) for references on this colorful description of the fields of deviance and social control, or Spitzer (1975:638) for a version that includes “lames,” “crooks,” “junkies,” and “juicers.”
Parsons notes that “[I]ndeed, that there is something wrong with current social theory seems to me to be clearly indicated by the fact that there is such drastic lack of agreement and that most people who write and talk about it feel impelled to divide theorists up into “schools” which, it goes without saying, are mutually incompatible so that a person who agrees with one school in almost any respect, must by definition oppose all other schools in all respects.” (Parsons 1938:16)
⁴ I suggest that this is no different than what has transpired in a plethora of other professions. For example within medicine there has been an effort in both medical education and practice to specialize. And while as a whole there appear to be many benefits to the recipients of medical knowledge of this specialization, there are a number of negatives, namely, increased cost, a lack of understanding the human body as a holistic organism, increased inequality within the medical profession, and a movement in western medicine as a whole to treat disease and not pathology within the human condition.
and/or methodological Wiccaism. The main difference between the inter-discipline versus intra-discipline jockeying is that specialists within a field are more reluctant to cede territorial knowledge to others within the same discipline because doing so devalues an entire milieu of existing research, devalues the methodology used to conduct research, and places in question the raison d’être of the researcher as a researcher, rendering them at best “research relics.” While certain research is in fact anachronistic, and those who do not “modernize” do find themselves relegated to the waiting room of the resurgence, this is more the aberration than the norm, and researchers usually do not go down without a fight.

While the theoretical underpinnings of this socio-specialization, whether they be a consequence of what Durkheim suggested was the result of specialization due to changes in forms of solidarity, what Max Weber suggested was the result of the development of

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5 Within a broader methodological conflict I include the positivist/anti-positivist debate, its roots in the competing ideologies of Comte and Hegel, Durkheim and Weber, and Merton and Goffman. See also Burris (2007)

Placing these methodological approaches in opposition, Weber notes “[S]ociology… is a science concerning itself with the interpretive understanding of social action and thereby with a causal explanation of its course and consequences.” (Weber, Roth and Wittich 1978:4, see also Weber, Gerth and Mills 1958:55-61) For Durkheim in contrast, sociology is the study of social facts or distinct social phenomena, how those social facts constitute social relations and a collective or social conscience, and further how they mold or influence behavior, how the collective differentiates the normative from the pathological (Durkheim, Lukes and Halls 1982:59, 79, 93-94), and finally how the social can be empirically or scientifically proven. (Durkheim 1979)

6 For example: the Keynesians during the Reagan years, current day sociology’s Ethnomethodologists, and any rational penologist during the ‘prison/incarceration boom’ over the last forty years.

7 Durkheim noted that within a given society the collective conscience acts as a social control, constraining individuals from deviant action. Primitive societies are characterized by an undeveloped or nascent division of labor and exhibit mechanical solidarity. In such societies the collective conscience is strong, law (non-codified) acts though repression and deterrence, and labor units are interchangeable, although there are, of course, gender-based labor divisions. As societies develop, mechanical solidarity gives way to organic solidarity. This process of development brings more highly developed labor specialization and with it the greater potential for labor exploitation, the system of law becomes formalized, more rigid and is characterized by its restitutive nature, and the collective conscience is weakened. (Durkheim and Coser 1984:291-341)
formal rationality,\textsuperscript{7} or the product of some other theory that lays claim to the knowledge of the relationship between social order and specialization, are not the primary focus of this dissertation, it is important to note that the result leads to both a skewing and distortion of both research and finding. This is a problem of both accuracy and validity. Additionally, it leads to reductionist thinking, where, in the case of the study of piracy, the researcher leaps to discuss the relationship of the accused maritime pirate to international trade without considering existing social processes and structures that both affect, and are affected by, the accused maritime pirate and the act of piracy. In contrast, within areas where there are competing theoretical and methodological frameworks, reductionist thought gets juxtaposed against reductionist thought. Scholars with a multidisciplinary bent are then able to piece together these parsimonious correlations and explain complex social phenomenon. This is not only beneficial for the explication of the social phenomena under consideration, but also for a greater social understanding; a way

\textsuperscript{7} A Weberian typology that explicates a move to socio-specialization is that of the formal juridical apparatus. This typology rests on the axes of two ideal types: the axis of rationality/irrationality, and the axis of formalism/substantivism. Within, but not confined to the economic realm in which Weber conceived it, rationality refers to the degree of systematic arrangement of rules and the precision of calculations and logic (Weber, Gerth and Mills 1958:293, see also Sutton 2001:114-116, Treviño 1996:166-167) The formal/substantive continuum is based on the degree that the system is based on procedures (formal) or outcomes (substantive). (Weber, Gerth and Mills 1958:224; see also Sutton 2001:116-117) A system of “[J]uridical formalism [formal rational law] enables the legal system to operate like a technically rational machine. Thus it guarantees to individuals and groups within the system a relative maximum of freedom, and greatly increases for them the possibility of predicting the legal consequences of their actions.” (Weber, Roth and Wittich 1978:811) Within the formal rational system the law is autonomous, rules and procedures are formalized, inequalities are discounted in favor of truth finding (Sutton 2001:119), and a staff of trained legal professionals maintain bureaucratic control of the juristic system. (Weber, Roth and Wittich 1978:775) Compliance (resultant social control) “...is externally guaranteed by the probability that... physical or psychological coercion will be applied by a staff of people in order to bring about compliance or avenge violation.” (Weber and Rheinstein 1954:5, 20; Weber, Roth and Wittich 1978:34) The bureaucracy effectively shifts the power, which in other forms of domination (traditional or charismatic) resides with the individual, to the administrative office(s); however, the administrative office as a standalone entity is meaningless without the structure of the entire specialized bureaucratic system. Thus, ultimately power does not rest with the individual or even with the office, but with the legitimated system comprised of specialized functionaries.
to contextualize meaning within a positivist empiricism that accounts for existing social structures and processes. However, when socio-specialists retains authority to narrowly interpret and inform the media, policy makers and lay public about the history, challenges, and the present and future condition, and provide scholarly analyses of particular social phenomena within their specialty area without other balanced or skewed interpretations of the social phenomenon, causal linkages may be inferred and/or assumed where none exist, leading to erroneous claims on all points of the research spectrum.

Understood in this way, socio-specialist knowledge/power is merely a means of turf protection, a form of intellectual bullying; the social sciences as a whole benefit from a more balanced holistic phenomenological approach. While socio-specialization can manifest itself in myriad ways, from the phenomena chosen for examination to the research marked for publication, or from the corollary and causal links drawn to the experts that maintain the authority to speak about certain social situations, its consequences can range from telling or misleading to socially perilous.

Examples of this methodological parsing are numerous. Edging toward the benign end of the scale was the result of a panel lecture I attended on March 18, 2014, at the University of California, San Diego, Institute for International, Comparative and Area Studies (IICAS). The lecture concerned Russia’s motivations for invading Crimea, Ukraine’s options in the aftermath of the invasion, an analysis of the European and American responses, and some thoughts on what might have been done to effect a different course than the one instigated by Russia: invasion and annexation of the Crimea. The lecture was enlightening for two reasons, neither of which includes the commentary delivered by the panel’s four learned political scientists. The two reasons the lecture was
enlightening included both the rich description given by the lone representative of the literature department, and the fact that the most erudite study of the situation was delivered by a professor of literature, and not a professor of politics. While the political scientists regurgitated the latest line expounded by the pundits on any given cable television channel, the literature professor talked of how those who supported and those who opposed the Maidan People’s Union movement understood what precipitated the invasion. She positioned politics within the broader spectrum of social movements, and she described a broader array of motivations than merely Vladimir Putin's expansionist aims juxtaposed against the United States’, Europe's or “the West’s” policies of containment and economic starvation. She was able to illustrate how culture is integral to political motivation, and further how military intervention is not just political, it also contributes to derivation of social meaning on many levels. Yet her analysis was not merely descriptive, it was “scientific” as well. Meaning was discussed within the foundations of the scientific method.

I use this example not only because it illustrates so well that subsumed knowledge needs to be a part of a particular knowledge classification to be valuable, but also because reliance upon policy constructed in the absence of cultural or phenomenological understanding may have deleterious consequences. In this case, the literature professor had the ability to provide analysis without that which was provided by the political science professors. Yet over time, socio-specialization can result in the giving of preference to specialist interpretations with the concurrent discounting of non-expert interpretations. In fact, upon entering the lecture hall at the event referenced above, I overheard a number of attendees questioning the participation of a literature professor on
a panel of political import. Paraphrasing, one stated, “She might know books, but she
doesn’t know Putin.” Interestingly, I left the lecture thinking that she probably
understood Putin’s motivations significantly better than any of the political science
experts seated around her. It is my assumption that the group questioned the literature
professor’s participation on the panel because they questioned her credentials; in matters
of political significance, “non-experts” tend to assume that those with knowledge and
expertise are political scientists, just as with matters of the economy we turn to and trust
economists and in matters of jurisprudence we turn to and trust the interpretations of
legal scholars.

I assert that this is precisely the problem inherent in research on the structure and
the execution of the law to acts of piracy jure gentium; the law is constructed by those
within the juridical apparatus, enforced by those within the juridical apparatus, and
adjudicated by those within the juridical apparatus. The greater social implications of
much well-intentioned work are often lost in the mono-focal juridical thought processes
confined in the “iron prison” of existing juridical structures.

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9 This assumption that economists truly understand the workings of not only a particular economy, but the
relationships of economies and their economic and social consequences as well, is a subject worthy of
study in and of itself by social scientists other than economists. In working paper 1107 OECD Forecasts
During and After the Financial Crisis: A Post Mortem, Nigel Pain, et al state that during the most recent
world-wide financial crisis, 2007 - 2012, OECD (34 Organization for Economic Co-operation and
Development member countries—mostly developed or highly developing countries) and BRIIC (Brazil,
Russia, India, Indonesia and China) GDP growth was overestimated by a variety of NGO, government,
and consensus forecasters, with the most egregious overestimations consisting of those countries affected
greatest by the recession. While these challenges in predicting economic growth were more significant
during periods of turmoil, predicting in general is hampered by the interrelationship of comparatively
open economies with those that are more highly regulated and controlled. The paper also notes that there
are a variety of other externalities that hamper economic predictions including: degree of government
regulation of trade, banking and labor markets. It is also important to note the focus on economic inputs
at the expense of other salient social variables.
This assumption that certain sub-discipline experts possess the knowledge, power and authority to comment on a particular territory, combined with a deference and ceding of territory by scholars in related social science fields, can lead to at least two problems that are of significance to my research, both of which are present in the relationship of the law to maritime piracy, and the relationship of piracy to the law. These problems are reductionism and the acceptance of social inequality as not only the status quo, but the deserved, appropriate and preferred means of social relations.

The first challenge, as discussed above, is an issue that plagues much research in the social sciences: the application of reductive methodologies and frameworks to complex social phenomena. This is chiefly because reductionist frameworks trade explanatory power for parsimony, demanding *a priori* structured and static definitions of social behaviors and interactions that preference existing power structures and relations and the maintenance of the existing social status relationships between hegemonic elites and subaltern actors. Quality research in the social sciences, quality research in science, and quality research in general is dependent on two inputs that all too often are overshadowed by the data: structurally sound research methodologies that can account for both symmetrical and asymmetrical power relations and answerable research questions that are relevant and applicable within, tangential to, and external to the field of inquiry. I contend that reductive methodologies (being the poster child for poor science) lead scientists to arrive at not only poor conclusions, but conclusions that are plainly implausible. For example, in his 2010 article *Rationality Pirates, and The Law: A Retrospective*, Peter Leeson states that
Pirates have always been rational actors who will do what they can to offset legal changes that threaten them… The good news about pirate rationality is that through careful rational-choice analysis, we can try to understand how pirates might adjust their behavior in response to various legal changes that influence their incentives. The bad news about pirate rationality is that we need to try to predict what pirates will do when we change the law to combat them. If pirates were like bumps on a log, legal systems could handle them much more easily. But pirates are clever people who are determined to circumvent the legal reforms that seek to stop them. Using the law to address piracy therefore requires strategic, game-theoretic thinking. Because pirates are as interested in confounding legal changes designed to prevent and punish them as the persons making legal changes are interested in confounding pirates, thinking about how to use the law to address piracy is more like playing chess with a skilled opponent than playing “guess which hand” with a toddler (Leeson 2010:1220). Pirates will manipulate the law as the law manipulates them (Leeson 2010:1230).

There are a number of challenges inherent within Leeson’s argument and methods in addition to reductionism, namely the degree of agency and subsumed knowledge held by certain subaltern actors, the assumption that particular subaltern actors are able to affect outcomes within existing structures or processes, and the giving preference to economic outcomes over other social, political, cultural, or life-choice outcomes. Yet, in addressing the problem presented by Leeson’s reductionist methods and conclusions, the myriad erroneous assumptions required to arrive at reductionist conclusions become apparent.

The first challenge within Leeson’s argument is that reductionist methodologies, in this case, rational choice, reduce a matrix of complex social interactions and structures into a simple single-issue risk/reward continuum. Leeson would have his readers accept that maritime pirates are homogenous and interchangeable, have similar motivations for engaging in piracy, and have had similar social and life histories. He also suggests that temporality, location, and situation are not relevant variables to consider when examining
the relationship of the law to piracy. While rational actors may adjust certain behaviors to achieve a particular outcome, they must first understand the variables involved. Ethnographic research conducted by the author of this dissertation shows that those engaged in piracy have little understanding regarding questions of legal jurisdiction,\textsuperscript{9} the application of law or the sanctions they may face. To complicate matters, many of those who enforce, adjudicate and sanction those suspected and/or convicted of piracy are just as confused with regard to the same legal issues.\textsuperscript{10}

In addition to Leeson’s penchant for reducing complex social interactions to a single variable continuum, is his assumption that those Somalis who engage in piracy are merely \textit{homo economicus}. Not only do these individuals understand “the law” (presumably international, and a varied number of municipal legal codes; because municipal laws defining and sanctioning maritime piracy are not only numerous, they are quite disparate) and its myriad definitions, applications and jurisdictional ambiguities, they use this information in determining rational choice economic profit maximization or “...game-theoretic thinking” schemes. (Leeson 2010:1220) I suggest that while these

\textsuperscript{9} Aside from the fact that incarceration in a Northern European country is in many cases preferable to life as an unskilled, unemployed young male in Somalia. See footnote below.

\textsuperscript{10} In questioning a Somali informant who had worked as an interpreter during a number of piracy trials in Mombasa, Kenya, and who had more than a degree of familiarity with some of those who engaged in piracy and more than a passing knowledge of Somali piracy, I was informed that there is a wide spectrum of motivations for Somalis to engage in piracy. He pointed out the obvious, money (both for food stuffs and shelter, and big ticket discretionary items) and social prestige, but also noted that absent a successful attack and a negotiated ransom was the hope to be detained by a European warship, tried in a European court, incarcerated in a European jail and to seek asylum in a European country. Addressing Leeson’s assumption of “legal knowledge,” I asked my informant in which countries in Europe do these men hope to be tried and sanctioned. He first told me that “anything was better than Somalia,” although he did later add that they did hope to be tried in the courts of Northern European nations because they believed that there was the potential for asylum based on human-rights violations or the political situation in Somalia. Additionally, he had no knowledge of what normative sanctions were for piracy in Kenya or in any country in Europe. Follow-up conversations with those involved in defending accused pirates in both Mombasa, Kenya and Mahé, Seychelles, confirmed this finding that pirates do not seek, as Leeson suggests, to “offset legal changes that threaten them.” (Ethnographic fieldwork, July 2013)
subaltern actors are social agents, in the context of piratical law they are merely the object of juridical frameworks structured by bureaucrats within bureaucratic institutions that ultimately serve the interests of hegemonic elites.\footnote{This statement should in no way be construed to imply that those who engage in piracy lack agency, are not able to choose from a variety of social actions in addition to piracy, or because of their social situation are not culpable for particular acts of criminality. I am merely suggesting that those who engage in piracy are not able to structurally or procedurally “manipulate the law.”} Further, the hegemonic elites to whom I refer are also not merely \textit{homo economici}, they are social actors who engage with other social actors, and with a variety of social processes, structures and institutions in efforts that are not singularly driven by economic motivations. These assertions are supported by the historical analyses of sovereignty and jurisdiction in Chapters 5 and 6, and empirical research on the relationship of nexus to the application of universal jurisdiction in Chapter 7.

Unfortunately, this challenge of subsuming social knowledge as a by-product of economic knowledge is not new. In fact E.P. Thompson writes that “[F]or decades systematic social history has lagged in the rear of economic history, until the present day, when a qualification in the second discipline is assumed to confer, automatically, proficiency in the first.”\footnote{Thompson\textquotesingle s notes that reductionist models are not able to elucidate complex social phenomenon. He states that “[A]ccording to Rostrow we need only bring together an index of unemployment and one of high food prices to be able to chart the course of social disturbance. This contains a self-evident truth (people protest when they are hungry); and in much the same way a “sexual tension chart” would show that the onset of sexual maturity can be correlated with a greater frequency of sexual activity. The objection is that such a chart, if used unwisely, may conclude investigations at the exact point at which it becomes of serious sociological or cultural interest: being hungry (or being sexy), what do people do?” (Thompson 1971:77)} (Thompson 1971)

Similarly, while in this case I direct my arrow at economic rational choice and game theoretic analyses, the same case can be made against the reductionist argument that piracy can be explained via a political analysis of failed States (Menkhaus 2009;
Murphy 2009; Samatar, Lindberg and Mahayni 2010; Sorenson 2008), that piracy is the normalized deviant outcome of a failure to meet certain basic needs as described by Maslow (Bennici 2011), or that piracy can only be satisfactorily addressed by a rebuilding of government structures. (Kraska 2010; Kraska and Wilson 2008; Menkhaus 2007) In short, complex social phenomena, of which piracy is an excellent example, can rarely be explained or understood within a reductionist framework. And while many scholars within the academy, as well as political leaders and media pundits, suggest that pirates rationally weigh competing juridical frameworks in deciding whether or where to engage in piracy; I posit that reductionist frameworks preference reductionist conclusions; whereas multi-dimensional sociological frameworks can account for the interaction of social variables and complex interactions.

What can maritime piracy tell us about the law? Power, law and the reification of inequalities: a three part methodological framework

I embark on a discussion of the relationship of the law to maritime piracy, and on the relationship of nexus to universal jurisdiction with regard to what “international law knows [as the] only…true case of universal jurisdiction: piracy” (Guillaume 2002:42), by first rooting empirical study within analytic theory. Theory provides a structural foundation for empiricism, as empiricism either strengthens theory or causes theoretical innovation. And while I assert that the facts provided in Chapter 7 lend clear support to my assertion that appreciable power asymmetries lead to a construction of repressive law that is a reification of social inequality, I take note of Parsons’ quoting of economist Alfred Marshall who stated “[T]he most reckless and treacherous of all theorists is he
who professes to let facts and figures speak for themselves.” ([Pigou 1925:108 in] Parsons 1938:15)

In his 1937 address to the Institute of the Society for Social Research theoretician Talcott Parsons noted that empirical science cannot “be developed to a high point without reference to generalized conceptual schemes, to theory. The process of the growth of scientific knowledge is not a process of accumulation of discrete discoveries of “fact.” In the first place our study of fact, however little we may be aware of it, is always guided by the logical structure of a theoretical scheme, even if it is entirely implicit.” (Parsons 1938:14) This logical structure is based on the interconnectivity of social facts, of the relationships between and among social facts. It is these relationships that dictate what can occur given the structures available. In this way, theory limits outcomes, yet the outcomes available have social meaning. For example, without a theory of the social contract, as first conceptualized by Grotius and Hobbes and later reframed by Locke and Rousseau, could Jefferson have conceived of such a statement as “[W]e the People”, or Lafayette that “[M]en are born and remain free and equal in rights”? In this case, theory provided the ideals of freedom, rights, and government by the masses, ideals that did not conceptually exist more than one hundred years before they became part of the foundational documents of political democracies.

In wedding theory to empiricism, it is important to point out the obvious, that empirical work does not develop absent a foundation and an impetus. For example, “immaculate conception” appears to be sui generis, as it concerns the creation of life without original sin. Yet, from a theoretical standpoint “immaculate” may merely be descriptive of the foundational soul transmission at the time of “conception.” With this
foundation, and the given empiricist's scientific proclivity, empirical work can proceed to support, debunk and/or buttress particular theories of soul transmission. In this respect, theory is not only foundational, it is functional to empirical work, assuming one considers the transmission of the soul given to empirical study.

In total, Parsons states that theory is functional for those who engage in empirical research in four main respects: 1. It “provides selective criteria” for the discrimination of social facts, allowing the empiricist to decide between what is of consequence and what is superfluous; 2. It allows for “coherent organization of factual material” or schemes of categorization and coding; 3. It fosters methods of organization, and sheds light on “knowledge gaps” that exist within, or are tangential to, the areas of research; and 4. As suggested earlier in the discussion on the pitfalls of reductionism, “different analytical systems… provide a source of cross fertilization of related fields of the utmost importance.” (Parsons 1938:20)

The analytical framework I employ in examining the relationship of the law to maritime piracy is one of narrowing theoretical fields: First, I engage the discourse of socio-legal theory to better explicate the structure and function of a modern western conception of “the law;” second, I examine power as a social relation and its relevance to constructions of law; and, finally, I investigate the law as a reification of social inequalities, and a structural or instrumental tool manipulated by hegemonic elites in their engagement with subaltern actors. In the following chapter, this theoretical framework is used as foundation to engage in a discussion on maritime piracy as an example of a moral economy, and the law as a response to, and counterintuitive to, normative social thought as a driver of maritime piracy.
Law

As stated above, President Guillaume of the International Court of Justice in his separate opinion on the Application Instituting Proceedings on the Arrest Warrant of 11 April 2000 by Belgian investigating judge Damien Vandermeersch against the Minister of Foreign Affairs of the Democratic Republic of the Congo, Abdulaye Yerodia Ndombasi, notes that “[T]raditionally, customary international law… recognize[s] one case of universal jurisdiction, that of piracy.” He further cites Article 105 of the Geneva Convention on the High Seas (1958) noting that:

[O]n the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft… and arrest the person and seize the property on board, The courts of the State which carried out the seizure may decide upon the penalties to be imposed.”

“Thus, under these conventions, universal jurisdiction is accepted in cases of piracy because piracy is carried out on the high sea, outside all State territory. However, even on the high seas, classic international law is highly restrictive, for it recognizes universal jurisdiction only in cases of piracy and not other comparable crimes which might also be committed outside the jurisdiction of coastal States[.]. (Guillaume 2002:38-39)

From a sociological standpoint, there are two significant issues with Judge Guillaume’s conclusion that do not appear to be legal issues. The first issue is merely a reckoning that legal theory and legal practice can be based on social commentary and social discourse. Perhaps this should be termed a socio-legal fiction. As I argue in Chapters 5 through 7, the totality of the legal claim for the application of universal jurisdiction is based on social discourse and not a juridical history of its application or the historical creation of legal structures sanctioning the act. This, in and of itself, is not problematic to those that apply or interpret the law from within juridical apparatuses or to those that theorize the law from within institutions of higher learning, as it is normative
for “lawyers” to conceive of the law as much more than just merely a social construction. In fact, I contend that it is normative for those within juridical apparatuses to understand the law as a self-referential and auto-reproductive system; what Niklas Luhmann would refer to as an autopoietic system. (Luhmann 2004; Tomlins 2007; Zumbansen 2009)

Where this does become problematic is the point at which other social systems question the application of certain of these social legal fictions. This is the second issue, and it is of significantly greater consequence than the first.

Both Article 19 of the Geneva Convention on the High Seas (1958) and Article 105 of the United Nations Convention on the Law of the Sea (1982) make clear how, until recently, social and legal theory, and legal practice were in a state of balance. They clearly note who is charged with the authority to prosecute and sanction those seized and accused of maritime piracy: “The courts of the State which carried out the seizure may decide upon the penalties to be imposed.” Strangely, in a field fraught with verbal ambiguity, the message here is decidedly unambiguous. A nexus must exist between the seizing State and the State of adjudication. However, in 2008, an imbalance was engineered by certain powerful States in the form of third-party jurisdictional piracy courts; this is a manifestation of the second issue.

Of additional interest to social theorists is the fact that legal practice changed well before legal theory. In fact, to my knowledge (and in opposition to Parsons’ thoughts above), there exists no legal theory supporting the application of universal jurisdiction
without a nexus between the seizing State and the State of adjudication.\textsuperscript{13} This is a problem not only from the standpoint of the application of a rule of law, but also one of social equity, a topic I will discuss again later in this chapter.

In discussing the law, as with any social structure or process, it is important to note that its historical development and application portends its more immediate structure and application. As with most social phenomena this is not a rule. Sometimes laws are organic, but laws usually develop out of and/or contribute to the creation, perpetuation or change in social situations. Yet, laws as we understand them are product of Enlightenment thought. As States coalesced, peoples’ actions, behaviors and interactions came more under the structure of law and less under the control of informal structures.

In his magnum opus, \textit{The Civilizing Process}, Norbert Elias suggested that the process of civilizing required rules, manners and codes of social conduct. He noted that rules were not static but were constantly evolving during the process (again continual) of civilizing. Elias writes, “[I]n reality, our terms “civilized” and “uncivilized” do not constitute an antithesis of the kind that exist between “good’ and “bad”, but represent stages in a development which, is still continuing.” (Elias 1978:59) It is the process of changes in rules and/or codes that facilitates and is facilitated by changes in social situations, interactions and structures; and which has the consequence of the adoption of informal, formal, or juridical social controls. These social controls may be as elementary as regulating the time, place and manner of expelling mucus from one’s otolaryngological system (Elias 1978:148) or as complicated as the systemization of

\textsuperscript{14} See Kontorovich and Art (2009) for a discussion on the application of universal jurisdiction and an accompanying discussion on nexus; however, there is no discussion on how juridical practice is incompatible with legal theory.
procedures governing total institutions. (Treviño 2003:21-22) Elias noted a corresponding change between political institutions and social relations, as political control centralized forms of social control moved along a continuum from informal mores, moral and values to codified law. And while in one sense codified law is both more obvious or more visible, in another sense, when one considers the manner in which hegemonic ideology is reflected in rules and laws, it serves as the center of a system of social control that is so ingrained in normative culture that it passes unchallenged into the milieu of conventionally accepted social behaviors. In practice, the law exists in the form of statutes, precedents, administrative regulations, treaties, and bilateral agreements along with the apparatuses that are responsible for their prescription, enforcement and adjudication. Yet as noted above, there is a conceptual divide between a juristic law and a sociological law.

Consistent with Elias’ conception of the law as a natural evolution of informal social controls, Brian Tamanaha suggests that law can be understood as emanating from “Patterns of Behavior”, yet he also points out that there is a committing foundational system, that of a “State Law Model of Rules and Institutions.” (Tamanaha 1997:93, 97)

The first system suggests that the law is a reflection of “…regularized conduct or actual

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15 Douglas Litowitz notes that for Gramsci the law represents hegemonic power via the juridical apparatus. While its outward manifestations, the police, prisons, courts, etc, symbolize the power of hegemonic actors to exert their will, it is the legal apparatus in the form of organizational structures, contracts, license requirements, rules, statutes, etc. where hegemonic power is most clearly evidenced. (Litowitz 2000:530)

16 Leopold Pospisil notes that there is “…universal agreement on the point that law is the primary mechanism of social control which preserves the normative order of society.” (Pospisil 1971:24)

17 Eugen Ehrlich makes an important distinction with regard to the “…law that [which] lives and is operative in human society…” and law as the “…judicial administration of justice.” A scientific (positivistic) sociology of law not only informs the praxis of law, it is necessary to the functioning of judicial administration; adding meaning to practice. (Ehrlich 1962:10) See also Hunt 1978, 1993:302-303.
patterns of behavior in a community, association or society.” (Tamanaha 1997:93) This view of law can be exemplified in the works of Bronislaw Malinowski and Max Gluckman. In *Crime and Custom in Savage Society*, Malinowski elucidates a concept of tribal rights as a form of social law. For example, in a dispute between cousins within a matrilineal/patrilocal “primitive” society, the tribal chief, following tribal custom, does not intervene on behalf of his son (one of the cousins). The result is the banishment of the chief’s favorite son to the son’s mother’s village. (Malinowski 1989:100-105) Malinowski notes, “…the law and legal phenomena… do not consist in any independent institutions they exist as a form of social relations. Law represents rather an aspect of their tribal life…” (Malinowski 1989:59) In this case the law is a manifestation of the workings of both intra-familial social relations and social relations conducted in between societies (villages). The function of the law is to balance social relations for the overall benefit of the community.

Gluckman’s work supports this evolutionary conception of the law. In *Custom and Conflict in Africa*, Gluckman makes the case for tribal belief systems as a “primitive” system of law. For example, the Azande of North Central Africa believe that a witch lies dormant within the stomach of all individuals, yet when the individual affronts the collective conscience of society, the witch ‘activates’ the spirit within and *causes* an illness of the body of one who may have transgressed against the individual who holds the witch’s spirit.

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17 In this society children reside with the mother, who lives with the children’s father in the father’s village. However, this society recognizes matrilineal inheritance, where the uncle (who resides in the birth village of the mother) passes on his “wealth” to the nephew, who will join his village after the age of majority. The father merely has a caretaking role of his wife’s children. Yet, Malinowski notes that inheritance relations may come into conflict with father-son filial-love relations. (Malinowski 1989)
Other tribes have noted that witches operate via different means to affect the health or life chances of individuals. In another example, Gluckman notes the case where a certain individual of the Zulu tribe had taken ill. The diagnosis by a tribal doctor was that a witch caused the illness and if he (the tribal doctor) was compensated with a cow, he would reveal the name of the witch who caused the individual ill-health. A westerner living among the Zulu contested that the cause of the illness was not a witch but that the individual had eaten green corn. This fact the tribal members did not dispute, but they added that others had also eaten the green corn, yet they did not become ill; thus the witch caused the illness. “Witchcraft as a theory of causation is concerned with the singularity of misfortune,” and is an attempt to direct inquiries regarding illness to social conflict. (Gluckman 1959:84) The power of witchcraft as a legal structure is not based on its ability to address the question “how?,” which in this case is obvious, but its ability to address “why?,” specifically, why a particular individual and not another was afflicted with illness.

As noted in the case prior, the Azande believe that the witch lies dormant in the stomach of the individual. The witch remains dormant as long as the individual is reasonable, amiable, charitable and a man of good character. Yet, if the individual becomes quarrelsome, anti-social, or selfish, the witch within is activated and seeks vengeance on those with whom the individual has grievances. It is not the individual who causes illness or misfortune, but the witch, yet the individual can control the ability of the witch to wreak havoc via socially accepted behaviors. In this manner, witchcraft acts as a social control. But the effect of witchcraft on tribal life is greater than harmonious relations ex ante. Because the person afflicted with illness or misfortune must name those
with whom he has (or has had) poor relations in order for the tribal doctor to ascertain the origin of the witch, there is an investigatory police function integral to the process, thus an *ex post facto* function. Thus, in these two respects, tribal custom functions in a similar fashion to modern juridical apparatuses.

Both Malinowski and Gluckman recognize law as a social control that affects and regulates patterns of collective behavior. This conception of behavior patterns as being not only representative of law but being “the law” is in opposition to a concept of law as an expression of State social control.\(^\text{18}\)

In *Economy and Society*, Weber notes that this anthropological conception of law as derived from behavioral patterns, as advanced by Malinowski, Gluckman and others, is in fact not law but convention, “…so far as its validity is externally guaranteed by the probability that deviation from it within a given social group will result in a relatively general and practically significant reaction of disapproval.” Weber contrasts “convention” with “law,” in noting that law “…is externally guaranteed by the probability that the physical or psychological coercion will be applied by a *staff* of people in order to bring about compliance or avenge violation.” By “staff,” Weber is referring to a group charged with the maintenance of order, including: “…judges, prosecuting attorneys administrative officials, or sheriffs” (Weber and Rheinstein 1954:5, 20; Weber, Roth and Wittich 1978:34)

Weber further defines the law as the product of an entity (the State) that “…possesses an administrative and legal order subject to change by legislation, to which

\(^{19}\) See also Ehrlich 1962:12-25 and Pospisil 1971:24.
the organized activities of the administrative staff, which are also controlled by regulations, are oriented. The State claims binding authority not only over the members of the state, its citizens…but also to a very large extent, over all actions taking place in the area of its jurisdiction.” Finally, important for the construction of law as “the” system of State social control and for definitions of the State as “the’ entity maintaining sole legitimate authority within a jurisdiction to exert social control, the State claims the monopoly power of the use of force within its jurisdiction and as required for its continued existence. (Weber, Roth and Wittich 1978:56) For Weber, social control is not “the law” without the backing of the State apparatus.

A Weberian conception of law precludes considering pre-modern or informal social controls as law. This is unproblematic if one merely accepts that customs, mores, and folkways, while not laws, are also effective and distinct forms of social control. This is especially true in societies where the division of labor is pre-industrial or, in the case of more modern States, where the State is unable to effectively exert its centralized social control apparatuses without the assistance of informal social controls (Durkheim and Coser 1984; Sumner and Sagarin 1979). While this examination of the relationship of the law to maritime piracy is socio-historical in nature, because the empirical object is based on an a priori relationship of the State to the structure and practice of the law, this paper treats the law as a Weberian construct. As stated above, this treatment of law so defined is unproblematic when the examination of the law is based on a modern western socio-political construct. Yet it is important to recall that while post-industrial economies and international organizations interact with Somalia, and Somalis within Somalia, under a Weberian conception of law, intra-Somali relations are not only informed by customary
law (Xeer or Heer), customary law is “the law.” As I discuss more completely in Chapter 3, within Somalia today, relations based on clan lineage govern social interactions. Not unlike the conclusions derived by Malinowski and Gluckman in their discussion of “primitive society,” social harmony between Somalis and a variety of disparate Somali kinship groups is prized over adherence to codified legal constructs. This is a significant source of conflict in addressing not only Somali piracy, but also in the construction of juridical regimes to address Somali piracy, and how those regimes interact with Somalis who are accused of and/or convicted of maritime piracy within the jurisdiction of those regimes, whether or not the act of piracy occurred within the jurisdiction of those regimes or if there was a nexus between the seizing State and the State of adjudication.

From a standpoint of a juristic science, the function of the law is both straightforward and well-summarized in its definition. Black’s Law dictionary defines law as:

1. The regime that orders human activities and relations through systematic application of the force of politically organized society, or through social pressure, backed by force, in such a society; the respect for the law <respect and obey the law>. 2. The aggregation of legislations, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative actions; esp., the bond of rules, standards, and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them <the law of the land>. (Garner and Black 2004:900)

And while I have mentioned that on many an occasion there has been a gap between legal understanding and greater social understanding, in the case of a definition of the law, the

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20 I am not suggesting that the stated legal function is the true function of the law. In fact, as noted below, I contend that the stated function of law, to engender “social organization” and “institutional respect,” serves to engender its true function of hegemonic stasis and reproduction, and social pacification and division.
legal definition is in fact consistent with the sociological definition advanced by Weber. While for Weber the law exists in a variety of manifestations, the highest form of legal reality is the formal rational legal system. This system can be defined as: one where rules and procedures are formalized, where inequalities are discounted in favor of truth finding, and a staff of trained legal professionals maintain bureaucratic control of the juristic system (Weber, Roth and Wittich 1978:212) This formal rational system of law, based on the Roman law, is the form of jurisprudence found on the continent of Europe, whereas the substantive rational legal system can be found in the United Kingdom and a number of its former colonies, including the United States. Weber states that whereas outcomes within the ‘formal’ civil law are based on legal codes of equity and fairness, outcomes within the ‘substantive’ common law are based on precedent and the perpetuation of dogma and group solidarity. Under the substantive system, equity becomes relative,

21 As mentioned in Chapter 1, fn 8, Weber’s typology of law can be understood as resting on the axes of two ideal types: the axis of rationality/irrationality, and the axis of formalism/substantivism. Within, but not confined to the economic realm in which Weber conceived it, rationality refers to the degree of systematic arrangement of rules and the precision of calculations and logic. (Weber, Gerth and Mills 1958:293) The formal/substantive continuum is based on the degree that the system is based on procedures (formal) or outcomes (substantive). (Weber and Rheinstein 1954:224) A formal irrational legal system or ‘primitive law’ is one where the legal process is separated from everyday life. It follows defined procedures (for example, the tossing from a container a set of small bones to settle disputes) and outcomes or decisions are mystically or magically derived (the reading of the orientation and placement of the bones by one who has mystical powers of interpretation). In a substantive irrational system, law is a part of everyday life, and custom is used to settle disputes. The objective is collective cohesion. Weber refers to this as “Khadi justice,” which Hunt defines as “any system in which individuals submit to the authority of an official who is free to find the law not being bound by any extensive framework of general ethical principles.” (Hunt 1978:108) A substantive rational legal system is one where there is a high degree of order and rules, and the outcomes of decisions are based upon the perpetuation of dogma and group solidarity, not on codes of equity and/or fairness. Weber notes that it is not the aim of “...ecclesiastical hierarchies as well as patrimonial sovereigns...” to achieve[ing] the highest degree of juridical precision...,” but “...rather to find a type of law which is most appropriate to the expediential and ethical goals of the authorities in question.” (Weber and Rheinstein 1954:225) In contrast, a system of “[J]uridical formalism [formal rational law] enables the legal system to operate like a technically rational machine. Thus it guarantees to individuals and groups within the system a relative maximum of freedom, and greatly increases for them the possibility of predicting the legal consequences of their actions.” (Weber, Roth and Wittich 1978:811)
fungible. Yet as we will see within international law as codified though treaty, formal rational systems also have considerable interpretive and outcome flexibility.

While a typology of legal structures is helpful in understanding the theoretical workings of juridical systems (see Chapter 1, fn 21), only through a discussion of power relations can an understanding of the construction and exercise of law be explicated. In this area too, Weber provides some insight.

Weber defines herrschaft (domination) as “...the probability that certain specific commands (or all commands) will be obeyed by a given group or persons.”21 (Weber, Roth and Wittich 1978:946) This definition, however, is lacking in clarity. Two additional elements are necessary to gain a full understanding of Weber’s use of the term: power and authority. Weber’s vision of power is the ability to assert one’s will against the will of others. In non-status based relationships, power is situationally relational. Authority is the degree to which demands are followed for their own sake. Authority can also be understood as the degree of obedience of the follower. (Weber, Roth and Wittich 1978:946 [see also Sutton 2001:103])

Weber writes of three forms of herrschaft: traditional, charismatic, and rational legal. These can be explicated with regard to not only their form of legitimation, but also, their type of administration, type of obedience paid by the subject, form of judicial process, form of justice, and type of legal thought (Hunt 1978:119). The traditional form is based in the personal authority of a ruler (e.g. a king or prince) and a belief in the sanctity of long-standing tradition. Administration is patrimonial, with the structure and

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22 Hunt notes that herrschaft as been translated as domination, imperative control and authority. (1978:103) All are useful in understanding its meaning in context.
scope of the position and its authority based on heredity, relationships to other accepted forms of authority, and nepotism. The basis of obedience rests with the holder of the traditional office, the duty one owes to the ruler. In contrast, charisma is characterized by a “cult of personality” surrounding a particular person. As such, judicial administration lacks structure and definition. Due to this lack of structure, the judicial process may be based on the intuitive authority of the leader or his selected representatives in association with procedural formalism. This nepotism reinforces status relationships.

Finally, rationalism is characterized by a codified system of law that has been reified. As such it is formal, rational, and in its highest form, decidedly logical. While this system is unique in the respect that it is characterized by rationality, it is also unique in that it is based on bureaucratic administration, staffed by professional administrators who occupy a hierarchical position. The bureaucracy effectively shifts the power, which in other forms of *herrschaft* resides with the individual, to the administrative office; however, the administrative office as a standalone entity is meaningless without the structure of the entire bureaucratic system. Thus, ultimately, obedience does not rest with the individual or even with the office but with the legitimated system.

Thus, for Weber, the formal rational system not only describes a juridical system, it is a theoretical and functional framework for the exercise of power that derives power from a tautology. In other words, the bureaucracy is the authority because that is where power lies, and because power lies with the bureaucracy, it maintains authority. Thus, whereas those within juridical apparatuses may choose to understand the law as a self-referential and auto-reproductive system, it is not the law that is such, but the
bureaucratic structure that is the juridical system that can be construed as an autopoietic system.

**Power**

Steven Lukes notes that a definition of power such as Weber’s restricts understandings of power in a number of substantive ways. He writes that first, it focuses on the exercise of power, thus lending itself to

the exercise fallacy: power is a dispositional concept, identifying an ability or capacity, which may or may not be exercised. Secondly, it focuses entirely on the exercise of ‘power over’ - the power of some A over some B and B’s condition of dependence on A. Thirdly, it equates such dependence-inducing power with domination, assuming that ‘A affects B in a manner contrary to B’s interests’… Fourthly, assuming that power… affects the interests of those subject to it adversely, it offers no more that the most perfunctory and questionable account of what such interests are and, moreover, it treats an actor’s interests as unitary, failing to consider differences, interactions and conflicts among one’s interests. And, finally, it operates (like much of the literature on power) with a reductive and simplistic picture of binary power relations, an unending array of permutating relations between A and B, as if it were obvious that Lenin was right to say that the only important question is ‘Who whom?’ Perhaps it is and he was, but we need to broaden and deepen the scope of the analysis. (Lukes 2005:109)

Lukes offers a basic framework from which to conceptualize power. He suggests as a starting point Spinoza’s differentiation between “potentia” and “potestas”. **Potentia**, he writes, “signifies the power of things in nature, including persons, ‘to exist and act’. ‘Potestas’ is used when speaking of being “in the power of another.” “The concept of asymmetric power, or power as potestas, or ‘power over’, is, therefore, a sub-concept or version of the concept of power as potentia: it is the ability to have another or other in your power, by constraining their choices, thereby securing their compliance.” (Lukes 2005:73-74)
Yet, even if we accept Spinoza’s vision, we still must confront a subset of power as domination. We may conclude that “power over” is the ability to constrain the choices of others, coerce others, and/or secure their compliance by impeding them from acting in a manner consistent with what may be their own nature, their judgment or their interest. Empirically, the international community, in the form of powerful Western nations, acting on their own, in coalitions, and through the United Nations Security Council, has asserted domination over Somalia and Somalis. Yet perhaps more significant from a precedent setting standpoint, these powers have not only constructed heretofore nonexistent juridical processes and have forced them on a group of subaltern actors as if they were normative, but have also passed them on to the remainder of the global community as again, normative. In this way, these States, coalitions and institutions, through the exercise of power (domination and authority), have usurped State sovereignty and rewritten the law of nations. Additionally, they have done so furtively, yet with the consent, or at least implied consent, of other States. However, in addition to violating normative structures and processes, these hegemonic groups have also, by not exercising power, created power asymmetries and inequalities. As discussed in Chapter 7, maritime piracy exists wherever seaborne trade exists. In recent history, it has plagued the South China Sea, the Straits of Malacca, and Western Africa, yet no other State has suffered the indignity of Somalia in respect to the international community’s response to maritime depredation, and no other people have been subject to its creative application of universal jurisdiction. Whereas imperialism and colonialism were temporal apotheoses of inequality, in an age of globalization, the law of nations and the actions of the UNSC
working on behalf of powerful States are among the new forums for the reification of inequality.

Lukes asserts that power is more than merely empirical evidence that the will of a particular individual or group has been realized in opposition to another individual or group. He suggests that pluralist views of power are limiting because they do not include certain potential issues of contention. These include, issues that fail to become empirically verifiable due asymmetrical power relations that kept them out the general public sphere. For example, the shaping of wants or the setting of the agenda. By limiting the choices over which individuals or groups can contend, the agenda-setter is exercising power. From a Weberian perspective, by its very legitimacy, the organ with authority limits options, and thus exercises power. (Lukes 2005:16, 25, 27) Thus, Lukes defines power as a “dispositional concept, comprising a conjunction of conditions or hypothetical statements specifying what would occur under a range of circumstances if and when the power is exercised. Thus power refers to an ability or capacity of an agent or agents, which they may or may not exercise.” (Lukes 2005:63)

If power is then defined by (a) actual conflict, (b) the absence of conflict through control of an agenda or agenda-like decision-making mechanism(s), or the ability to engage in or not to engage in the above, then is not the law a perfect example of the exercise of power? Laws are created by legislation, by administrative or regulatory action, through precedent, and through treaty or international agreement. By its very definition the law is created by organs with legitimate authority to do so. Those organs set agendas, establish pathological behaviors, determine sanctions and set modes of enforcement. Laws are, by Lukes’ definition, the exercise of power. This form of power
is Spinoza’s *potestas* or the most common usage of Weber’s *herrschaft* or, simply, domination.

Competing with this concept of the “law” as a vehicle of domination is one of a “rule of law.” Arendt writes that the rule of law resides with “the power of the people,” which implies a diffuse power which influences the structure of the law (Arendt 1970:40) But what is a rule of law? While in common usage it is certainly more than “[A] substantive legal principle,” does it truly mean the preeminence of regular power over arbitrary power? (Garner and Black 2004:1359) And if the answer to that question is “yes,” must we not also ask what is arbitrary, and also, somewhat recursively, what is power?

If we start with the assumption that a rule of law does in fact mean the equal application of law to all within a particular jurisdiction, then if we were to inquire if a general rule of law exists within a jurisdiction, we could examine the application of laws and quantify results. For example, one could engage in a three-part exercise of juridical application analysis. One could divide a jurisdiction by certain demographic factors and analyze the enforcement of law as applied to each demographic group, the adjudication of law as applied to each demographic group, and the sanction imposed as a result of breaking the law as applied to each offender group within that jurisdiction. If the rule of law exists the enforcement, adjudication and sanction percentages applied to each demographic group should approximate the percentage of that particular demographic group within a particular jurisdiction. This should be the expected outcome unless, of course, we believed that certain demographic groups were inherently more prone to particular forms of deviance. Further, if that were the case, would that not be an
indictment of a society based on a rule of law for marginalizing entire demographic groups? This study could be compared to societies where we believe the rule of law not to exist. We should expect statistically significant differences, unless we expect that, within societies that profess to be based on a rule of law a true rule of law does not, in fact, exist.

Using history as a guide, and through an examination of the specific creation and unequal application of law and sanction, I contend that a general rule of law does not exist. Further, I assert that the law is a structural and/or instrumentalist tool manipulated by hegemonic elites in their engagement with subaltern actors, that the law can be reasoned as a reification of power asymmetries and social inequalities, and finally, that, the greater the power asymmetries, the more repressive the structure and application of the law.

From a theoretical standpoint it must be noted that there are competing theories of power relations that do not conform to the Weberian root model, conceptions of power where power is not primarily a vehicle of some iteration of domination. However in practice, chief among these models cannot find support in empirical study. Unlike Weber, and Lukes, Michel Foucault adduced that power was not embodied within persons or institutions. Power, he suggested, was relational. Foucault explored power relations via a discourse on political and institutional change. While Foucault stated that power was not held and imposed, he did note that unique manifestations of power could be realized within certain institutional settings and, further, that changes in punishment, which ran concurrent with changes in political authority, were based on transformations in power relations. In *Discipline and Punish* Foucault details these changes from a physical
relationship between the body of the monarch and the body of the subject, to unidimensional surveillance between the institution and the body of the incarcerated, and finally to a power of redemption on the soul. While Foucault’s conception of power relations does not account for systemic inequalities, it does allow for the individualization of power via a continuum of power/knowledge. In this respect inequalities are not exerted by the elites on subaltern actors, they are embedded within social knowledge. The ultimate outcome is still inequality, but the path to inequality is more furtive and, depending on how it is conceived, more nefarious. (Foucault 1977; Hunt and Wickham 1994) Finally, it is also very difficult to empirically support.

**Inequality**

A number of scholars have presented socio-historical accounts that suggest that the law is constructed by elites to control the behavior of subaltern actors; that it is either a structural or instrumentalist tool of these elites; and that power asymmetries account for the ability of these elites to construct and apply the law. William Chambliss writes that the first vagrancy laws were passed in England in 1349. Based on a 1274 statute created to provide relief to overburdened religious houses that had traditionally provided relief to those who were in need of food or shelter, the 1349 statute made it a crime to provide alms to “any who were unemployed while being of sound mind and body.” (Chambliss 1964:68) The Black Death had arrived in England in approximately 1348. Within three years the population of England would be reduced by nearly half. The 1349 statute was promulgated to effect changes in the distribution of labor; landowners wanted to curtail the movement of *their* local labor. The statute also made it mandatory for the
unemployed to take up the service of their local lord should they be required to do so. Failure to comply was met with imprisonment. A 1351 statute prohibited the movement of labor to take up seasonal employment outside their town. The statute states that

[B]ecause great part of the people, and especially of workmen and servants, lately died in pestilence; many seeing the necessity of masters, and great scarcity of servants, will not serve without excessive wages, and some rather willing to beg in idleness than by labour to get their livings: it is ordained, that every man and woman, of what condition he be, free or bond, able in body and within the age of threescore years, not living in mechanize, (etc) be required to serve…. (Chambliss 1964:70)

There was no attempt to veil the rationale behind the statute; it was based on service owed to a superior by an inferior. Caleb Foote noted that these vagrancy statutes were an attempt to ensure landowners a supply of inexpensive labor and to tie labor to landowners; it was a substitute for serfdom. (Chambliss 1964:70) By the early 16th century, the statutes widened to include idleness and deviant occupations. Correspondingly, the punishments became more repressive, moving from whippings, to the stockades, to the pillory, to the loss of an ear. By 1571 conviction on a second offense brought the sanction of branding, a third offense death without the benefit of clergy. (Chambliss 1964:73) These changes in sanction were in effect a reification of power by elites over subalterns. As Chambliss implies, the power of the aristocracy over laborers and peasants extended far beyond the control of labor. Branding was a visible sign of the control after immediate punishment had been served. It was not only a visible manifestation of deviance, it was also a mark of being dominated. Further, while we may understand death to be the ultimate act of finality, the denial of clergy to one sentenced to die was an extension of the power from this world to the next. Not only could elites control the movements and markings of the body, they could control the soul after death.
Chambliss connected the change in penalties and the construction of the law to changes in social relations: the effects of the Black Plague, centralization of political power, and a move from an agrarian to an industrial society. By the 18th century Chambliss noted how layers of law existed to address the same problem, providing a tool chest of statutes to prosecutors and to the landed gentry. Additionally, the Black Act of 1723, which made over fifty crimes capital offenses, was introduced to address the problem of widespread poaching due to growing poverty. The purpose of the vagrancy laws, which were initially advanced to provide relief to the overburdened houses that provided relief to the masses, was changed to prevent persons of inferior rank from squandering their labor potential. This was clearly a class-based ideology grounded in conceptions of service and birth; the lower classes’ station in life required them to be in the service of their class superiors, the argument being that the poor were to be protected from their own idleness.

Chambliss was not the only scholar to note this instrumentalist use of the law by elites to control the labor and behavior of subaltern actors. E.P. Thompson, his contemporary Eric Hobsbawm, and his students including Douglas Hay, Peter Linebaugh and John Rule commented on the relationship of the law as an instrumentalist tool of social control.

“True equality before the law in a society of greatly unequal men is impossible: a truth which is kept decently buried beneath a monument of legislations, judicial ingenuity and cant. But when they wrote the laws protecting wild game, the rulers of eighteenth-century England dispensed with such hypocrisies.” (Hay et al. 1975:189) So starts Douglass Hay in his detailed account of Poaching and Games Laws on Cannock Chase.
In setting the metaphorical stage, Hay then notes the income qualification to hunt game: GBP 100 generated from a freehold estate (between five and ten times the annual income of a laborer), the penalties for keeping dogs rabbit snare or killing rabbits, GBP 5 or three months incarceration, and for killing deer, GBP 30 or a year incarceration. These restrictions and penalties coincided with other legislation aimed at securing elite privilege and criminalizing traditional small game hunting for consumption and supplementary income.

In a manner similar to which vagrancy was conflated with deviance, in the enactment of anti-poaching laws we find that poaching was conflated with other forms of deviance and criminality. Quoting Plato, Hay writes of the judge who notes the depravity of poachers: “[H]e who sleeps by day, and prows for food in the night, soon acquires the disposition of a savage or a wild beast - a disposition which must lead to robbery, and every species of nocturnal depredation.” (Hay et al. 1975:205) How could such partial views lead to even the slightest hope of impartiality? While farmers and tradesmen made up the panels of common jurors, it was noted that they had empathy for the plight of the poachers. So legislation was passed that placed adjudication of most game offenses at Quarter Sessions and assizes under the authority of justices, justices dependent on the generosity of the lords on whose land the courts convened. Juries, the cornerstone of the common law, had been replaced to guarantee substantive inequality; what had been substantive rationality was replaced by substantive irrationality.22

21 In Whigs and Hunters (1975) Thompson notes how the Black Act of 1723 was the legal conclusion to efforts by the aristocracy to impose the consequences of a property rights scheme on the pre-industrial economy of subaltern actors. It marked a significant shift in replacing informal social controls and relations with juridical forms of social controls and relations. The scheme was a benefit to elites in using
The laws did not represent the moral authority of the masses, only the moral authority of the elite. Property rights were given primacy over social relations and long-standing practices of game hunting. Class divisions were reified into law.

In a final example of socio-historical research of the construction and application of the law by elites to control the behavior of subaltern actors, I turn to none other than Karl Marx. Marx’ series of five pieces titled the Debates on the Law of Thefts of Wood was published in the Rheinische Zeitung for which he served as editor. The pieces appeared from the end of October to the beginning of November 1842. While the seemingly benign topic was the gathering of wood in the forests by peasants, Marx was severely admonished by the local political establishment for the articles. It was written “[T]he trend pursued by the Rheinische Zeitung after Marx became its editor was a source of apprehension for the Prussian authorities. Oberpräsident of the Rhine Province von Schaper wrote to Berlin stressing that the tone of the paper was “becoming more and more impudent and harsh.” (Marx and Engels 1975:746-747 fn 104) Marx penned these articles after noting the challenges of the Provincial Assembly, “namely, its confusion over freedom of the press and its unfreedom in regard to the confusion.” (Marx and Engels 1975:224) With his hot poker squarely positioned at the ruling elite, Marx noted the single most significant problem, the construction of the law. In summary, the law made the gathering or pilfering of felled wood a crime as if the gatherer had felled the tree. Further prior to enactment of the statute, the gathering of wood by peasants on the

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property to create value; in the same way it was a burden to those who relied on a pre-industrial economy, as they did not have access to assets on which to generate wealth. See also Linebaugh and Rediker 2000.

24 https://www.marxists.org/archive/marx/works/download/Marx_Rheinishe_Zeitung.pdf
land of the landed gentry had been a customary right. Marx understood this codification of law to be antithetical to customary law. He noted that by conflating the gathering of wood with the theft of wood, peasants who had been law-abiding peasants were now, with no change in behavior, criminals. (Marx and Engels 1975:226)

Marx’ claimed that the arbitrary creation of law and the refashioning of customary law by the hegemony who benefited from the change was not only unjust, but also criminal. There was little difference between the laws criminalizing vagrancy, the laws criminalizing small game hunting and the laws criminalizing the gathering of wood. Where there is equity, tradition, custom and existing statute should govern the adoption and/or the fine-tuning of the law. When law is constructed and applied to serve the interests of an elite group that benefits from the creation of the law, it is incumbent on society to question its legitimacy, to question the authority that gave it rise. The problem with this polemic is that weak actors are structurally and procedurally impotent to engender equity in, and under, the law. Additionally, hegemonic actors often construct the law behind closed doors, and apply the law furtively. Alternatively, they construct the law within an air of nationalistic fanfare in order to create a collective consciousness against a unitary enemy, or with demonizing rhetoric to create a social outcast. These were the tactics used by groups addressing maritime piracy off the coast of Somalia. While in many cases, those who constructed and applied the law had confidence in the mission and earnestly believed that the remedy was appropriate given the circumstances, the fact that those caught in its web were treated inequitably and contrary to international law is undeniable and highly problematic.
In Chapter 2, I examine maritime depredation as part of a moral economy. A background of the development of the concept of the moral economy is presented, as are a number of definitions. Further, examples of maritime depredation are placed within the theoretical framework of the moral economy. Finally, constructions of piracy and privateering are examined and the question is asked that if, in practice, piracy and privateering involve essentially the same functional acts—the expropriation of goods and commodities using, or under the threat of, violence—is it merely the denunciation of the act by a legitimate authority, thereby ascribing on the former a label of deviant and a sanction, or the approbation of the act by the same legitimate authority, thereby conferring on the later legitimacy and praise, that which differentiates the two?
Chapter 2: The Moral Economy of Maritime Depredation

The theoretical argument

This dissertation does not include information about the history of piracy other than to describe instances in which that history directly speaks to the roots of the piratical act, piratical intent and their relationship to the law. Besides the obvious, that this is in the interests of brevity, there is an additional reason. Because the purpose of this dissertation is an examination of the law as a reification of instrumental inequalities as explicated in the application of universal jurisdiction lacking all nexuses to the act of maritime piracy, any addition here to a general history of piracy beyond the discussions on piratical law and the relationship of piracy to jurisdiction in Chapters 5, 6 and 7, would, in comparison, be lacking in scope, substance and theoretical significance. For those so inclined to peruse the history of piracy, scholarly tomes focusing on periodic piracy,¹ specific pirates,² piracy as an occupation,³ piracy and gender,⁴ piracy and the law,⁵ the law and piracy,⁶ and even general histories of piracy⁷ do exist. Additionally, one can merely glance over the bibliography at the end of this dissertation to find dozens of references concerning the history of piracy from a variety of social science (including legal) perspectives.

² See Ritchie 1986
³ See Pennell (ed.) 2001
⁴ See Cordingly 2001
⁵ See Benton 2005
⁶ See Rubin 2006
⁷ See Gosse 1968
In discounting the value of a chapter devoted to a history of piracy, there is an aspect of piratical history that does merit inclusion as it directly speaks to the roots of the piratical act and to the subject of piratical intent, thus linking piracy with the application of law. Through an understanding of piratical motivations, we are able to examine the relationship of the law and social inequality through an analysis of the relationship of piracy to the law. In this case, the law can be understood, as discussed in Chapter 1, as a reification of social relations. It is precisely this subject I address below.

In Chapter 1, I presented a theoretical framework for conceptualizing the relationship of the law to maritime piracy. The first subject of theoretical significance presented was the construction of law. As Durkheim suggested “[W]e do not condemn it [certain non-normative behavior] because it is a crime, but it is a crime because we condemn it.” (Durkheim and Coser 1984:40) In this light, we do not condemn piracy because it is a crime; piracy is a crime because we condemn it. An explanation through an example may render this statement less absurd then it first appears.

As discussed in Chapter 1, the State remains the sole legitimate authority to exercise certain powers within its jurisdiction. Among those powers, as further detailed in Chapter 5, is the power to tax. Not only does the State retain sole legitimate authority to tax its own citizens, but also as mentioned in Chapter 1, the State retains sole functional authority to tax other States and their persons within its jurisdiction. For example, a maritime vessel or an aircraft that enters the jurisdiction of a State with intent to do more than pass innocently though the waters or airspace of the its territory is not only subject to its criminal law but also to its fiscal regulations. UNCLOS (1982) Article 33 (Contiguous Zone) details that in cases including “customs, fiscal, immigration or sanitary laws and
regulations within its territory or territorial sea,” this jurisdiction extends up to an additional twelve nautical miles past the edge of its twelve-nautical-mile territorial sea. In cases concerning the taxation of activities that would be taxable within the territory of the State, the State may tax vessels and persons aboard those vessels engaged in the taxable activity. Under the law of nations, the obvious requirement for this power of taxation is State authority. Yet what happens when the State authority is impotent to enforce its territorial laws? Can it delegate its powers of enforcement and collection to other entities? Further, will the international community accept such delegation of powers? These questions speak directly to the question of legitimate authority. Should an act where certain representatives of the State grant an actor(s) power to exercise certain State functions be construed as deviant or criminal because the act is deemed as such by other comparatively more powerful State actors within the international community, even though the State authority offers the actor and the act legitimacy within its jurisdiction? What about the case of a government that exercises full juridical power within a particular jurisdiction, yet lacks a functional coast guard and also lacks recognition of the greater international community? If that government delegates the enforcement powers that would normally fall under the purview of a coast guard to a militia and extends to that militia the additional power to issue and collect fishing-license fees, should the international community recognize the power vested in that militia or consider those acts a violation of international law? What about the case of the exercise of police power granted it by a legitimate authority, including those powers to confiscate property and assume ownership of that property in the name of the State? Further, if those powerful nations usurp the Sovereign powers held by the functioning, yet unrecognized by
powerful nations of the international community, State, are those States acting in violation of the law of nations? All of these questions speak to questions of legitimacy, authority and power, and all of these questions pertain to actual events that have occurred in Somalia.

In the end, perhaps it is best to add another dimension to Durkheim’s comment on the root of deviance. An act is deemed deviant not because it is a crime; it is a crime because those with the power to declare it deviant and sanctionable have done so. I hasten to add the Weberian conceptions of legitimacy and authority to this particular power because, in the case of defining deviance in the acts of piracy and the construction of juridical apparatuses surrounding those acts, while the international community might argue a formal rational international law, it appears that the application of herrschaft is both substantive and irrational.

The second subject of theoretical significance I discussed in Chapter 1 was the basis for the construction of power relations. I presented what I contend be a somewhat limited conception of power as detailed by Weber and suggested that perhaps Lukes’ expansion of a Weberian theory of power to include Spinoza’s framework should be preferred. Spinoza’s framework included a differentiation between “power of” and “power over,” potentia and potestas, and the suggestion that we incorporate into a discourse of power concepts of agenda-setting and the ability to address conflict or furtively avoid it. In this light, power is not merely observable domination but also that which is unseen, that which is not known. This expansive understanding of power is well known in the martial arts, but translates very well into other vestibules of power relations.

Go no sen (後の先) - is the exercise of power in response to power, whereas sen no sen
(先の先) is the exercise of power simultaneous to the exercise of power. The successful exercise of power vis-à-vis another using either of these power relations is dependent on one, or multiple, observable power asymmetries (speed, quickness, strength, etc.) *Sen sen no sen* (先々の先) is different; *sen sen no sen* is the furtive exercise of power. This power relation is not dependent on observable power asymmetries, but on the power to set the agenda. Perhaps the embodiment of this power relation is the imputation of illegality to acts that have previously been legal and understood within a given society as behaviorally normative. Municipal laws as mundane as anti-window tinting laws fall into this category, as does the expansion of international laws covering searches on the high seas. The United States has, by avoiding any agenda-setting, unilaterally decided that it has the right to search vessels, flagged by nations other than the United States, traveling the high seas as part of its “war on drugs.” This practice is in violation of international law as outlined under Article 110 of UNCLOS (1982).¹

Consistent with the application of power, I would add that the relative size of power asymmetries is causally related to conflict outcomes. I suggest that the larger the power asymmetry, the greater the potential for violent outcomes between hegemonic and subaltern actors, and coercive and punitive juridical measures imposed by hegemonic actors on subaltern actors. Further, while violence may be bi-directional and the juridical

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¹ UNCLOS (1982), Article 101 Right of Visits states “1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in board it unless there is reasonable ground for suspecting that: (a) the ship is engaged in piracy; (b) the ship is engaged in the slave trade; (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109; (d) the ship is without nationality; or (e) through flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.”
measures unidirectionally imposed, other societal outcomes favor hegemonic actors including expanded international trade, extension of the influence of multinational corporations, and an expansion of the influence of already powerful States and international organizations. This line of research will be explored in subsequent work by this author.

The final subject of theoretical significance addressed in Chapter 1 was the degree to which the law, construed as the quintessential social fact as it is representative of “all that is essentially social” (Hunt 1978:65), was as Marx conceived it, an instrumental tool of oppression and a reification of inequality. This line of thought is predicated on both the construction of the law and substantive outcomes of the application of the law, to wit all parties do not create the law, the law does not apply equally to all parties under the rule of law, and the law reinforces inequality through practice. In supporting this thesis, I provided a number of socio-historical examples of the creation of law by hegemonic elites to address social changes and the law’s application as a method of social control to only certain subaltern groups and not to society as a whole. In Chapters 5 through 7, this methodological framework is again employed in exploring the construction and application of the law of nations and municipal law to a specific group of subaltern actors. In those chapters I additionally explore the actions of hegemonic actors in the construction and application of the law. Yet, a complete analysis requires more than a socio-historical account of action and an assessment and interpretation of hegemonic actors and their actions. Also required is a historical account of the subaltern actors and their unique situation, the focus of Chapter 3. Yet, this accounting would also be incomplete without a theoretical framework addressing the existence of the action by the
subaltern actors that “provoked” action by the hegemonic actors. This “provocation” is the focus of the remainder of this chapter.

**Piracy as a moral enterprise**

Oceans and seas have always provided opportunities for the relatively cheap transport of products and person, and the resulting movement of vulnerable assets has attracted from the earliest times predators called pirates. These generally behaved as a species of William H. McNeill’s metaphorical macroparasites, human groups that draw sustenance from the toil and enterprise of others, offering nothing in return. The form of maritime macroparasitism termed piracy adversely affected trade and so productivity in ways not always recognized. It also had political implications when it was as expression of conflict between the practice of indigenous peoples and the economic expansion of a power from beyond the region. (Anderson 1995:175)

Justice being taken away, then, what are kingdoms but great robberies? For what are robberies themselves, but little kingdoms? The band itself is made up of men; it is ruled by the authority of a prince, it is knit together by the pact of confederacy; the booty is divided by the law agree on. If, by the admittance of abandoned men, this evil increases to such a degree that it holds places, fixes abodes, takes possession of cities, and subdues peoples, it assumes more plainly the name of a kingdom, because the reality is now manifestly conferred on it, not by the removal of covetousness, but by the addition of impunity. Indeed, that was an apt and true reply which was given to Alexander the Great by a pirate who had been seized. For when that king had asked the man what he meant by keeping hostile possession of the sea, he answered with bold pride, “What thou meanest by seizing the whole earth; but because I do it with a petty ship, I am called a robber, whilst thou who dost it with a great fleet art styled emperor. (Augustine of Hippo and Dods 1871:IV, 4)

In the first quote Anderson wrote that pirates drew “sustenance from the toil and enterprise of others, offering nothing in return.” McNeill refers to such groups as “macroparasites.” Anderson further suggests that the results of this macroparasitism were not only economic, but also that piracy had “political implications” when it was an expression of unequal power relations. Yet, it is Augustine of Hippo who elucidates the
reality of those power disparities. He begins by noting the not-so-noble origins of the State; a band of men under the authority of the prince, knit together by a confederacy based on the division of booty governed by an agreed upon law (not a codified law, but an informal law agreed upon by confederates). From these immodest beginnings and the “admittance of abandoned men,” the germ of the State grows to possess cities and “subdue[s] peoples” and thus a kingdom is created.

Augustine notes the exchange between the lowly pirate who had been seized and brought before Alexander the Great. When the Macedonian King asked the pirate “what he meant by keeping hostile possession of the sea[?],” the pirate noted that social position dictated not only the grandeur of action, but also the legal interpretation of that action. The seizing of the earth by a king is merely an expansion of the kingdom; the seizing a ship by a pirate is robbery on the seas. While both takings involve the use or the threat of use of force, one is political and the other criminal. That which is political is \textit{a priori} not criminal, that which is criminal is both \textit{a priori} not political and \textit{a posteriori} sanctionable. Legitimacy gives rise to authority,\textsuperscript{3} and authority, backed by legitimacy, possesses the right of legal construction and interpretation.

What I have stated above is not to suggest that piracy is not pathological; by definition, a non-normative action is indeed pathological. Yet, what I do suggest is that when certain subaltern groups are confronted with the very real probability of a subsistence existence for prolonged periods of time and/or a real shock to their social

\textsuperscript{9} There must exist honesty among thieves, “[F]or he who takes anything by stealth or force from a fellow-robber cannot maintain his place in a band of robbers…Indeed, it is said that even among robbers there are laws which they obey….” (Cicero and Peabody 1887:54)

\textsuperscript{10} Depending on the political system, authority may also give rise to legitimacy.
condition that may lead to, or has led to, real social and economic hardship, some have turned to deviant occupations and justified such actions as moral based upon a comparison of their condition with the condition of other actors, actors that may have contributed to their plight.4

Thompson notes that while he dates the origin of the term “moral economy” to the late 18th century, the first use he is able to cite is that by James Bronterre O’Brien in 1837. O’Brien used the concept in a polemic against political economists and their focus on the accumulation of capital and the division of labor. He noted that focusing on the political economy removes the moral economy from consideration. O’Brien stated that “[W]hen they [political economists] talk about the tendency of large masses of capital, and the division of labour, to increase production and cheapen commodities, they do not tell us of the inferior human being which a single and fixed occupation must necessarily produce.” (Thompson 1993:337) Thompson does not note that O’Brien was among a group of Chartists5 at odds with its leadership who advocated for a campaign of moral force. O’Brien’s use of “moral” appears to be grounded in the Chartists’ legitimation of a moral argument, although the Chartists would ultimately pursue a different agenda.

Thompson writes in The Moral Economy of the English Crowd in the Eighteenth Century that while “[T]he food riot in eighteenth-century England was a highly-complex

11 As with a number of social pathologies, ‘need’ is but one reason that contributes to an individual’s decision to partake in that pathology. Other reasons include ideological followings, a desire to engage in pathological behaviors for the sake of engaging in pathological behaviors, and criminality. With this understanding, the individuals to whom I am referring are those who engage in a social pathology as a matter, that they perceive to be, of survival.
12 Chartistism was a social movement established in the wake of the 1832 Reform Act (Britain), which did not extend the right to vote to the working class. The Chartists sought political reform. O’Brien was among a group at odds with a campaign established by the leadership of the Chartists. The moral force campaign was one that advocated for the dissemination of information through the written word and non-violence.
form of direct popular action, disciplined and with clear objectives,” the “grievances operated within a popular consensus as to what were legitimate and what were illegitimate practices in marketing, milling, baking, etc.” The determination of legitimacy was grounded in “a consistent traditionalist view of social norms and obligations, of the proper economic functions of several parties within the community, which taken together can be said to constitute the moral economy of the poor.” (Thompson 1971:78-79) Tilly adds to this definition of a moral economy. He states that “[T]he term ‘moral economy’ makes sense when claimants to a commodity can invoke non-monetary rights to that commodity, and their parties will act to support these claims - when, for example, community membership supersedes price as a basis of entitlement. To the extent that moral economy comes merely to mean tradition, custom, or exchange outside the established market, it loses its conceptual force.” ([Tilly quoted in] Thompson 1993:338 fn 2)

Thompson made clear that deprivation alone was not the cause of riots; many are deprived, yet not all riot. He further suggests that a necessary precondition for a riot was a belief held by those who were deprived that others had a hand in their misfortune. The causes needed to be of a social and/or political nature and not attributable to the divine. Because this moral argument was based not only on deprivation, but also on social relations that contributed to deprivation, amelioration of the condition necessitated not only corrective action (e.g. those with privilege bear the cost of expanding the supply of food to the masses), but also that there exist some equity in the remedy (e.g. the equitable distribution of food).
There is a temporal variable to this argument. I suggest that it is no accident that Thompson dates the use of the term ‘moral economy’ to the end of the 18th century. A colony had broken from Britain, a revolution brought an end, albeit in the form of a very long death, to a neighboring monarchy, enlightenment thought and political change were in the air, and perhaps most importantly, industrial capitalism emerged from mercantilism. I suggest that it was the moral basis of this argument that, nearly one-hundred years after Adam Smith suggested that an invisible hand optimally guided markets which were generated by the industry of self-interested capitalists in An Inquiry into the Nature and Causes of the Wealth of Nations (2007), contributed to the formation of the moral economy before Marx had questioned commodification in Capital: A Critique of the Political Economy (1967).

While Marx was a useful foil for Thompson in his critique of Smith, he was a less useful foil for Thompson in his critique of the markets. In fact, Thompson somewhat rhetorically wondered if the markets were actual or merely “a metaphor (or a mask) for the capitalist process.” While he did note that an “‘open market’ in which the petty producers freely competed, rather than the closed market when large dealers conducted private bargains over samples in the back parsers of inns” was “the crowd’s preferred model,” he asks “[H]istorians who suppose that such market really could be found…to show in the records.” (Thompson 1993:305) In reconciling these two statements it
appears that Thompson accepted that those involved in the “market” wished to have an open market, but they wanted it to be a “moral” market.6

Thompson laid out a compelling case for a moral economy based on empirical evidence, yet his incorporation of private property as a problematic along with his eloquent railing against laissez faire markets leaves the moral economy as little more than an analytical tool that weds a theory of subaltern social movements to empirical examples. It is wanting in both offering a theoretical tool to examine the actions of hegemonic actors in their relations with subaltern actors, and in providing suggestions for remediation.

Additionally, Thompson is somewhat ambiguous in regard to expanding the use of the moral economy outside the contexts in which it was conceived, although he does somewhat rhetorically ask, “[P]irates had strongly transmitted usages and customs: did they have a moral economy[?]” He addresses this question by noting that his conception of a moral economy is not merely based on values, but attachment to a commodity. He states that “if values, on their own, make a moral economy then we will be turning up

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6 Thompson addressed this issue of free markets directly in another section of *Customs in Common*. He stated “[I]t should not be necessary to argue that the model of a natural and self-adjusting economy, working providentially for the best good of all, is as much a superstition as the notions which upheld the paternalist model... In some respects Smith’s model conformed more closely to eighteenth-century realities than did the paternalist; and in symmetry and scope of intellectual construction it was superior, but one should not overlook the serious air of empirical validation that the model carries. Whereas the first appeals to a moral norm - what *ought* to be men’s reciprocal duties—the second appears to say: “this is the way things work, or would work if the State did not interfere.” And yet if one considers these sections of *The Wealth of Nations* they impress less as an essay in empirical enquiry than as a superb, self-validating essay in logic.” (Thompson 1993:203) Thompson seems to be having difficulty reconciling the want of a competitive, free and fair market by those who participate in the market with his want of a paternalistic government regulatory scheme that is fair. In essence, while he spends considerable time and effort in empirically pointing out the flaws of the market scheme, he suggests that a paternalistic scheme is perhaps less desirable. Assuming that he does not believe riots are preferable to regulated markets, it is a wonder that he did not rise above a Marxist rhetoric of pointing out the flaws of the nexus of the capitalist mode of production and laissez faire markets, take off his historian’s cap, and plainly assert a preference for a regulated, transparent, paternalistic market scheme.
moral economies everywhere.” (Thompson 1993:339) Yet he also notes that he holds no special claim to the term or idea of a moral economy and, further, that certain infringements on economic relations that impact peasants and early industrial communities could in fact be considered moral economies when he states “[I]n this sense, the moral economy is summoned into being in resistance to the economy of the “free market.” (Thompson 1993:340) Given this ambiguous welcome, others have weighed in on the discourse of the applying of an understanding of the moral economy to maritime piracy.

Given a definition of the moral economy as resistance to the free-market economy, the realization that elite actors contributed to deprivation, and a lack of adherence to a moral/ethical obligation on the part of the elites to the subaltern actors, I suggest that Hay’s poachers, Marx’s gatherers of wood and Chambliss’s trapped laborers were exemplars. Both the small-game hunters and wood gatherers had long traditions of activity engagement. In both cases, while the commodity could be sold by the elites on whose land it was present, it was also used to supplement other commodity-based trade or income by the family unit of the subaltern actors, additionally it could be consumed or used directly by those actors. Thus, in declaring the commodities as property, the elites caused a three-pronged effect: trade and supplemental income by peasants or the lower working class was reduced; terminal use by peasants or the lower working class was reduced; and traditional activities that had previously been normative had become criminal, creating a new deviant class. As for Chambliss’s laborers, while they did not interact with commodities, more than their labor power became commodified. As their movement became restricted, a case can be made for the commodification of the
individual. Given these definitional parameters for a moral economy, a strong case for inclusion can be made for Abdi Samatar, Mark Lindberg and Basil Mahayni’s defensive pirates in the aftermath of the fall of the Siad Barre regime just prior to the start of the third millennium.

Samatar, Lindberg and Mahayni write of four distinct types of piracy having existed in temporal succession (with overlap) in the waters surrounding the Horn of Africa: political, resource, defensive and ransom or criminal pirates. Further they state that “[F]or most Somalis defensive piracy symbolizes the population’s feeble effort to protect the moral economy of their livelihoods. From their perspective it is not possible to separate defensive and ransom piracy from the depredation of resources piracy.” (Samatar, Lindberg and Mahayni 2010:1387) Samatar, Lindberg and Mahayni suggest that the scope of Thompson’s moral economy can be expanded. James Scott’s analysis of Southeast Asian subsistence peasant rebellions provides the basis for the reasoning that rebellions are rooted in the “need for subsistence security.” While Scott noted that the peasants he studied were risk-adverse, and respected hierarchical social structures, he stated that when representatives of colonial states threatened the peasant’s subsistence security and violated moral/ethical guidelines based on rights and obligations between the elite and peasant groups, the peasants rebelled. (Samatar, Lindberg and Mahayni 2010:1388) As suggested by Thompson, subaltern actors rebelled not merely due to deprivation, but due to deprivation combined with injustice. Yet, at times there were limits on the manner in which subaltern actors could address injustices. Scott suggests that when confrontation in the form of rebellion was not in the interest of the peasants, other less remonstrative means—such as work slow downs, sabotage, and “inadvertent
errors”—were employed. Yet, at times, even these actions were difficult to employ. During times when work actions were not possible, expressions of simple agency appeared as inward individual protest; as an Ethiopian proverb exemplifies: “When the great lord passes, the wise peasant bows deeply and silently farts.” (Scott 1976:19)

Samatar, Lindberg and Mahayni write, “[A] moral economy interpretation of defensive pirates would indicate that these actors were merely trying to protect their resources from stronger groups who were not bound by local ethics.” In keeping with Scott’s conception of a moral economy, it is not merely the depletion of resources that incites defensive piracy, but also that the depletion of resources is so great as to threaten the livelihood of the local subaltern actors, that in the depletion of resources there is an implicit lack of moral respect and, finally, that there exists no cultural connection between the weak and powerful actors. As Somalis understood the situation, it was not the Somalis who were the (defensive) pirates, but the foreign trawlers who were fishing in Somali territorial waters or its Exclusive Economic Zone (EEZ), or foreign companies who were dumping toxic waste in its territorial waters and EEZ who were the (resource) pirates. The injustice of labeling a defensive act as piratical caused Somalis to unite behind those who committed acts of maritime piracy. The leap to defending criminal acts of piracy was not necessarily great as the stigma and label remained on the Somali pirate, while there existed little stigma and no label for those engaged in resource piracy. (Samatar, Lindberg and Mahayni 2010:1388-1389; [see also Hansen 2009:8])

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The moral economy, as conceived by Thompson, is tied to capitalism, as is the conception of the bandit archetype as conceived by Hobsbawm. Hobsbawm takes on a decidedly Durkheimian tone when he writes that “[F]or the law, anyone belonging to a group of men who attack and rob with violence is a bandit...,” but “[H]istorians and sociologists cannot use so crude a definition.” (Hobsbawm 1969:17) From a sociological perspective we do not condemn banditry because it is a crime, banditry is a crime because we condemn it. In a similar fashion to Thompson’s food rioters, Hobsbawm’s bandits are a marginalized group that have been victims of economic transformations over which they have no control, and importantly, they have been morally aggrieved. Hobsbawm understands the law as a capitalist tool of oppression, giving preference to property over social relations. This preferencing has the instrumental effect of marginalizing those who do not own property, relegating them to merely acting as the suppliers of labor power within the capitalist mode of production. Further, he understands the role of bandits as that of “social avenger.” He writes that the “programme” of the bandit “is the defense or restoration of the traditional order of things ‘as it should be’. They right wrongs, they correct and avenge cases of injustice, and in doing so apply a more general criterion of just and fair relations between men in general, and especially between the rich and the poor, the strong and the weak.” (Hobsbawm 1969:26) What the bandits desire is the status quo ante, a better day when social relations were important and equal. Whether that day ever existed is not relevant to Hobsbawm’s narrative. This is also true of the situation in Somalia. While defensive pirates sought to punish foreign vessels engaged in resource pirating in the territorial waters or the EEZ of Somalia, there is question whether
their desire for equitable access and sharing of resources had existed prior to the arrival of the foreign vessels.

Thomas Gallant suggests that there may be more to the picture than merely a return to the “good old days.” He notes “[R]ather than being antithetical to a world organized into nation-States and dominated by capitalist economic relations, however, military entrepreneurs, bandits and pirates are integral parts of it, and have been since the sixteenth century.” (Gallant 1999:25) Those “military entrepreneurs” of which Gallant speaks were drawn from the ranks of those who were displaced from subsistence farms that were expropriated by large land owners in their effort to enlarge, and increase commercialization of, their holdings. These estates would employ some of the displaced young men as guards and agents of enforcement, while others would find it advantageous to band together into bandit groups. So the situation that led some to “legitimate” enterprise, led others to “illegitimate” enterprise. Yet the job descriptions were remarkably similar, and included violence. (Gallant 1999:30) What differentiated the two groups were relations to authority, legitimacy and power.

What Gallant noted in the piracy of old was also relevant in the development of piracy off the coast of Somalia at the end of the 20th century. In 1999, Hart International was engaged by the provisional government of Puntland to staff and train a coast guard. Hart International was also granted authority to develop and operate a licensure scheme

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15 Gallant uses the term “military entrepreneurs” to refer to “a category of men who take up arms and who wield violence or the threat of violence as their stock in trade.” He writes “[B]andits and pirates stole. By definition they expropriated goods and commodities illegally.” Yet he noted that the use of the labels was in fact problematic. “Depending on the context and on which historical actor’s viewpoint we adopt, the identical depredations by the same men could be and were considered legitimate by some and illegitimate by others. One state’s pirate was another state’s privateer.” (Gallant 1999:26-28)
for fishing licenses. In 2001, clan and leadership disputes led to a war between backers of sitting president Abdullah Yusuf and Jama Ali Jama, who had been recently appointed president. As a result of the war, Hart International terminated its contract with the government of Puntland. This resulted in unemployment for former members of the Puntland Coast Guard. Stig Jarle Hansen notes that at least some of the former members of the Puntland Coast Guard became bandits and pirates. (Hansen 2009:31) This transition from law enforcement to piracy was not an anomaly. Hansen writes that “[T]he UNDP’s Rule of Law programme failed to guarantee the wages of police officers, and thus indirectly created trained bandits.” (Hansen 2009:43) While a number have posited that these unemployed law-enforcement officers turned to piracy solely because their employers failed or because their employers failed to pay them, Samatar, Lindberg and Mahayni suggest deprivation, power relations and morality were just as important in determining their life choices.⁹ (Samatar, Lindberg and Mahayni 2010)

**The empirical argument**

By its very definition, organized crime does not fit within our understanding of a moral economy. And while a strong case can be made that prior to its apparent disappearance off the coast of Somalia during the first quarter of 2015 piracy had become a full-blown criminal enterprise, much Somali piracy prior to 2007 can be construed as a

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⁹ This translation from legitimate occupations to illegitimate ones is not unusual. In asking the questions “[W]ho exactly were the pirates and where did pirates come from?,” Cordingly noted that “a sample of seven hundred men indicted for piracy between 1600 and 1640 shows that 73 percent described themselves as mariners or sailors…Marcus Reducer’s analysis of Anglo-American pirates operating in the western Atlantic and Caribbean at that time [1720’s] shows that 98 percent were formerly seamen in the merchant service or the Royal Navy or had served as privateers.” (Cordingly 1995:10)
moral enterprise. Defining Somali piracy as organized crime brings with it the advantage of legitimizing not only the re-creation of a private-security sector to protect commercial shipping, but also entire militarization schemes created by powerful States, coalitions, and international groups aimed at extirpating the piratical scourge from the transportation corridors of commerce; it also serves the function of changing the object of inquiry. When hegemonic actors are able to define social phenomena in the absence of definitions from other social actors, a skewing of reality often ensues. In the case of Somali piracy, when hegemonic actors are able to construct Somali piracy as a unique form of deviance, they can then make the grand leap to structure unique juridical responses. This is highly problematic not only from the standpoint of a rule of law, but also from one of social equity.

A competing definition of Somali piracy as a moral enterprise could help frame this particular form of deviance without the stigma that the label “organized crime” carries. Additionally, it could assist in de-constructing the juridical formations that have been created to address Somali piracy as a form of organized crime. This sociological framework could be used to examine the application of juridical reforms that specifically address Somali piracy and none of the other local or temporal iterations of piracy. I use this framework in Chapter 7 to examine juridical schemes newly created to address Somali piracy.

As I discuss in Chapter 3, the Somali economy is primarily based on the economics of pastoralism and, to a lesser extent, agro-pastoralism. Over a period of

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10 While using 2006/2007 as the dividing line between criminal and other forms of piracy is somewhat arbitrary, incidence of piracy off the Horn of Africa dipped in 2006 from 2005, only to precipitously rise in 2007 and explode from 2008 to 2011. See Appendix 2.
twenty-five years war has destroyed much of not only the physical infrastructure of the
country, but also the juridical, financial, and social infrastructures. As opposed to finance
capitalism, industrial capitalism or merely municipal finance, the primary function of the
Somali financial sector has been relegated to the processing of remittances from the
Somali diaspora. Those in defense of a moral economy are hard-pressed to assert that a
functioning economy exists; yet there are those who not only defend Somalia as a nation-
State, but also many within Somalia who believe that hegemonic actors have been
complicit in their suffering. Their goal, consistent with the moral economy, is for these
foreign actors to offer compensation for what they have pilfered, and to do so equitably.

On September 25, 2008 three skiffs approached the *MV Faina*, a Ukrainian
flagged freighter. The following day it was reported that the vessel had been hijacked 200
nautical miles off the coast of Somalia, and that the vessel and the crew were being held
for ransom. While in 2008 134 vessels would be hijacked off the coast of Somalia, the
*MV Faina* was unique. The *MV Faina* was not a TI-class supertanker, but she was very
valuable. Although she was a freighter, she was not carrying foodstuffs or discretionary
goods; she was loaded with 33 T-72 Soviet-era tanks, 150 grenade launchers, 6 anti-
aircraft guns, and a significant amount of ammunition. Additionally, her cargo was an
international secret.

Reports suggest that the vessel and cargo had left the Ukrainian town of
Oktyabrsk upstream on the Volga River from the Black Sea, and was headed for
Mombasa, Kenya. The governments of Ukraine and Kenya stated that the weapons were
destined for the Kenyan military. Alfred Mutua, a spokesman for the Kenyan
government, stated that the hijacking of the weapons cache was “a big loss for the
Kenyan government.” Later, when questions arose regarding how the weapons fit into the existing equipment holdings of the Kenyan military and if perhaps the weapons were destined for another African nation—implying that government officials were not being honest—Mutua responded that “[T]here’s no cover-up.” As it turns out, there was a huge cover-up; both the Kenyan and the Ukrainian governments, along with the United States government, were caught in lies. As revealed by WikiLeaks, in truth, the weapons were destined for the rebel insurgency in Southern Sudan and the Kenyan government knew that they were to serve as a transit port. While the United States government knew about the sale of weapons to the rebels in southern Sudan, the State Department suggested, before the leak, that such shipments to the rebels were illegal. After the leak, it denied prior knowledge.

In order to mitigate any potential power imbalance due to the incorporation of the weapons into clan-based militias on the ground in Somalia, immediately after the hijack, a number of military vessels maneuvered near the MV Faina to make sure that no military equipment was off-loaded, although it was reported that a number of grenade launchers had been thrown overboard with expectations they would be retrieved later by the pirates.\textsuperscript{11} The vessel and crew were released after four months, and the payment of a USD 3.2 million ransom by the vessel’s owner.

Prior to the vessel’s release, in an interview with the head of the New York Times East Africa Bureau, Jeffrey Gettleman, pirate spokesman Sugule Ali stated that “[W]e
don’t consider ourselves sea bandits [pirates]. We consider sea bandits those who illegally fish in our seas and dump waste in our seas and carry weapons in our seas. We are simply patrolling our seas. Think of us like a coast guard.” In responding to Gettleman’s question regarding the criminality of hijacking and holding persons at gunpoint for ransom, Ali responded that “[I]f you hold hostage innocent people, that’s a crime. If you hold hostage people who are doing illegal activities, like dumping or fishing, that is not a crime.”

Whether his responses were merely rhetoric or not, the rationale used is one of demanding recompense. Whether there would be equity beyond the dozens or hundreds of clan relations who would share in the ransom payment was not made clear. The pirates clearly portrayed their actions as moral, yet whether one can consider the hijacking of a vessel to be the functional social-movement equivalent of a bread riot is questionable.

Militarization schemes off the coast of Somalia in the form of United States-led CTF-151, European Union NAVFOR’s Operation Atalanta and NATO’s Operation Ocean Shield, have cost taxpayers over USD 6 billion since 2008. Total ransoms collected by Somali pirates over an eight-year period, including the six-year period referenced above, amount to less than USD 400 million. Piracy attacks off the coast of Somalia peaked in 2011 at 239 incidences, falling to zero attacks in the first quarter of 2015. Yet, with all of the resources expended to thwart piracy off the coast of Somalia, Reuters reported in March of 2015, that there had been a rise in the incidence of illegal fishing off the coast of Somalia. This undoubtedly sparked concern by those charged with

addressing maritime depredation off the coast of Somalia. In fact none other than Alan Cole, head of the UNODC-MCP, spoke in regard to the problem. Cole stated, “piracy could return as criminal gangs and pirates use the rise in illegal fishing as a pretext to hijack other vessels...The international community has spent millions of dollars trying to counter piracy, help Somalia and make sure that (sea) trade is not interrupted, but because of the activity of a relatively small number of illegal fishing vessels, all that is put at risk.”

While it is difficult to restrain myself from colorfully commenting on Mr. Cole’s callous disregard for the plight of those affected by illegal unreported and unregulated (IUU) fishing off the coast of Somalia, his comments do warrant a calm and reasoned response. First, his figures are off, in fact, three orders of magnitude in error. The militarization of the transportation corridors and the open ocean surrounding the Horn of Africa cost the tax-paying public over USD one billion per year. Millions more are spent on capacity-building in Somalia and in countries that have joined with powerful Western countries in performing the functions that those powerful Western countries do not wish to perform as they address maritime piracy off the coast of Somalia, including Kenya and Seychelles. Those functions include enforcement support, as well as adjudication and sanctioning services. These direct costs of governments and international organizations say nothing about the USD hundreds of millions in costs that shipping companies shift onto their customers to compensate for BMP4 recommendations for increased security and speeds, and transiting along the IRTC, or the costs of additional fuel, manpower,

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13 http://www.reuters.com/article/2015/03/31/somalia-piracy-crime-idUSL6N0WS4SP20150331
insurance and other charges hegemonic actors attribute to Somali piracy. Second, illegal fishing is not a pretext for any other deviant activity. Illegal fishing is illegal both under municipal law and the law of nations. A number of UNSCR’s specifically state that, just as it is the duty of the international community to patrol the territorial waters and EEZ of Somalia in order to keep them free of maritime pirates, it is their duty to patrol those waters and keep transgressors from illegally fishing. While the international community seems to have spent USD billions in successfully completing the first task, it has not properly allocated resources to address IUU fishing, and it is a long way away from succeeding in its mission to stop IUU fishing in Somali waters. Third, the belittling of illegal fishing by the United Nation’s point man on addressing deviance off the coast of Somalia should be more than embarrassing for the United Nations (UN). Cole should acknowledge that IUU fishing is considerably more damaging to the world economy in comparison to maritime piracy. In fact a 2009 report by Agnew, Pearce, Pramod, Peatman, Watson, Beddington, and Pitcher stated that in “[R]eviewing the situation in 54 countries and on the high seas, we estimate that lower and upper estimates of the total value of current illegal and unreported fishing losses worldwide are between $10 bn and $23.5 bn annually, representing 11 and 26 million tonnes.” (Agnew et al. 2009:1 [emphasis added])

**The moral economy of piracy versus the morality of privateering**

A final topic that speaks directly to the question of morality of action is that of the differentiation of analogous acts on the basis of the legitimacy, authority and power. The acts of piracy and privateering are analogous in constructions and practice; they both
involve the expropriation of goods and commodities using, or under the threat of, violence. The only differentiations between the two acts involve questions of legitimacy, authority and power; subjects discussed in Chapter 1. Can the denunciation of an act, through caveat or code, by a legitimate authority, thereby ascribing on it a deviant label and a commensurate sanction, differentiate that act from one that is, while analogous, positively sanctioned by the same legitimate authority thereby conferring on it legitimacy? Further, if both acts involve depredation, does that change the answer?

Gallant notes “[D]epending on the context and on the historical actor’s viewpoint we adopt, the identical depredations by the same men could be and were considered legitimate by others. One state’s pirate was another state’s privateer.” (Gallant 1999:27-28) From the time of the ancient Greeks to the 19th century, sovereigns, or their representatives, granted “Letters of Marque and Reprisal” to private persons (privateers) duly authorizing them to capture foreign goods and vessels during times of conflict, and occasionally during times of peace. A Letter of Marque allowed the taking of property by the holder in the name of the sovereign. A reprisal involved the retaking of goods by a representative of the injured party from the actor(s), or their representative(s) who had taken goods from the injured party in the first place. Goods retaken on reprisal need not have been the exact goods initially taken, nor need they have been taken from the exact party responsible for the initial injury. They merely had to be goods of similar value from the party, or a related party (flying the same flag or, on some occasions, a nation in amity with the nation that flagged the vessel responsible for the initial taking) that was responsible for the initial taking. (Cordingly 1995:xvii; Rubin 2006) The signatories to the Paris Declaration of 1856, signed at the end of the Crimean War, agreed to cease
issuing Letters of Marque. Eventually fifty-five nations acceded to the treaty. The 1907 Hague Convention lent clarity to the Paris Declaration and the practice of privateering is no longer accepted under international law. This conveys both strong social and legal meaning. Both in theory and practice, depredation on the high seas is piracy. Therefore any act of maritime depredation would not be consistent with the law of nations, as represented by UNCLOS (1982) and customary international law, and would be considered piracy jure gentium. Sovereignty, legitimacy, power, and authority should have no effect on interpreting the act differently.

Yet, prior to the Paris Declaration, privateers were more than normatively non-military personnel on normatively non-military vessels responsible for the taking of a prize. In many cases they served the function of adjuncts to a standing navy. In this respect, the inability of comparatively less-developed nation to issue Letters of Marque placed them at a distinct disadvantage to comparatively developed nations with large standing navies. This is not only true for cases involving privateers prior to the 20th century; it also has application in the 21st century. For example, during the early to mid-2000’s, Somali privateers, some acting under the sanction of State officials, engaged in the capture of property from nearly any foreign ship they could reasonably hope to overpower that was in Somali territorial waters, assuming that the ship was removing, had removed, or was related to a ship that had in the past removed “property” from the Somali EEZ or its territorial waters. The international community treated these privateers as pirates. This is inconsistent with the practice of international law.

The determination of criminality within the jurisdiction of a nation is a function of domestic sovereignty (see Chapter 5), and not part of the law of nations. While UNCLOS
(1982), SUA (1988) and a number of strongly worded UNSCRs strongly advocate the creation of domestic legislation criminalizing piracy, domestic statute is a function of the State, not one of the international community. While piracy *jure gentium* is a crime under international law, laws criminalizing piratical acts may or may not be part of a domestic criminal code. Further, it is not under the purview of any international body to mandate the particular form and function of domestic legislation. While it might not have been normative, the Somali federal government would have been within its rights to deputize into military or police service any number of civilians, using their own maritime vessels, in order to address illegality (again domestically defined) within its territorial waters.

In the case of alleged pirates, or privateers, engaged in “pirate like behavior” in the territorial waters of Somalia, it is under the sole authority of the State of Somalia to determine if those actions were in fact deviant, criminal, or in accordance with national law and serving a police function. States who disagreed with the manner in which Somali officials addressed their enforcement problem had recourse within diplomatic circles, in bi-national or multi-national talks or within international bodies. In the above scenario, those accused of engaging in piracy may very well have been serving as privateers to a government lacking either infrastructure to support, or, funds to cover the cost of, a standing navy, coast guard or maritime police force, and as such, those actions would have been consistent with international law. And because the “privateering” in this case took place not on the high seas, but within the territorial waters of a State, the act of privateering would be consistent with modern conceptions of sovereignty and with international law. (Cordingly 1995)
While historically privateers operating under a Letter of Marque and Reprisal did serve an important State function, that function was predicated on the lawfulness of the taking. Here we can turn to Hugo Grotius for the legality of prize under conditions of hostility between nations. Grotius noted that the taking of a prize by a privateer consists of two elements, the “deprivation of previous possession, and the acquisition of new ownership.” These elements serve as proof of the primacy given property under a developing international law. Grotius writes that “just as it is impossible that a given thing should appear at one and the same time in two different forms, so there cannot exist simultaneously two full possessors, or owners, of one and the same thing…” (Grotius 2006)

Grotius later clarifies that not only is it just and right to use any means possible to guard ones’ property, but that if that property is taken during hostilities and if one is not presently able to retake those exact possessions, one should be permitted to take from among the goods of a hostile debtor an equivalent of the debt owed. This is the justification Grotius uses to suggest that privateering is acceptable. Further, if we add Emer de Vattel’s argument that the chief responsibilities of the State to the person are protection and the restoration of wrongs inflicted on the person, then it is a short leap from a justification for the taking of prize as acceptable, to one where whether it be by official State apparatuses or by privateer, it is a duty of the State to make its persons’ whole. In this respect, privateers are not part of the moral economy; they are part of the moral commitment of the State to the individual. Yet, this right of property attachment only exists within the territory of the State sanctioning such taking.
There was another implicit moral commitment that a privateer needed to fulfill in the execution of a Letter of Marque, the bringing in to port and evaluation of the prize. A Letter of Marque issued to the Captain of the privateer Prince of Neufchatel by President of the United States James Madison during the War of 1812 states that the captain:

Nicholas Millin is further authorized to detain, seize, and take all vessels and effects, to whomsoever belonging, which shall be liable thereto accounting to the law of nations and the rights of the United States as a power at war, and to bring the same within some port of the United States, in order that due proceedings may be had thereon.\textsuperscript{14}

A Letter of Marque against pirates issued by William the Third to Captain William Kidd in 1695 was similar in structure. It mandates that Kidd:

bring, or cause to be brought, such pirates, freebooters, and sea-rovers, [being either our subjections, or of other nations associated with them], as you shall seize, to a legal trial, to the end they may be proceed against according to the law in such cases... And we do hereby enjoin you to keep an exact journal of your proceedings in execution of the premises, and set down the names of such pirates, and of their officers and company, and the names of such ships and vessels as you shall by virtue of these presents take and seize, and the quantities of arms, ammunition, provision, and lading of such ships, and the true value of the same, as near as you can judge.\textsuperscript{15}

There was a structure to the full execution of a Letter of Marque. The Letter, issued by a legitimate authority, provided legitimacy to the acts of the named privateer, in the taking of property from an individual or a State with which the State that authorized his Letter was engaged in hostilities. These authorizations mandated that, once the prize had been taken, that the prize be brought back to a port within the jurisdiction of the issuing State, or to the port of a State with whom the issuing State was in amity, so that

\textsuperscript{14} http://www.constitution.org/mil/lmr/1812amer1.htm
\textsuperscript{15} http://www.constitution.org/mil/lmr/1695engl.htm
the prize could be evaluated, and adjudicated upon. Invariably, claim holders would come forward to assert claims to the vessel and/or cargo, and in many cases those claim holders would be individuals of the issuing State, or States in amity with the issuing State. Determining ownership of property was under the purview of the courts, yet possession was a high hurdle to overcome.

As a new country at the end of the 18th century at continued hostilities with its former colonizer, the United States used Letters of Marque and Reprisal in the formation of its navy and to establish its naval presence far from its territorial borders. Further, the determination of prize legitimacy by United States privateers, and the determination of ownership of prizes taken as a part of the wars of independence of a number of South American nations, became a significant part of the adjudicative history of the United States federal courts during the early to the mid-19th century.\(^\text{16}\)

So important to the birth of the United States were the actions of privateers, the framers of the Constitution thought to include the power to issue of Letters of Marque and Reprisal within the Constitution. Section 8 (Powers of Congress) of Article 1 of the United States Constitution states that it is a power of Congress “[T]o declare war, grant letters of marque and reprisal…” directly after it notes the congressional power “[t]o define and punish Piracies and felonies committed on the high Seas, and Offenses against the Law of Nations.”

\(^{23}\) United States v. Jones (1813); United States v. Jones et al (1814); Dias et al v. The Revenge. Bustamento et al v. Same (1814); Juando v. Taylor (1818); United States v. Bass (1819); United States v. Chapels et al (1819); United States v. Klintock (1820); The Josefa Segunda Carricabra et al. Claimants (1820); United States v. Smith (1829); The Bello Corrunes, The Spanish Consul, Claimant (1821); The Palmyra Escurra, Master (1827); United States v. Gilbert et al (1834); Davidson v. Seal-Skins (1835); Peter Harmony and Others, Claimants of the Brig Malek Adhel v. The United States - The United States v. The Cargo of the Brig Malek Adhel (1844).
In summary, in theory and in practice the act of piracy can be little differentiated from the act of privateering absent legitimate authority. Consistent with constructions of sovereignty discussed in Chapter 5, this is part of the definition of the State. Yet, just because the State, by virtue of it being the State, can lay claim to the legitimate use of force, police powers and certain fiscal power (e.g. the power to tax), does that mean that if a State cannot perform the functions of a State, that it loses the ability to delegate those functions to other non-State entities? Further, is the delegation of State functions any more damaging to the State than the usurpation of the functions of the sovereign by powerful States and international organizations?

This chapter questioned the degree by which legitimacy and authority determine legality or illegality, and to what degree a moral economy exists in the act of maritime depredation. Ultimately, the differentiation of action is determined by power structures and the ability of certain groups to control the definition setting of action and actors. In this respect, defensive piracy is no different than privateering. This conflation of deviance definitions is contrary to definitions of normative police functions. Legitimate agents of enforcement—as defined by powerful nations and international organs—have the authority to interdict vessels on the open ocean and, based on certain agreements, within the territorial waters of some nations. Illegitimate agents of enforcement—as defined by the same powerful nations and international organs—lack the authority to interdict vessels on the open ocean, nor do they have, under any circumstance, the authority to interdict vessels within the territorial waters of a State that grants them legitimate
authority if that legitimate authority is contra to the legitimate authority of hegemonic actors.

This is the situation that exists in Somalia. Somali actors are powerless to stop incursions into their territorial seas in order to protect their resources, and are powerless to assert jurisdiction over their territorial sea due to resource and socio-structural constraints.
Chapter 3: Somali Exceptionalism, or an Exceptional Response to Somalia: A View on Sovereignty, Power Asymmetries, and Judicial (Re)constructivism

According to a report from the United Nations Office on Drugs and Crime and the World Bank, tracking financial flows from piracy around Djibouti, Ethiopia, Kenya, Seychelles, and Somalia, pirates plundered from $339 Million to $413 Million in the last seven years… The World Bank estimates piracy is a serious impediment to the global economy, costing about $18 Billion a year in increased trade costs. It must be reminded that, throughout the world, piracy finances slavery, arms deals, drugs trafficking, but also legitimate business investments.¹

The above quote provides two clear messages with regard to Somali piracy as a global social problem. The first message is one of gravity: The international community pays a dear price in order to address maritime piracy off the coast of Somalia, upwards of “$18 Billion dollars a year in increased trade costs.”² What is implied is that you and I pay a tax, “a piracy tax,” on the goods that we use, need and desire, amounting to “an additional 1.1 percent value-added tax on all shipments through the waters affected by Somali pirate activities.” (World Bank 2013a:33) This tax is one indirectly imposed on the world economy by communis hostis humani generis, the enemy of all. It is a tax that the World Bank, the UNODC, and INTERPOL would like us to believe is causally linked not only to a specific deviant behavior, but to a specific deviant group. In summary, while this tax is imposed by global corporations on those that use its services and products and/or by sovereign authorities, we are told that it is an indirect tax caused by Somali pirates, who are, of course, at least indirectly, the beneficiaries of the tax, or are they? The second message is perhaps more opaque. It requires us to reevaluate the costs and

² See also World Bank 2013b
threats of maritime piracy and to examine who pays the costs associated with the acts and the threats of piracy. Finally it begs the question: Who benefits from the international juridical apparatuses constructed to address maritime piracy? To reevaluate the costs and threats and to address the questions, it may help to reframe or reconfigure the quote above: The world pays “$18 Billion a year in increased trade costs” (see Chapter 3, fn 1) to address a global social problem that has cost a number of global corporations approximately $400 Million over a period of eight years, amounting to an average of approximately $50 Million per year. (World Bank 2013b) Or stated another way, for every dollar of ransom paid between the years 2005 and 2012, there have been increased trade costs amounting to $4,500. This figure is from a World Bank report that cites another World Bank report as its source. Its model to arrive at the $18 Billion figure is based on estimated values of world trade volume, annual increases on trade volume, the amount of trade volume that passes through the region plagued by Somali piracy, the rerouting of shipping to avoid those areas, additional fuel and security costs, and additional insurance costs.¹ It is noted in the report that “[T]he estimated cost of piracy

¹ Due to a number of challenges inherent in the gathering of accurate economic data, the choosing of variables impacted by and/or having impact on economic activity, the assessment of the costs associated with economic activity and in the predicting of not only future costs, but also future variable correlations, it is tremendously difficult to predict or even to assess economic cost to much social activity. This USD 18 Billion figure, provided by the World Bank, is but one example. To show the fungible nature of economic prediction and the significant impact that the choice of variables, assumptions of growth, interest rates and investment, trade activity, allocation of resources, etc., have on cost estimates, one need only note the wide variation in the cost estimates provided by two institutions that provide expert research and commentary on maritime piracy off the coast of Somalia. While the World Bank notes that maritime piracy off the coast of Somalia increases trade costs approximately USD 18 Billion per annum, the most respected NGO addressing maritime piracy, Oceans Beyond Piracy, a program of the One Earth Future Foundation (OEF), asserts that the cost of maritime piracy off the coast of Somalia in 2010 was between USD 7 and USD 12 Billion. That figure was amended in 2011 to reflect “the result(s) of extensive research conducted by OEF with the collaborative participation of different stakeholders, and includes significant contributions made by commentators, experts, and others impacted by piracy.” (Bowden 2012) Estimates for the cost of Somali piracy in 2011 were between USD 6.6 and USD 6.9
indicates that the perceived cost of falling into the hands of pirates is high. The actual probability of being hijacked for ships traveling in the troubled waters is believed to be between 1/750 and 1/1,000, based on estimates by Mejia Jr., Cariou, and Wolff (2009), Newsome (2009) and Psarros et al (2011).” With the real cost of a detained vessel being less than $7.8 Million (average ransom of $3.3 Million, forgone revenue of a detained vessel of $2.5 Million and the “value of statistical life” (the potential of crew member loss) of $2.0 Million), “[T]he fact that shipping companies are willing to pay 1.1 percent more to avoid an event that happens with less than 0.1 percent probability and would cost only about US $7.8 million suggests there is a very large psychological cost associated with the prospect of long detentions and uncertain outcomes.” (World Bank 2013b:26) The fact that additional costs are self-imposed by the industry and largely passed on to consumers appears to be missing from the report.

Maritime piracy off the coast of Somalia appears to have the consequence of creating a heavy psychological burden on the shoulders of global corporations, one that they seem to be able to easily monetize and share with, or more correctly, pass on to their customers. It seems, via this reexamination, that the threat of piracy is not only

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Billion. This showed not only a decrease in costs associated with maritime piracy off the coast of Somali, but a narrowing of the very wide band of the initial estimate. OBP’s 2013 report details a significant drop in the economic costs of Somali piracy; this new estimated cost amounted to an over 50% reduction, USD 3.0 to USD 3.2 Billion. And what drove this tremendous cost reduction? “This cost downturn is mainly driven by reduced costs for ship transit patterns across the High Risk Area, such as reduced speeds and less re-routing by merchant vessels crossing the High Risk Area. Other significantly lower costs include insurance costs, and reduced costs for prosecution and imprisonment as venues shift to less costly jurisdictions.” (Bellish 2013) Interestingly, related estimated military spending decreased only from approximately USD 1.27 Billion to approximately USD 1.00 Billion. It appears that not only are cost estimates widely disparate, they appear to be driven by factors controllable by corporate entities, and the extent by which the governments of military powers are committed to provide enforcement support and to police the waters off the coast of Somali in cases where they lack a territorial or nationality interest, in support of those corporate entities and their interests.
significantly more costly than the act of piracy, but also that the threat of piracy can be both monetized by those under threat and passed on to consumers, and used as a pretext by powerful actors to further the aims of globalization in areas where States are unable to assert sovereignty and where regional enforcement mechanisms have not been developed to a degree to address deviance in areas external to the sovereignty of any and all States.

While I will return to the dichotomous characterization of maritime piracy off the coast of Somalia as a global social problem that was itself a consequence of the twenty-five-year-long socio-political quagmire resulting from the clash of the effects of colonization and clan-structures versus an aggrandized moral panic engineered by powerful States and the multinational corporations that drive foreign and defense policy within those States toward the end of this chapter, I will first provide some historical background on Somalia. It is my hope that presenting Somalia’s unique social structure, along with its post-colonial socio-political structure, will assist in interpreting not only why piracy can be construed as a normative outcome of circumstance, but also how powerful actors within the international community have justified the mobilization and expenditure of enormous resources and personnel in the waters off the Somali coast and the creation of third-party jurisdictional piracy courts to address specifically Somali piracy; and Somali exceptionalism (subjects I will address in Chapter 4). Finally, I will address the form and function of this juridical (re)constructivism.
The case of Somali piracy

On Wednesday morning the 24th of July, 2013, I arrived at the Palais de Justice at Ile Du Port on Mahé, Seychelles, which had been officially opened just over a month prior, in time to be led into the courtroom to witness the sentencing of the five Somali men, and one Somali boy, who the day prior had been convicted of two counts of piracy contrary to Section 65(1) of the Seychelles Penal Code read with Section 23 of the same. Although the small courtroom was not packed it was full. I sat in the third row next to a State Counsel of the Office of the Attorney General of the Republic of Seychelles. Around us were representatives of EUNAVFOR, RAPPICC, the UNODC, and INTERPOL. It had been explained to me that Seychelles’ interest in prosecuting cases of maritime piracy where it could claim no nexus to the act was more than merely in the interests of regional security and politics. Seychelles had aspirations of a seat on the United Nations’ Security Council, huge aspirations for a nation of 90,000 persons, and it was suggested to me that working with the United States, the European Union, the United Kingdom, Germany, France, Netherlands and the United Nations in prosecuting cases of maritime piracy and sanctioning those convicted for a portion of their sentences in prisons built or expanded with foreign grants and United Nations funds, could be the way to making that dream a reality.

4 Funded in great part by the Government of the Peoples’ Republic of China
6 In terms of population, Malta, approximate population in 1983-84 of 330,500 persons, and Djibouti, approximate population in 1993-94 of 642,000 persons, are the smallest nations to serve on the United Nations Security Council.
While the six Somalis left Puntland and began their piratical adventure days prior, the events that resulted in the guilty verdict and their sentencing began on the 11th of August, 2012. It was on that day that the French frigate *La Fayette* communicated with the German warship *Sachsen*, informing its Captain that one of its helicopters had observed six suspected pirates leave a dhow. After the *Sachsen* tracked the Comoros-flagged *Burhan Noor* through the night and prepared to send a team to board the vessel, the captain of the *Burhan Noor* radioed the *Sachsen* and informed him that a group had taken control of his vessel and that he and his crew would be killed if a team from the *Sachsen* attempted to board his vessel. Andreas Krug, captain of the *Sachsen* communicated with the commanding officer of EUNAVFOR Operation Atalanta, informing him of the situation. Further he communicated information regarding the situation to the commanding officer of the Netherlands’ warship *Rotterdam* which was in the vicinity of the *Burhan Noor*.

It is the official line that the commanding officer of Operation Atalanta determined that the *Rotterdam* was in a better position to intercept the *Burhan Noor*. Unofficially, it had been communicated to me that their superiors in Germany told the German crew of the *Sachsen* that they were not to engage, or even pursue, the *Burhan Noor* into Somali territorial waters. The crew of the Netherlands warship, *Rotterdam*,

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8 It was explained to me that it was the concern of the German federal government that interdicting in maritime piracy cases off the coast of Somali could result in political/human rights challenges, where the end result could be the trying of the Somali pirates in Germany, the potential incarceration of the convicted Somali pirates in Germany (or the release of the accused if found not guilty), and a subsequent application for asylum in Germany by the accused on political or humanitarian grounds. The German government was not only worried about the costs of such events, but also of the message that this would send to would-be Somali pirates looking to emigrate to Schengen countries. (Field research during the months of July and August 2014 in Nairobi and Mombasa, Kenya, Mahé, Seychelles, Dubai, United Arab Emirates, London, England, and Washington D.C., United States of America.)
was under no such restriction; additionally, they were operating not directly under the EUNAVFOR’s Operation Atalanta, but under NATO’s Operation Ocean Shield. At the time that the Sachsen disengaged from pursuing the Burhan Noor, the Rotterdam was within the territorial waters of Somalia, operating under United Nations Security Council Resolution 1816, as subsequently extended under UNSCRs 1846, 1897, 1950 and 2020. The general purpose of the resolutions, was the “legitimate” transfer of enforcement powers by the Transitional Federal Government, which exerts control over approximately four square blocks of Mogadishu, to nearly any and all sovereign States or their representatives over the territorial and EEZ waters of Somalia. It granted those representatives of the enforcement arms of foreign nations the right to act in the capacity of Somali law enforcement agents in addressing Somalis who are accused of piracy jure gentium. Additionally, it granted enforcement rights to those foreign agents to address cases of piracy jure gentium by Somalis who are later found in the territorial waters of Somalia. Further, it granted power to those agents to address piracy by statute committed by Somalis in Somali territorial waters. Finally, it granted those foreign powers the right to remove those Somali citizens from their sovereign territory, to be tried not in the courts of the law enforcement agent, but in third-party jurisdictional piracy courts under the laws of those third-party nations, to be sanctioned under those third-party laws, and to be incarcerated within the prisons of the State of adjudication.\footnote{This act of sovereignty by proxy is unique to Somalia. While I have no doubt that the motives behind the resolutions by some of the persons responsible for drafting them were in the interests of the world community, in practice these Security Council resolutions have resulted in the transfer of the control over resources and corridors of commerce. They are an insult to conceptions of domestic sovereignty (the right of the sovereign to organize social control apparatuses within the State), interdependence sovereignty (the right of the sovereign to regulate the flow of person, goods, services contraband, and}
Security Council resolutions, with regard to this all-encompassing power to interdict, of a right of enforcement in cases where non-Somalis are charged with piracy in either the territorial waters of Somalia or on the high seas off the Horn of Africa. As this power is not enumerated, we must presume that it does not exist. This theory has not been tested, as it appears that only Somalis can be pirates in these waters, as, to my knowledge, not a single Eritrean, Yemeni, Omani, Djiboutian, Kenyan or Tanzanian has been brought before the courts of Kenya or the Seychelles for the crime of maritime piracy.

Commander Hulsker of the *Rotterdam* was ordered to take up a position to effectively block the *Burhan Noor* from approaching the Somali shore. The *Sachsen* remained behind the *Burhan Noor*, however, it is not known if the *Sachsen* was to remain as only a visual deterrent or if she was permitted to reengage the *Burhan Noor* if the vessel was to attempt to leave the territorial waters of Somalia. The *Rotterdam* communicated with the Somalis who had taken the *Burhan Noor* that they were to surrender. After two warning shots were fired over the *Burhan Noor*, the Somalis holding the *Burhan Noor*’s crew indicated that they were prepared to surrender. The *Rotterdam* sent boarding teams on two fast boats to disarm the suspected pirates and take control of the vessel. As the teams approached the *Burhan Noor*, the teams noted that the Somalis were tossing weapons overboard. As they boarded, the Pakistani crew who had been confined to the aft of the vessel, greeted them. The Somalis, who were at the fore of the vessel, were lying prone with their hand above their heads.

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residual waste across its borders), international legal sovereignty (the right of the sovereign to enter into agreements with other nations on the basis of equality), and Westphalian sovereignty (the right of the sovereign to construct a political structure absent external influence). The Security Council has effectually stripped Somalia of its status as a State, while not allowing it to internally negotiate other forms of statehood (e.g. the splitting of Somalia into separate States).
After two weeks on the *Rotterdam*, Commander Hulsker was informed that a political decision had been made to try the suspected pirates in the Seychelles. He was instructed to offload the six Somalis while at port in Salala, Oman, and that the suspects would be delivered to the Seychelles for trial.

The evidence presented at the trial was overwhelming. The boarding crew from the *Rotterdam* noted that in addition to cell phones and knives, 40 7.62 caliber bullets used by AK-47 rifles, a Rocket Propelled Grenade (RPG), and grenades were found. All of the AK-47s, which were visible to the crew of the *Rotterdam* during the chase and confirmed, through photographic evidence, to have been in possession of the Somalis, had been thrown overboard. Oral statements taken, by the crew of the *Rotterdam*, of the crew of the hijacked *Burhan Noor*, indicated that the Somalis had used their skiffs to attack the *Burhan Noor*, that no resistance to the attack was attempted, and that it was their understanding that the dhow was to be used as a mother ship for further attacks farther away from the Somali coast.

Interviews of the accused revealed that the Somalis were between the ages of 15 and 38 (three were under the age of 20), and were recruited by persons known to them who were in the business of assembling crews for the purpose of engaging in piracy. Each was advanced between USD 100 and USD 200 to hijack a dhow. They were told that they would be compensated upwards of USD 3,000 each for returning with a captured dhow.

The court noted that the burden of proof had been met in detailing that the accused had violated Section 65(1) of the Seychelles Penal Code - piracy, as read with Section 65(4) of the same. Section 65(1) defines piracy as “(a) Any illegal act of violence
or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or aircraft and directed (i) on the high seas, against another ship or aircraft, or against persons or property on board such a ship or aircraft; (ii) against a ship or an aircraft or a person or property in a place, outside the jurisdiction of any State; (b) Any act of voluntary participation in the operation of a ship or an aircraft with knowledge of facts making it a pirate ship or a pirate aircraft; or (c) Any act described in paragraph (a) or (b) which, except for the fact that it was committed within a maritime zone of Seychelles, would have been an act of piracy under either of those paragraphs.”

While there was no doubt that the accused had engaged in piracy jure gentium, I was shocked that questions of jurisdiction seemed to have been glossed over in a rush to “justice.” I was most perplexed by the rationalization that conceptions of territorial sovereignty could be discarded; that Somali citizens could be arrested within the sovereign territory of their homeland by a foreign naval power, held for weeks in limbo, transported over 1,500 kilometers to a sovereign unrelated in any way to the act, tried under the municipal law of that foreign nation, and convicted under the rules of that law. The practice, the process, the outcome, seemed an anathema to a rule of law.

As I sat in the courtroom, I listened as the presiding judge, C.G. Dodin read the charges, recounted the guilty verdict, and hand down the sentence in English. There was a pause, and then the charges, the recounting of the guilty verdict and the sentence were read in Somali. During the entirety of the reading in Somali I was transfixed on the six Somalis to the left of me sitting in a benched box reserved for the accused. Each man received twelve years for each of the two counts of piracy, twenty-four years in prison. The lone youth, who was sixteen at the time of sentencing, received six years on each
count, twelve years in prison; my son had recently celebrated his seventeenth birthday. Not a tear was shed; there were no emotional outbursts, no visible displays of sadness. Almost without pause, one of the convicted men stood to address the court. In broken English he thanked the court and the judge; strangely, he smiled, not a grimaced grin, but what I perceived as a genuine display of happiness. Then I looked at the others, they too displayed cheek-to-cheek toothy grins. My mind had trouble reconciling the difference between a sentence of twenty-four years in prison and a death sentence, yet those convicted were smiling.

I later spoke with both defense and prosecuting counsel, asking them about what I had just witnessed. The impressions they shared with me were quite similar. The situation in Somalia went beyond poverty. They suggested that western conceptions of poverty still included hope, hope for change. The men who had just been convicted of piracy came from a place where hope was absent. Engaging in maritime piracy was a way to bring hope back to their lives. In this particular case the potential payoff of USD 3,000 was not large in comparison to the potential payoff for hijacking a large cargo vessel or oil tanker which could amount to USD 50,000 to USD 75,000; potentially more than twice times the expected lifetime earnings of an average Somali male. Yet, USD 3,000 was life-changing. It could buy a house, livestock and secure a family.

The dream of these young men, in the best possible scenario, was to hijack a large vessel and earn a huge payday. This allowed them to buy a house, a car, start a legitimate business, support a number of wives and children, and to support parents and extended family. Absent that reality, a smaller payday would suffice until another opportunity to engage in maritime piracy presented itself. Their alternative realities were shocking to
me. Their best-case alternative reality was to be picked up by the navy of a Northern European country, charged and convicted of piracy in the courts of that country, and to apply for and be granted asylum, based on human rights law. Bringing their family to that country after serving their sentence was their goal. Being tried in a third-party jurisdiction, juridical challenges aside, was not troubling to them. They understood that they would be fed three meals a day, have adequate housing, and be with fellow Somalis. They knew that they would not serve the entirety of their sentence in Seychelles; they knew that they would not serve the entirety of their sentence in any respect. The reality was that they would be repatriated to Somali prisons (built courtesy of the UNODC-CPP, later the UNODC-MCP) within three years, that they would spend only a short time in those prisons, while being able to reconnect with immediate family and clan members, and once released, be able to ply their trade once again, should the dire social and economic situation persist at home. They were not pirates by choice; they were pirates because they had no choice.

**A short social history of exceptional Somalia**

As discussed in summary form in the following chapter, piracy has existed in its present form for millennia, yet the response by the international community to Somali piracy is unprecedented. While I do not suggest, in theory or in practice, that unique social situations or social problems should result in juridical responses that are inconsistent with international law, examinations of cases in which this has been done can provide contextual meaning to outcomes. While, in general, it can be suggested that the genesis and political progression of any and all nation-States is *sui generis*, in the case
of Somalia I assert that its history, along with interactions with and responses by the States of the international community, has contributed to Somalia being a unique State, and Somalis being a unique people. I further assert that this history has contributed to conceptions of Somalia as a geo-political amorphism, Somali piracy as a unique form of piracy, and has provided justification to powerful nations, global corporations, and the international community, as a proxy for those powerful nations and corporate interests, to address Somali piracy in a manner that can not only be considered *sui generis*, but more germane to this dissertation, contrary to an entire history of the practice and theory of piratical law.

Through a combination of written historical evidence and oral tradition,\(^5\) I.M. Lewis suggests that the use of the word “Somali,” first used to describe a people in the fifteenth century, post-dates the beginning of the migration and expansion of the Hamitic Somali people by nearly half a millennium.\(^9\) Over a period of nearly ten centuries the Somali migrated from the coastal region of the Gulf of Aden beyond the land borders of both present day Kenya and Ethiopia to inhabit nearly the entire Horn of Africa. (Lewis 1962:36)

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\(^{10}\) The importance of oral tradition in the form of tribal lineages is, as Bohannan states, “at once a validation and a mnemonic device for present social relationships.” (Bohannan 1952 in Lewis 1962:36) It is not that the truth of particular lineage is the only truth, but it is a truth as understood by those who are able to create and perpetuate that truth. In this respect, Samāle societies belong to “the class of segmentary lineage societies” “whose social groups are lineages… deliberately manipulated to represent not the past, but the present balance of political relationships.” (Lewis 1962:36) In this way, these lineages not only connect the past to the present and future, but also make possible, as well as limit, social interactions and structures. (Lewis 1962, MacMichael, 1922) This creation of social reality via a genealogical connection is significant not only to Somali identity, but also to social relations and the structures of social control. In Somali society these structures are manifest in strong forms of informal social control (e.g. kinship and clan groups) and weak forms of formal social control (e.g. juridical and political apparatuses). (Lewis 1972:386)

\(^{11}\) The first references to ‘Somali’ as a distinct group are believed to be those of geographers al-Idrisi and Ibn Sa’id. Al-Idrisi stated in the twelfth century that, “Merca [near the Shebell river] was the region of the ‘Hadiye’.” Approximately a century later Ibn Sa’id noted that near a town known as Merca was the “‘capital of the Hawiye country’.” Both referenced the Hawiye clan. (Lewis 1966:27)
1960) A result of this migration is the displacement of indigenous populations, the Galla to the west and Bantu populations to the south and southwest.\(^{10}\)

Beginning shortly after the Islamic *hejira*\(^{11}\) in the early 7\(^{th}\) century, Arab traders and proselytizers established settlements on the coasts of the Horn of Africa, where they formed a quasi-aristocracy, intermarrying with the local Hamitic population.\(^{12}\) (Cummings 1986:5; Lewis 1960; Lewis 2002:4-5) The spread of Islam with this migrating population had a profound impact on not only the development of the Horn, but also on the development of Somali social structure in the form of clan identity. It is this link to both Hamitic Africa and Salafi Islam that today informs the lives and social relations of Somalis, as well as Somalia’s relationships with its former colonial powers and present-day global powers. (Lewis 1960) I contend that the relationship of this unique Islamic-based Somali clanship to global power structures is in fact reified in both

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12 For additional information on modern relationships between the Somali and the Bantu see Besteman (1999) *Unraveling Somalia: Race, violence and the Legacy of Slavery*, University of Pennsylvania Press.

13 The *hejira* (622 CE) marks the first migration of proselytizers of Islam, coinciding with the exodus of Mohammad from Mecca to Medina.

14 Ahmed suggests that evidence supporting assertions of the introduction of Islam to the Horn of Africa during the time of Mohammad lack empirical support, stating that not only was Zeila (in Northwestern Somalia near the Djibouti border) an Abyssinian Christian city, but the numerically small community of Muslims paid tribute to the Abyssinians. He additionally notes the pagan customs practiced by northern Somali groups were “only lightly touched by Islam.” (Ahmed 1995:8) Cummings also reminds us that not only preceding the *hejira*, but also preceding Islam, Abyssinians lived in the Arabian Peninsula. (Cummings 1986:5) For a discussion regarding interpretations of archeological evidence supporting disparate views of contact between the peoples of the Northern Horn of Africa and Southern Arabia including Yemen see Fattovich 2010:13-164.
the socio-juridical frameworks aimed at addressing Somali piracy\textsuperscript{13} and the socio-political actions of the present day Somali states.\textsuperscript{14}

The salience of which will become evident during the reading of this chapter, not only do Islamic-based Somali clanship structures inform Somalia’s relations with external governmental and non-governmental organizations, it is also through this system that Somalis understand and experience their position within Somali society and within the myriad agnatic divisions that comprise greater Somali society. “Every Somali group has a genealogy which has some historical content, and which also represents the way in which contemporary groups combine and divide in the present political structure of Somali society.” (Cassanelli 1982:6-7; Lewis 1960:215) While Lewis made this observation in 1960, it is no less true today. (Menkhaus 2003)

A vestige of the Muslim elites who brought Islam to the Horn of Africa, Somali clans are structured on patrilineal lines, yet it is primarily the division of labor, pastoral nomadism versus agricultural production, which distinguishes the two major divisions of Somali clan structure, the northern Samāle and the southern Sab. Samāle clans practice pastoral nomadism, moving great seasonally regular and patterned distances to feed and water their livestock: droves of sheep and cattle, tribes of goats, and herds of camels. In

\footnote{Durkheim understood the “… law as a prime example of the consecration or objectification of social norms and values[.]”… “…a visible symbol of all that essentially social[.]” (Hunt 1978:65) I suggest that these norms and values are in fact reified as not only “the law,” but also as treaty, resolution, enforcement action, adjudication and sanction.}

\footnote{While the international community presently only recognizes the Federal Republic of Somalia, the influence of the ruling federal government extends over only a small part of the federal capital Mogadishu. There are other “governments” operating in various areas of Somalia that service the needs of those people within their jurisdiction including the internationally unrecognized Republic of Somaliland. This former British protectorate, which declared itself independent from the Republic of Somalia in 1991, is nominally the successor State of Italian Somaliland, a trust territory administered by Italy.}
comparison, the Sab clans are farmers and agropastoralists. There are four main Samāle clan groups: the Darōd centered in the north, western central (into present day Ethiopia) and south (into present day Kenya); the Hawiye, located primarily in center Galmudug region and also straddling southern Ethiopia and northern Kenya on the southwestern Somali border; the Isaaq, who predominate in the north central region; and, the Dir in the northwest. There are two southern Sab clans: the Digil and Rahanwayn, both straddling and between the Shebelle and Juba rivers in the south. Each of these major clan lineages or families is further divided into sub clan and sub-sub clan groups. (Lewis 1972; Muhammad 1967; Njoku 2013:14) These sub-groups are structured on two socio-cultural practices: Dia-paying (as relevant to Somali clanship and informal social control practices), and ‘linkage allegiance[s]’ that are situationally dependent and in constant flux. (Lewis 1962:38; Lewis 1972:386)

Lewis calls dia-paying groups “the most stable units” of social and political structure “in a system of shifting genealogical attachment.” While dia-paying groups are based on patrilineal kinship ties (tol), the nature of their function is founded in the social economy of nomadic pastoralism and a system of informal social control. The

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17 The Darōd trace their lineage to Sheikh Ismā‘īl Jabartī who migrated from the Arabian Peninsula in the tenth or eleventh century; the Isaaq to Sheikh Isaaq who migrated in the twelfth or thirteenth century, also from the Arabian Peninsula (Lewis 1960:219-220); the Dir to Dir, grandson of Ram Nag whose migration history is not known definitively, but who is probably from either the Arabian Peninsula or the Indian Sub-continent; and, the Hawiye to Hawiya Irir brother of Dir. (Lewis 1966, Lewis 1969) It is assumed that Ram Nag migrated to the Horn of Africa sometime during the late tenth to late eleventh centuries. Lewis notes that these “genealogical fictions” are rare among the cultivating Digil and Rahanwayn clans of the south. (Lewis 1959:274)

18 Lewis defines the ‘levels of segmentation’ of clan social relations as such (large to small unit members): Clan-family, Clan, Primary lineage group, Dia-paying group, and Individual elder. (Lewis 1959:275)

19 This system of control falls under what Weber would describe as a substantive irrational system, or one of ‘Khadi Justice’, where ‘law’ is a part of everyday life, and custom is used to settle disputes. The objective of such a system is social or collective cohesion. This is in contrast to both a formal system,
foundation of the *dia*-paying group is part social contract, part insurance policy (as it exists under the informal or customary legal system known as *Xeer* or *Heer*). Contractually members of “a common [patrilineal] ancestor from four to eight generations removed” commit to the payment of compensation to others within the group in the event of death or loss. The size of a group can vary “from a few hundred to a few thousand men” (Lewis 1959:276; Lewis 1962:38; Muhammad 1967:102), with hundreds of known groups within Somalia (Lewis 1982:390). This commitment to payment for unexpected or unanticipated casualty is essentially a form of mutual insurance. Yet, while *dia* refers to the “obligation to pay and receive damages for injury and death,” in practice the *dia*-paying group supports the aggrieved party (intra *dia*-paying group) until “revenge or satisfactory damages [have] been exacted” (Lewis 1972:390).

While *dia*-paying groups serve as a self-funded mutual insurance to intra-group members, *dia* payments also cross group boundaries. In cases where there is injury in the form of “[property] damage, [physical] injury, or manslaughter,” and there is knowledge of the offending party, “…the compensation to the aggrieved party is paid by members of the offender’s lineage in the form of *dia.*” Excluded acts appear to be only those where there was malicious intent (e.g. theft). Quarrels that result in physical or property damage are covered under *dia* because the ultimate outcome or effect of action is unknown to the offender (Holý 1967:469-470). This contrasts with common law which recognizes that persons who engage in acts where the desired outcome will result in damage to person

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where the workings of the ‘legal’ process are separated from everyday life, and from where a class of professionals in content and procedure emerge, and a rational system, where social relations and inequalities are discounted in favor of truth finding. (Weber and Rheinstein 1954:213, 224, Weber, Roth and Wittich 1978:775, Sutton 2001:119)
and/or property, and/or have knowledge that their actions could result in the damage to
person and/or property have responsibility for those acts.\textsuperscript{18} This difference in juridical
correction is consistent with the socio-cultural and socio-economic differences between
pastoral and post-industrial societies, and helps frame relations between the two.

As discussed above, there are many levels of clan structure that exert informal
social control on both the individual and the group. Clanships, based on lineages or
lineage fictions, are not only the largest, but also the least ephemeral, of the clan
structures. As the clan structures branch into smaller groups, the cohesion between the
particular group and the individual member, as well as cohesion between individual
members, becomes less static. These weakened bonds lead to comparatively more fluid
social relations. Whereas “[i]n many parts of Africa, the principle of government is based
upon allegiance that the people owe to the hereditary chiefs,” Somalis owe primary
loyalty to the clan. “The binding loyalty that the members owe to their \textit{dia}-paying group
[as a proxy for groups smaller than that of the clan] does not prevent them from forming
other alliances [that may conflict with the interests of local elders].” (Muhammad
1967:101) This fluidity in the structure of social relations has been implicit in the
recruitment of men to engage in maritime piracy; in social constructions of not only
piracy, but in the relationship of those engaged in piracy and those engaged in other

\textsuperscript{20} See for example the Modern Penal Code (a guideline for state legislatures in enacting criminal law),
where \textit{mens rea} is defined with regard to culpability. The elements of knowledge of criminality do not
merely rest on the commission of an act defined as illegal, but on the capacity of the individual to
understand that the act was illegal. There are four levels of “understanding”: Negligence - where a
reasonable person would or “should be aware of a substantial and unjustifiable risk” that his conduct will
lead to a particular outcome; Recklessness - where the actor “consciously disregards a substantial and
unjustifiable risk” that his conduct [or the result of his conduct] is of [or will lead to], a particular
outcome; Knowledge - where the actor assumes that there is a high probability that his conduct will lead
to a particular result; and, Purpose - where the actor consciously engages in conduct to bring about a
particular outcome. (Marcus 1993:2231)
business enterprises; and in the relationship of those engaged in piracy and those engaged in formal social control apparatuses.

While Somali culture is both structured around, and contributes to, a number of layers of agnatic social groups ranging in size from clanship groups to sub clans, and from \textit{dia}-paying groups to allegiances between individuals and elders, what is surprising is the lack of organizational control at the highest rungs of the hierarchy and behavioral control at the levels closest to the individual. (Lewis 1959:275-276; Lewis 1960:215) This lack of organization and social controls, combined with agnic loyalties that are based on hereditary formations that are many generations removed, lead to unique political allegiances and formations that are fluid and situationally dependent. Where external observers might see highly decentralized and independent groups operating under a leadership concentrated into the hands of elders, operationally and functionally the resultant political and social structures are anarchistic. (Lewis 1962; Samatar 2003:29) While for well over a millennium this fluidity has served the socio-economic and socio-political realities of pastoral nomadism, through late and post modernity it has been implicated in an inability to provide Somali society with formal institutions and social structures that give rise to a civil society that can both exert formal social control over its populations and can interact with external global powers and organizations. This is one of the primary reasons that global powers have not been able to exert influence over both Somalia’s internal politics and Somalia’s interactions with the international community. It is also one of the reasons that the first decade of the twenty-first century saw levels of piracy \textit{jure gentium} off the Horn of Africa not experienced since piracy plagued commerce in and around the East and West Indies, the Malabar Coast, Northern
Africa and the Eastern Seaboard of the North America from the time of Queen Elizabeth I of England through the Golden Age of Piracy and into the early 19th century.\(^{19}\)

To highlight the challenges of not only the functioning, but also the creation and maintenance of socio-political units within a greater Somalia, a brief discussion of Galmudug should suffice. Galmudug was officially formed in August of 2006 as the administrative regions of Galgudud and Mudug united in accordance with Article 11 of the 2004 Transitional Federal Charter. Yet this union was not truly the union of two functional socio-political units; it was, and remains, a fungible socio-political unit based on clan relationships. A special report on Galmudug in the Somalia Report underscores the salience of clan relationships to social structures in present day Somalia.

The merger of the regions was not predicated on the coalescence of two functional governmental units, but was “an attempt by the most powerful clan of the region, headed by members of the Sa’ad clan diaspora, to consolidate power. To further solidify its base and influence, Galmudug solicited the support of the Shiikhal, Marehan, Madhiban, Suduble, Arab Salah, Saruur, and Ayr clans. In addition, at the end of last year the Wagar-dhac (a sub-clan of Marehan) officially joined the other clans supporting the Galmudug project. The state is currently trying to engage the Biyo-Maal clan (a sub-clan of Dir) to join the state and extend their reach into Hiran region.” Yet even with clan power sharing accords in place Galmudug is “broken into a series of clan based mini-states” further “there are few resources or government structures to project governance.” “Puntland controls the northern section of Gallkayo, the capital… The Ahlu Sunna Wal Jamma (ASWJ) militia controls… parts of Galgadud [sp.] including Guri-El, Ceel-Bur, Dhusamareb and Abud-Wak (from Marehan, Dir and parts of sub-clans of the Habir Gedir like Saleban and Cayr). The mini-state of Himan and Heeb, created by elements of the Sa’ad rival Saleban clan, controls Adaado and the surrounding area.”\(^{20}\)

\(^{21}\) This period of over 300 years includes attacks by British privateers on Spanish and French maritime commerce, privateering and piracy against a variety of States occurring in and around the Caribbean and the British (American) colonies, attacks on British, French, Dutch and Portuguese maritime commerce in the Eastern and Western Indian Ocean, and attacks by the Barbary Corsairs in the Mediterranean. 

\(^{22}\) http://www.somaliareport.com/index.php/post/3120
The above quote from the report is interesting in a number of respects. First it refers to the region or state of Galmudug as a “project,” and does not mention it in the context of an established and functioning government. Second, it is a ‘project’ based on the support of, from a Western prospective, non-political units, clans, and dependent on clan relations. Third, power within the region is not based on, again, Western understanding of socio-political structures, or more correctly a Weberian interpretation of Western socio-political structures, but on inter-clan relations. Fourth, not only does Galmudug lack defined borders, as does the entirety of Somalia south of Galmudug, with the potential exception of Mogadishu, but its borders are dependent on clan representation and relations. Fifth, mini-states ruled by clans within Galmudug fulfill the structural and process roles of social control in certain areas of the region; and, a state that has declared its independence from the country of Somalia, Puntland, controls some areas in the north of Galmudug. Finally, as made clear in the map below, regional borders within and to the south of Galmudug are not identified as counties, districts or similar political descriptions, but by the clan that controls the area.

Figure 3.1 Map of the Galmudug Region of Somalia
Showing Regional Control by Clan Groups
Beyond the brief discussion above, a case cannot be made that the millennium-long Muslim trade had a profound effect on either the internal structure of Somali society, Somali societies’ interaction with those societies external to it, or Somali expansion throughout the Horn of Africa.\textsuperscript{21} The same can be said of the influences of the slave trade and of the Ottoman Empire, and that of the influences of Germany and France. And while the influences of the British and Italians during the years between the signing of the Treaty of Berlin (1885) and the end of World War II, and the years between the end of World War II and the gaining of independence by the countries of the Horn were significant in terms of external social relations, their influences and effect on Somali societies were not structural ones, with one significant exception: socio-political structures in the form of border construction. (Hess 1966; Lewis 2002) These borders, bisecting and dividing clan communities, have, for decades, continued to be a source of conflict for the countries of the Horn.\textsuperscript{22} While the borders created during the waning days of colonial empires created sovereignty issues for many African nations, Somali’s situation is somewhat unique. Somalia does not hold numerous tribal groups within its borders, it holds ethnic Samāle. Yet, those ethnic Samāle also live in Ethiopia and Kenya. The desire for an all-encompassing Somali homeland has been a source of friction between Somalia and Ethiopia, and to a lesser extent Somalia and Kenya, for decades.

\textsuperscript{21} For those interested in a concise summary of Somali expansion throughout the Horn of Africa and Somali interaction with Abyssinian Empire from approximately the thirteenth century to the early twentieth century refer to Lewis 1960.

\textsuperscript{22} Cassanelli clearly lays out the basis for the border dispute encapsulated in Britain’s decisions regarding the former Italian colony of Somalia in the aftermath of World War II. “In the end, the proposal of British Foreign Minister Ernest Bevin to form a ‘Greater Somalia’ uniting all the Somalilands was scrapped in favor of a less imaginative solution: Britain retained its northern Protectorate, the Ogaadeen was returned to Ethiopia, and former Italian Somalia became an Italian Trust Territory under the United Nations supervision for a period of ten years.” (Cassanelli 1982:34)
Somali independence, the emergence of a fractious State and the growth of a moral economy

The Somali Republic was formed of the British and Italian Somaliland protectorates on July 1, 1960. Aden Abdullah Osman Daar served as president until 1967, when his former Prime Minister Abdirashid Ali Shermarke electorally defeated him. During this period of time, the government was committed to policies based in civic nationalism and institutionalized democracy; yet there were groups with competing sectarian clan-based agendas who sought “…to use public power for divisive and private ends” (Samatar, Lindberg and Mahayni 2010:1381). Mohamed Siad Barre came to power in a bloodless coup d’état backed by the Soviet Union after the assassination of then-sitting president Shermarke in late October 1969, and ruled as a military dictator until 1991. Barre’s regime was based on clan-centric nepotism; and it was inter-clan power struggles that would ultimately lead to his ouster. Barre, who was of the Rer Dini sub-sub-clan (located in Ethiopia) of the Marehan Darōd centered in northern Somalia, was overthrown by forces allied with Mohamed Farrah Aaidid who was of the Habar Gidir sub-clan of the Hawiye from central Somalia.

With the exit of Barre, regional clans have ruled the remnants of a factious Somali State semi-autonomously since. Functionally, the State of Somalia operates as four distinct political units, three of those units having declared independence (Somaliland, Puntland and Galmudug),\(^{23}\) yet the international community politically recognizes none

of the three. Interestingly, at least one of these units, the Republic of Somaliland has a functioning government, viable and functioning political and social control infrastructures, and relative peace. It is rather perplexing why the power brokers of the international community prefer to interact with a federal government that has proven to be impotent, corrupt and incapable of forming a unified political structure; unless of course these power brokers find it more appealing and/or remunerative to deal with chaos than with stability.

The Republic of Somaliland sits along the coast of the Gulf of Aden in the northern part of Somalia, east of Djibouti and west of Puntland. Puntland, comprising the northeast of the country, sits north of Galmudug. Leaders of these later two regions contribute to the ‘functioning’ of the federal government, but do little to contribute to its exercise of control in areas external to Mogadishu. In areas outside of Somaliland, government services and functional infrastructure are close to non-existent. Failures by the international community to foster a functioning unified government have been as numerous as attempts, as inter-clan political struggles trump the goal of establishing an inclusive functioning government.

While two failed United Nations (UN) missions (United Nations Operations in Somalia I and II – UNOSOM) led to the departure of both the UN and the International Red Cross (IRC) in 1995 (Sorenson 2008), warring factions did ultimately come together to negotiate a return to a united Somali federal government. Negotiations led by the Inter-
Governmental Authority on Development (IGAD) and the Somali Restoration and Reconciliation Council (SRRC),\(^2^4\) culminated in the establishment of the Transitional Federal Government (TFG) in 2004.\(^2^5\) (Menkhaus 2007) The TFG appointed the then sitting president of Puntland, Abdullahi Yusef Ahmed (of the Marjertain sub-sub-clan of the Harti Darōd), as president of Somalia. While the TFG is the politically recognized government of the Federal Republic of Somalia, as mentioned above, functionally Somalia operates as a very loose federation composed of autonomous regions based on clan relations.

Out of the remnants of the dysfunctional TFG, and with the input of a number of influential leaders, in February of 2012 an agreement was reached to form a parliament and to draft a constitution. A little over seven months later the Constitution was passed through the National Constituent Assembly. After forming a committee to oversee presidential elections, and the appointing of two interim presidents to lend political support for the presidential electoral process,\(^2^6\) Somali legislators elected Hassan Sheikh Mohamud, of the Abgaal sub-clan of the Hawiye as president.

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\(^{2^6}\) Both organizations were heavily influenced by Ethiopia with whom Somalia has had ongoing disputes, and a failed military incursion against in 1977-1978. The disputes were a consequence of the aforementioned arbitrary borders drawn by colonial European powers in establishing the States of the Horn of Africa. These borders had the effect of dividing both the ethnic Somali Darōd and Hawiye clans between Somalia, Ethiopia and Kenya.

\(^{2^7}\) The TFG, which replaced the ineffectual Transitional National Government (2000-2004), was initially located in Jowhar and Baidoa, south of the capital Mogadishu. Its location was a compromise as Mogadishu was under the control of first, the Somali Reconciliation and Reconstruction Council (SRRC) led by Hussein Mohamed Farrah Aidid (son of warlord Mohamed Farrah Aidid of Blackhawk Down fame) and later by the Islamic Courts Union (ICU) until 2006. The ICU was defeated by Ethiopian forces (backed by the United States), resulting in the splintering of the ICU, moderate elements going into exile and radical elements emerging as Al-Shabaab and aligning with Al-Qaeda.

\(^{2^8}\) Muse Hassan Sheikh Sayid Abdulle served as interim President for eight days in August 2012, and Mohamed Osman Jawari served for just over two weeks until mid-September 2012.
While in geo-political terms Somalia is a fractious State, the nature of its political chaos is unique on the African continent. Somalia exists in spite of a lack of socio-political cohesiveness as conceived in the West, yet that is not to suggest that there is an absence of social ties that lend themselves to the creation of socio-political structures. What is important for observers of Somalia to understand is that social cohesiveness and socio-political structures exist in manifestations that are uniquely Somali. “Somalis… are united by language, the Islamic religion, ethnic affinity and customs. They can therefore, as they do, claim that the population of the area constitutes perhaps the most homogeneous national entity in Africa.” (Contini 1971:77) On much of the African continent the borders established by former colonial powers effectively forced tribal groups with different social and value systems, customs and languages to form nation-States. While this nation-State gerrymandering experiment-run-amok resulted in a small number of socio-political successes such as Tanzania, the normative

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27 It is perhaps rather Eurocentric to term Somalia a “failed state.” The Horn of Africa is an amalgamation of clan principalities that, due to the legacy of colonialism, was divided into four states with borders that do not respect traditional ethnic or cultural boundaries. Thus the Somali State, like much of Africa and the Middle East, is merely a social construction of European power brokers, and not a greater Somali homeland. In this respect, Somalia is not a failed State, it is a State structure that perhaps should have existed in another form. In a somewhat oblique support of this thesis Lewis discusses the socio-political organizational structure of Somali clans, and the preferring of intra and inter clan structures and processes over written law or formal territorial borders. With regard to legal structures, Lewis suggests that customary law (Xeer) and, in certain situations and within certain groups, Shari‘a is called upon as a method of conflict resolution. Lewis notes that “[t]raditionally, Somali society is extremely uncentralized and individualistic to a point verging on anarchy” and that “Somalis have an unusually wide-ranging tolerance of the absence of centralized government. From a traditional perspective indeed, they could be said to need states less than states need them!” Lewis (1961)

Pham notes “Rotberg’s distinction between a ‘failed state’, deeply conflicted and bitterly contested by warring factions, and its extreme version, the ‘collapsed state’, characterized by a complete vacuum of authority and reduced to ‘a mere geographical expression, a black hole into which a failed polity has fallen’ (Rotberg 2003, 9).” (Pham 2010:338 fn 1) While I do not take issue with Rotberg or Pham’s geopolitical characterization of Somalia as a “collapsed state,” I suggest that the metric used to judge Somalia is not useful in understanding the Somali in Somalia; it is only useful making State-to-State comparisons.

During the 20th century, this construction of nations from disparate cultural, religious, and ethnic groups was not unique to the African continent. The former Yugoslavia was a group of different ethnic and religious affiliations held together by the strength and vision of Josip Broz Tito and his conception of nationalism. And, while Yugoslavia existed due to the preference given to the construction of a national identity above other socio-demographic factors, it fell apart soon after Tito’s death when those conceptions of nationalism were challenged by cultural differences and the resurfacing of long-buried ethnic and religious group animosities.

In contrast to the many other nations on the African continent and in contrast to Yugoslavia, the colonial borders establishing Somalia included predominantly a single ethnic group, Samâle. Yet, as mentioned prior, although the Somali are united by language, religion, Hamitic ethnicity, and customs, they are related based on agnatic descent groups, Darôd, Hawiye, Isaaq, Dir, Digil and Rahanwayn. It is to these groups that they owe primary allegiance, and it this primary allegiance that has placed Somali against Somali, and Somalia as a social construct of powerful European nations, against the same powerful nations and the new global hegemon, the United States, in addressing maritime piracy.

Under the backdrop of this fractious Somalia, piracy arose as a response to political upheaval and expanded as a response to predatory or IUU fishing in Somalia's
EEZ\textsuperscript{28} and due to a lack of a functioning Coast Guard, in its territorial waters.\textsuperscript{29} The first accounts of piracy in the waters off the Somali coast coincide with the beginning of the slow collapse of Mohamed Siad Barre’s regime in 1989. Therefore, the rise of Somali piracy is unique in the respect that it formed in the political and social control vacuum left in the wake of the collapse of an authoritarian regime. This assessment is echoed by Samatar and his collaborators, who stated “[T]here were no [reported] incidences of Somali piracy before the national government began to disintegrate in 1989.” This is in contrast to other iterations of maritime piracy that share a temporal, but not location, connection to Somali piracy. As Samatar noted, “[W]hat distinguishes the Asian, West African and South American pirates from the Somali case is that all but the latter operate under the watch of their states.” (Samatar, Lindberg and Mahayni 2010:1384)

The first hijackings of vessels in the waters off the Somali coast appear to have been politically motivated. The political opposition Somali National Movement (SNM) hijacked two vessels in late 1989 and early 1990 as part of a campaign to block supplies from reaching government-controlled areas. While the SNM referred to their fleet as the “SNM Coast Guard,” they not only hijacked the vessels but also, in one confirmed case, unloaded and took ownership of the cargo, and robbed and beat the crew (Samatar, Lindberg and Mahayni 2010).

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\item[\textsuperscript{28}] A country’s Exclusive Economic Zone extends 200 nautical miles from the low-water line (baseline) of its coast. (UNCLOS 1982, Article 57) The pelagic, benthic and subterranean (subsoil) resources within a county’s EEZ are exploitable only by that country, or its assignees. (UNCLOS 1982, Article 56 and Article 58) Articles 86, 87, governs passage through EEZs by ships flagged under foreign nations. The application and enforcement of domestic laws within EEZs are subject to Article 73.
\item[\textsuperscript{29}] Territorial waters extend 12 nautical miles from the low-water line (baseline) of a country’s coast and are part of the sovereign nation. (UNCLOS 1982, Article 3) Passage through a nation’s territorial sea by ships flagged under foreign nations is governed by UNCLOS (1982) Articles 17-32. The application and enforcement of domestic laws within a nation’s territorial sea are subject to Article 2.
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By 1991, piracy appeared to be a response to another social problem, IUU or “pirate” fishing, otherwise known as “resource pirating.” 1991 marked the collapse of the Barre regime and with it any semblance of order and enforcement in the waters off the coast of Somalia. Foreign trawlers took advantage of this situation, moving into Somali waters at the expense of artisanal fishers. With no national coast guard to safeguard their waters, fishers took up arms and not only patrolled Somali territorial waters and its EEZ but also organized hunts to find and “punish” those illegally fishing (Menkhaus 2009). To exacerbate the problem, remnants of the Barre regime, local government officials, or merely entrepreneurs, issued “fishing licenses” to foreign trawlers and longline fishers (Weir 2009). Ambiguity as to the official license-issuing agencies created a system where some profited as artisanal fisheries were destroyed by trawling nets and local fishers were either physically forced out or out competed by foreign trawlers.

Due to the long-term conflict and civil war, gauging artisanal catch and sustainable yield estimates within Somali territorial waters and its EEZ fisheries have been and continue to be difficult. While data show that in the mid-1980’s artisanal fish landings were approximately 14,000 to 15,000 tonnes, estimates of the sustainable annual catch of large and small pelagic, demersal, shark and lobster stocks in Somali territorial waters and its EEZ are on the order of 200,000 tonnes (FAO 2005). These stocks have been illegally fished by foreign fishing vessels from Spain, Japan, Italy, Korea and Eastern European countries, as well as by ships flying flags of convenience from the likes
of Panama, Liberia, and the Marshall Islands, at a cost to the Somali economy of between USD 100 to 300 million (USDoS 2009).\textsuperscript{30}

The long-term effects of IUU fishing are far more damaging than merely the immediate economic consequences. It is obvious that the destruction of artisanal fisheries was devastating to local fishers, and that the pilfering of pelagic stocks off the coast caused serious harm to the Somali economy, as Somali interests could have either developed a longline fleet or managed the stocks via the issuance of legal fishing licenses. However, in addition to the immediate effects were the decimation of a nascent fishing industry, forced changes in the career patterns of those who would or could have engaged in the industry, and the effects of long-term habitat damage on greatly diminished fish stocks.

The international community resoundingly condemned the response of Somali “pirates” in attacking and hijacking the fishing and support vessels operating illegally within Somalia’s territorial waters and its EEZ, yet had been surprisingly silent to the problem of IUU fishing in Somali waters. What is especially interesting about this silence is that many of the nations so vocal in condemning Somali piracy yet so silent in responding to the problem of IUU fishing, were also members of military coalitions formed to address Somali piracy (see Chapter 4), but did nothing in addressing the pilfering of Somalia’s fisheries; and most were also signatories to UNCLOS (1982). Article 61 of UNCLOS (1982) calls for the responsible exploitation of fishery resources by coastal States, mandating the use of the “…best scientific evidence available…” for

\textsuperscript{32} In its 2005 report on Somalia, the United Nations Food and Agriculture Organization (FAO) estimated that as of late 2005 700 foreign-owned vessels were engaged on unlicensed fishing off of the Somali coast. (FAO 2005)(http://www.fao.org/fi/oldsite/FCP/en/som/profile.htm)
conservation and management. Article 62 states that “[N]ationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State[.],” and that “[T]hese laws and regulations shall be consistent with this Convention and may relate, *inter alia*, to the following…” including: fisher licenses, species to be caught, landing areas, seasons to fish, etc. Article 62 mandates that signatories, as well as countries that follow UNCLOS (1982) as part of customary law, should have been protecting Somali fishing resources, not assisting in their exploitation. Further, a number of UNSRs written to specifically address piracy off the coast of Somalia note the problem of IUU fishing and mandate that the navies of powerful countries and coalition forces transiting the waters off the Horn of Africa intercede in cases of the pilfering of fish stocks. With this in mind, I somewhat rhetorically ask: What would have been the outcome if the world’s navies had expended as much zeal, effort and resources in protecting Somali fisheries as they had expended in protecting commercial shipping from piracy? Perhaps Somali piracy would not exist at all.

The first USD 1 Million ransom for hijacked vessels taken in the waters off the Horn of Africa was paid in January of 1995 when defensive pirates captured two fishing vessels that were illegally fishing in Somali territorial waters. The vessels belonged to the Somali Highseas Fishing Company (SHIFCO), an Italian corporation that was formed as a joint venture between Italian interests and the members of the Barre-era Somali government. Perhaps it was the size of the ransom paid, or the media attention given, but this incident seems has been used as a marker to denote a ten-year shift from defensive
piracy to entrepreneurial or organized criminal piracy. (Samatar, Lindberg and Mahayni 2010:1386)

Based primarily in the port town of Eyl in Puntland, piracy, as a clan-based enterprise, was controlled by the Darōd clan through the last decade of the 20th century. Starting in 2002-2003, members of the Mudug- and now Galmudug-based Hawiye clan had taken to the occupation, primarily out of the port towns of Hobyo and Haradheere. Because piracy is lucrative, has low barriers to entry and is a learned occupation, many of whom had been trained as members of the Somali police force or various reincarnations of the Somali or regional coast guards have turned to piracy. Also, while the dream of large ransoms is enticing, perhaps the primary reason for the existence of entrepreneurial criminal piracy is that many of the men who occupied these positions in law enforcement were paid both poorly and sporadically, with sometimes months elapsing between paychecks. Because of the nature of clan-based social relations, it is not uncommon for pirates, law enforcement and government bureaucrats to be members of the same sub or sub-sub clan. These social relations, combined with social norms, mores and morals that gave preference to clan relations and customary law (Xeer) over written law and rational bureaucracies, resulted in deviant labels not initially being attributed to piracy; thus, those who engaged in piracy were not the victims of secondary stigma (Becker 1973; Goffman 1963; Lemert 1951; Lemert 1967). This is not so much a case of a sub-culture’s mores superseding the mores of the hegemonic culture, but of adaptations of hegemonic culture to new behaviors. It was under this social structure that piracy or at least the piratical intent became an accepted subcultural deviant occupation.
This divergence in the rationale for engaging in piracy widened during first decade of the 20th century, as piratical action became less associated with the protection of fisheries, fishers and ecosystems, and more with deviant criminality. This period of transition within Somalia coincided with the buildup of multi-national military forces off of the Horn of Africa and in the Indian Ocean. It was during this period within Puntland and what is now Galmudug that the label “pirate” began to be understood as deviant, and to carry secondary stigma. (Samatar, Lindberg and Mahayni 2010; World Bank 2013b)

As noted prior, piracy as a global phenomenon existed on and around the Aegean and Mediterranean Seas from near the beginning of the second millennium BCE to when Rome asserted control over the seas in approximately 65 BCE; on the North Atlantic in the 8th through the 12th centuries; again on the eastern Mediterranean Sea during the 9th and 10th centuries; around East Asia periodically during the 12th, 14th and 19th centuries; along the Maghreb (North Africa) from the early-17th to the early-19th century; in the Caribbean from the mid-16th century to the early-19th century; and, on the North Atlantic seaboard of the United States from the 18th to the early-19th century. There have also been other episodic local bouts of piracy throughout the long history of seaborne trade and population movements.

33 Some research suggests that what evolved into entrepreneurial criminality has morphed into organized criminality. Some state that far-flung criminal networks have been established to finance, provision, and plan pirate attacks. As these networks have grown it appears that the flow of ransom funds has changed. While much of low-level pirate income is spent locally on Khat (a mild chewing drug grown in Ethiopia), higher-level pirates are shifting ransom money from Somali pirate centers to centers of Somali diaspora in Kenya and in some cases off the African continent (Dutton 2011)
Modern piracy had not been considered a significant social problem until the last decade of the 20th century, although it has been underreported for decades.\(^{32}\) (Chalk 2008) Piracy data from the United States Maritime Administration (MARAD)\(^{33}\) between the years 1985 and 1999 and the International Maritime Organization (IMO), which began tracking incidence of piracy in 1984 and maintains summary reports starting in 1991,\(^{34,35}\) suggest that modern piracy did not rise above fifty reported incidences worldwide per year until the early 1990s. This increase was primarily due to a localized increase in piratical activity in the South China Sea and the Straits of Malacca. Piracy as a less-localized phenomenon began to increase dramatically after 1994, rising from nearly 150 reportedly committed or attempted cases in 1995 to 571 cases in 2011, with

\(^{34}\) Interestingly this increased interest by the international community coincided with the rise of Somali piracy, although piracy had been problematic for decades in the South China Sea, around the Straits of Malacca, and off the west coast of Africa.

\(^{35}\) MARAD data, from the Anti-Shipping Activity Messages Database (ASAM), is compiled and maintained by the Federation of American Scientists’ Intelligence Resource Program and includes not only data on piratical activity, but also data on security-related incidents (e.g. seizure of ships by navies in areas where territorial borders are contested).

\(^{36}\) The IMO (an agency of the United Nations) was established in 1948 and became operational in 1958 (its original name Inter-Governmental Maritime Consultative Organization (IMCO) changed to IMO in 1982). Its purpose is to foster cooperation between governments with regard to the regulation and practice of shipping in the course of international trade, and to assist nations in the establishment of and adherence to standards and practices of maritime safety, efficiency and pollution control. In fulfilling its mandate the IMO has sponsored a number of conventions including: the International Convention for the Safety of Life at Sea (SOLAS) 1974 and amended in 1988, which addresses, amongst other items, “minimum standards for the construction, equipment and operation of ships, compatible with their safety.” As of December 2011, 159 States have acceded to SOLAS; the International Convention for the Prevention of Pollution from Ships (MARPOL) 1973 and amended by the protocols of 1978 and 1997, which covers the “prevention of pollution of the marine environment by ships from operational or accidental causes.” As of December 2011, 150 States have acceded to MARPOL; and, the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) and amended in 1995 and 2010, which “establishes basic requirements on training, certification and watchkeeping for seafarers on an international level.” As of December 2011, 154 States have acceded to STCW.

\(^{37}\) The International Maritime Bureau (IMB), a division of the International Chambers of Commerce, also tracks data on piracy. Reports of pirate activity are available via the Piracy Reporting Centre beginning with data from 1992.
353 of those cases occurring in international waters.\textsuperscript{36,37} This rise can be attributed to both the aforementioned increase in the South China Sea and concurrent increases in the incidence of piracy in the Indian Ocean, the Straits of Malacca (1999-2007), Latin American and the Caribbean, West Africa, and especially off of the Horn of Africa (notably after 2006).

According to the International Maritime Organization’s Global Integrated Shipping Information System’s Reported Incidence of Piracy and Armed Robbery (IMO’s GISIS), year to date (through March 31, 2015), there have been 106 pirate attacks worldwide, a significant reduction from the 2011 peak of 238 attacks during the same time period. Additionally, in 2011 during the three-month period mentioned above, 105 of 238 piratical attacks occurred in the waters off the coast of Somalia, with an additional 30 of the 41 attacks that occurred in the Indian Ocean being attributed to Somali pirates. The bulk of the other attacks occurred in the waters of the South China Sea.

Four years later, of the 106 piratical acts reported on the IMO’s GISIS there has not been a single attack in the waters off the Horn of Africa and the two reported attacks in the Indian Ocean occurred in port and cannot be attributed to Somali pirates. In the

\textsuperscript{38} http://www.imo.org/KnowledgeCentre/ShipsAndShippingFactsAndFigures/Statisticalresources/Piracy/Pages/default.aspx

\textsuperscript{39} There is some debate regarding the accuracy of piracy-reporting data. Many cases do not get reported (e.g. attacks on Yemeni fishing boats (Fedeli 2010)); some conduct is mistakenly reported as piratical activity (e.g. fishers carrying guns to ward off pirate attacks are occasionally detained as pirates); some cases are miscoded by aggregating and reporting agencies or groups; and some cases reported as piratical activity are in fact not piracy, but other forms of criminality. This appears to be definitionally as well as legally dependent. For example, within its piracy reporting data, it appears that the IMB conflates piracy, defined as taking place in international waters, with municipal crime. Similarly, the IMB reports burglary and robbery onboard cargo ships in port or in territorial waters as piracy. While this is criminality, it is not piracy \textit{jure gentium} (see http://www.mpepil.com/sample_article?id=epil/entries/law-9780199231690-e1206&recno=7& - Max Planck Encyclopedia of Public International Law entry by ITLOS judge Tullio Treves). While those who perpetrate such crimes may, under different circumstances, be considered pirates, based on the information reported by the IMB, they should be treated as criminals and be subject to municipal law and sanction.
following chapter I will discuss the juridical apparatus that is responsible for this dramatic reduction in Somali piracy. Yet, it is important to note that while piracy off the Horn of Africa seems to have been successfully addressed by the Armadas of the United States and the countries of the European Union, piracy is still alive and well in many other parts of the world’s oceans. There has been a resurgence in the South China Sea and the Straits of Malacca, and piracy is growing off the western coast of Africa, especially in the waters adjacent to the Nigerian and Ghana coasts. However, more importantly, from a juridical standpoint, as a lesson in the application of instrumental inequality and conceptualizing the law as a reification of power relations between hegemonic and subaltern actors, not a single non-Somali suspected of piracy has been subjected to the jurisdiction of third-party jurisdictional piracy courts where no nexus can be established between the seizing State and the State of the adjudicating body; none have been deposited into the criminal justice systems of Kenya, the Seychelles or Mauritius where municipal law has not been broken; none have been subjected to general

Incidence of maritime piracy in the Straits of Malacca fell from 60 attacks in 2004 to 17 attacks in 2005. There were 22 attacks in 2006 and 12 in 2007. The number fell to near zero during the period between 2008 to 2010, before rising to 23 in 2011, 24 in 2012, 20 in 2013 and, ultimately, 81 in 2014. “While [in April 2011] Malaysian Defence Forces chief Jen Tan Sri Azizan Affifin said the Straits of Malacca last year achieved a ‘close to zero incident level’ due to the collaboration among the countries which formed the Malacca Straits Patrol (MSP) – Malaysia Singapore, Indonesia, and Thailand,” I contend that the real reason has less to do with enforcement success than with the effects of the devastation and rebuilding, in the wake of the earthquake and tidal surge that hit the area in December of 2004. The level of piracy dropped in 2005 through 2007 due to devastation from the earthquake. Pirate infrastructure had been as devastated as governmental, residential, and commercial infrastructures in the aftermath of the earthquake. Rebuilding in the area was slow to take hold, with efforts lagging until 2007. While these efforts assisted in the rebuilding of infrastructures within the extended Aceh area, they further negatively impacted pirate operations. These rebuilding efforts continued to have a negative impact on piracy in the area until 2011, when normalcy began to return. Normalcy has brought with it the reestablishment of piracy bases and the resumption of piracy, as evidenced by the increase of piracy attacks in the Straits of Malacca. Additionally, there have been no reports of a more recent reduction of anti-piracy efforts in the area. This again supports my contention that in recent history anti-piracy efforts have had little impact on maritime piracy in the Straits of Malacca.
and aggrandized demonization by powerful States; and none have been confined to prisons in States were no nexus can be established between the seizing State and the State of the adjudicating body. What makes Somalia so exceptional that it has suffered the indignity of the usurpation of sovereignty at the hands of the institution that was established to guarantee sovereign rights and those powerful countries that act in the name of the international community and purportedly under the law of nations? What makes Somalis so exceptional that they warrant such universal condemnation from the international community to incur an application of international law in such a manifestation that has never heretofore existed?

In this chapter I have examined one side of the deviance/social control equation; in the following chapter I examine the other side. The normative line is to construe those who engage in maritime piracy as deviants, and those praetors of the ocean as heroes. The troubling news is that, while no group gets to wear the proverbial white hat, there are also no clear demons to permanently condemn to Purgatory.
Chapter 4: Praetors of the Ocean: Juridical Regimes to Protect Commercial Maritime Traffic and Project Global Power

At the beginning of Chapter 3, I noted that, based upon World Bank estimates, the world pays a high price in order to address maritime piracy off the coast of Somalia. That cost, upwards of “$18 Billion dollars a year in increased trade costs[.],” amounts to “an additional 1.1 percent value-added tax on all shipments that transit through the waters affected by Somali pirate activities.” (World Bank 2013a:33) This cost is not a direct cost but one that is assumed by corporations that transit the waters surrounding the Horn of Africa and ultimately passed on to those who consume the products transported by those corporations. Yet, there are other ways to account for the cost of maritime piracy. One of the most significant indirect costs of maritime piracy is that of enforcement and protection schemes borne by powerful seafaring nations that maintain a maritime presence along transit corridors and police the high seas where piracy is known to be an issue.

In this chapter I begin with a “rationality analysis” of the militarization of the maritime transportation corridors off the Horn of Africa. This is followed by an introduction to the military organizations responsible for the bringing of relative tranquility to the waters off the coast of Somalia; referencing organizations that lent rationale and support to joint military efforts; and the treaties and other international law (soft law) that brought an apparent end to a decade of Somali piracy.

In presenting a concise analysis of the militarization schemes employed to address Somali piracy, I do not suggest that those who serve in protecting maritime shipping do
not perform an outstanding job as, on the whole, they do. I also do not suggest that the expenditure of funds did not yield results; Somali piracy is definitely dormant. In terms of efficacy, the expenditure of funds and the militarization of the transportation corridors and high seas surrounding the Horn of Africa are, to a significant extent, responsible for the absence of piracy in the waters off the Coast of Somalia during the first quarter of 2015. Yet there are significant costs. I suggest that when powerful States decide that money and manpower cease to be limiting factors, when human rights, as defined under United Nations’ 1948 Universal Declaration on Human Rights, can be considered guidelines as opposed to guarantees, and when corporate interests weigh on the actions more strongly than the welfare of weak actors, addressing the lawlessness of a few subalteren actors within a defined social space can be accomplished. Yet this cost is great, localized and temporal. This can be confirmed by the fact that piracy, while presently absent off the coast of Somalia, is having a resurgence in the South China Sea, the Straits of Malacca and in the waters of Western Africa.\footnote{IMO piracy data note that the incidence of piracy in the territorial waters of the countries bordering, and on the high seas of, the South China Sea fell from sixty attacks in 2009 to thirty attacks in 2012, only to rise to sixty-five attacks in 2014. Also, the incidence of piratical attacks in the territorial waters of the countries of Western Africa and on the high seas abutting those waters rose from thirty-six attacks in 2009 to forty attacks in 2012, only to fall to thirty-one attacks in 2015. For purposes of comparison, attacks the in territorial waters of, and the high seas adjacent to, the countries of East Africa (Somali Piracy) rose from two-hundred twenty attacks in 2009 to a high of two-hundred and thirty-four attacks in 2011, only to fall precipitously in 2012 to fifty-three attacks, and finally to two attacks in all of 2014.} Yet, no special regimes exist or have been suggested to address piracy in other parts of the world. This is evidence of the social cost imposed by the international community in addressing piracy off the coast of Somalia; a cost that yields an outcome inverse to the juridical measures employed. This inequality will be addressed in Chapters 5 and 6, and discussed in Chapter 7.
It would be rational to assume that the USD 18 Billion per annum cost of maritime piracy off the coast of Somalia must have wreaked havoc on the income statements of the world’s largest shipping companies. In fact, in its 2012 report *The Economic Cost of Somali Piracy*, NGO Oceans Beyond Piracy noted that the cost of increased speeds of vessels, required to meet the standards of the 4th revision Best Management Practices (BMP4) (OCIMF 2011), as adopted in 2011 and as supported by the IMO, was approximately USD 1.62 billion, the cost of additional insurance was approximately USD 600 million, the cost of additional labor and hazard pay amounted to about USD 480 million and the cost of security equipment and guards cost nearly USD 1.75 billion. (Bellish 2013)

These cost estimates attributed to maritime piracy off the coast of Somalia would fall substantially in Oceans Beyond Piracy’s 2013 report. *The State of Maritime Piracy* notes that the cost of increased speed had fallen to USD 276 million, the cost of additional insurance dropped to approximately USD 186 million, the cost of additional labor and hazard pay had dropped slightly to USD 462 million and the cost of security equipment and guards dropped to approximately USD 1 to 1.2 billion. This report suggests that although cost estimates had fallen considerably, in total, those that utilized the transportation corridors in the waters off the Coast of Somalia bore USD 2 billion in additional costs due to the existence of Somali piracy. (Madsen et al. 2014)

While USD 2 billion is a staggering sum, in order to understand the magnitude of the effect of Somali piracy on the maritime transportation industry and subsequently on consumer goods, it is important to investigate how these cost estimates effect the revenues of those companies most affected by Somali piracy and, further, if those who
bear the cost of military protection and enforcement schemes are also the beneficiaries of such largess. Let us start a priori with the assumptions that all of these costs are solely attributable to “Somali piracy” and not to any other iterations of piracy that plague the high seas, that all piracy attributed to Somali pirates takes place on the high seas or the in territorial waters and not in ports, that they were totally unnecessary for seafarer and/or vessel safety absent Somali piracy, and that the figures are accurate.2

Regressing the yearly gross revenue of ten of the fifteen largest container and tanker shipping companies in the world3 against the number of piracy attacks off the coast of Somali and in the Western Indian Ocean, while controlling for the global growth rate (Real Gross Domestic Product growth) and inflationary pressure (Consumer Price Index inflation),4 during the fifteen-year period from 2000 to 2014, yields no R-squared values that are significant at the 95% confidence interval. Similarly, regressing gross profit and gross margin against the number of piracy attacks off the coast of Somalia and in the Western Indian Ocean during the same time period, again controlling for the global growth rate and inflation, yields no R-squared values that are significant at the 95% confidence interval. In total, there appears to be no evidence of a causal relationship between maritime piracy off the coast of Somalia and maritime shipping companies’ revenue, profit or gross margin. Additionally, any additional costs that these companies chose to incur have been successfully passed on to their customers and probably on to consumers; the same consumers whose tax dollars paid for the militarization schemes that

2 An examination of IMO and IMB-PRC piracy report data, and a reading of BMP4 will show this not to be the case.
3 Publically available financial data on the five remaining companies was incomplete. See Chapter 4, fn 6.
have knee-capped Somali piracy and for whose protection these corporations have paid no additional fee or tax (note that lobbying is not a fee or tax; it is a tax deduction).

These militarization schemes beg the questions: To what extent is there a duty for the State to protect the subjects of that State from harm? And, to what degree should there be equity in the receipt of benefits from the State (are there limits to corporate welfare)? While I will discuss the first of these questions in some detail in Chapter 5, it is important to note that the duty of the State to protect its subjects is recognized as part of customary international law. The roots of State protection can be found in the writings of Vattel. Vattel stated that “[W]hoever ill-treats a citizen indirectly injures the State, which must protect that citizen[, as the] sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection.” (Vattel 1916) Further it is a right of the State, under international law, to define a subject or a person. In fact, Regulation S §902(k)(1)(ii) of the Securities Act of 1933 includes in the definition a United States’ person “[A]ny… corporation organized or incorporated under the law of the United States.” So it must reason that, whether or not corporations are harmed in a financial sense by Somali piracy, it is the duty of the State to protect its “persons” from potential physical harm.

As the country with the single largest military presence and exposure, and the single greatest contributor of funds to the suppression of maritime piracy off the coast of Somalia, one can safely assume that most of the corporations involved in the

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5 The second question is deserving of a dissertation of its own.
transportation of goods transiting these waters are United States corporations. Why else would such resources be employed to address this particular iteration of piracy and not others? This, in fact, is not the case. Of the fifteen largest container and the fifteen largest tanker companies transporting commodities across the oceans’ common, only one, Overseas Shipping Group (OSG) with revenues of under USD 1 billion in 2013, is a United States corporation. In contrast, Japanese corporations Nippon Yusen Kabushiki Kaisha and Mitsui OSK Lines had, for the year ending March 31, 2014, combined revenue of nearly USD 50 billion, just under the gross revenue of the largest container/tanker company in the world Denmark based APM - Maersk. Additionally, some of the largest shipping companies, UAE based United Arab Shipping Company, Italy domiciled Mediterranean Shipping Company, and Russia’s Sovcomflot, who severally transport greater amounts of commodities than does OGS, do not report financial information because they are privately held.6

As will be discussed later in this dissertation, corporations and individuals are not the only unit of analysis with regard to maritime piracy; vessels, too, are part of the State. Article 92, read with Article 58, of the United Nations Convention on the Law of the Sea, states that “[S]hips shall sail under the flag of one State only” and “shall be subject to its exclusive jurisdiction on the high seas.” Further, Article 110 limits the rights of vessels from States other than the flag State to visit (to board and/or assert control over) a vessel. Thus the State confers territory on vessels flying its flag, while, at the same time,

6 For information on the largest container shipping companies by volume of commodities shipped refer to www.alphaliner.com. For the same information regarding tanker companies refer to Tanker Operator Magazine March 2013 - http://ea45bb970b5c70169e61-0cd083ee92972834b7bbe0d968b89995r81.cf1.rackcdn.com/2013top20.pdf. Corporate financial data can be found at Hoover’s, a Dun and Bradstreet Company and Morningstar, Inc.
recognizing the sovereignty of vessels flying the flag of other nations. (Unts 1982) Yet, in a world where maximization of profit and shareholder wealth know no national borders, flags are merely an instrumental tool of profit generation. While flags of convenience have been implicated in the problem of IUU fishing (Allen, Joseph and Squires 2010; Environmental Justice 2005; Le Gallic and Cox 2006; Lehr 2007; Panjabi 2009), they have also been implicated in lax environmental rule enforcement, poor mariner and vessel safety, and tax avoidance schemes (Sorenson 2008). Thus corporations with a global presence that establish corporate domiciles to minimize taxes are also able to further minimize taxes by flagging their vessels in tax havens with poor records of maritime environmental rule enforcement, and lax mariner and vessel safety requirements. These States who benefit from the issuance of “flags of convenience” do not contribute to the maintenance of militarization schemes that address Somali piracy, they are all but absent from the coalition forces patrolling the waters off the Horn of Africa, and they do not prosecute accused pirates who transgress against their territory. They are in the words of William H. McNeill “macroparasites,” drawing “sustenance from the toil and enterprise of others, and offering nothing in return.” (Anderson 1995:175)

Given the economics of the situation, one must question the expenditure by the United States government of hundreds of millions of USD for protection schemes that provide, on a revenue basis, over ten times the benefit to the corporations from the nations of the Marshall Islands (Teekay) and Bermuda (Orient Overseas and Frontline) than that which is derived by the single United States corporate beneficiary. If it is under the purview of the international community to police the oceans’ common, why are
protection schemes staffed primarily by the navies of powerful States and funded by those powerful States? Further, if it is under the purview of not only international community but also powerful States to sanction deviance that takes place on the oceans’ common, why have adjudicative bodies been established to address Somali piracy in third-party States where no nexus can be established, especially in cases where nexus clearly exists to other States? Why are not countries that issue flags of convenience required, as suggested in SUA (1988), to prosecute cases of maritime piracy perpetrated against their vessels?

In the preface to the 2013 edition of the Oceans Beyond Piracy’s *State of Maritime Piracy Report*, Chairman and Founder of the One Earth Foundation, Marcel Arsenault points out that in contrast to “capacity-building and shore-based counter-piracy programs [which] make up a tiny fraction of the funds devoted to suppression at sea: roughly 1.5% of global spending on Somali piracy…,” interdiction efforts by the military forces of powerful States account for the bulk of resource expenditures. In noting the unsustainability of this lopsided resource-allocation scheme, he states further, that “[S]uppression alone will not deliver sustainable solutions to Somali piracy… at a total global cost of $3.2 billion for suppression, this means that the international community spent $139.1 million for each attack that took place in 2013.” (Madsen et al. 2014:ii [see also discussion by Gilpin as early as 2009])

While in Chapter 1 I railed against both the use of reductionist methodologies to address complex social problems and the privileged position subsumed by the social science of economics in examining “social costs,” I cannot help but point out the understated nature of Mr. Arsenault’s comments. The same report noted above states that
in 2013 “OBP estimates that $21.60 million was spent on ransoms”; an average of less than USD 1 million for each of the 23 settled cases. For the moment, let us proceed under the assumption that all cases of ransom involved Somali pirates. If this were the case, it means that the international community spent USD 3.2 billion for piracy suppression, while USD 21.60 million was spent on ransoms. Of that approximate USD 3.2 billion, approximately USD 1.0 billion can be attributed to the cost of military operations around the Horn of Africa. This translates into powerful States of the international community spending military resources equaling almost USD 43.5 million per vessel successfully attacked. As stated above, the application of almost limitless resources to a comparatively small problem (maritime piracy off the coast of Somalia) experienced almost exclusively by a very small population (large container and tanker shipping companies), can yield results, but at what cost, especially when one considers that the vast majority of attacks are not successful?

General overview of shipping

The waters off the Somali coast are traversed by over 33,000 shipping vessels each year. In the five-year period ending 2010, over 1,600 of these vessels had been attacked by pirates (IMO GISIS data suggest 1,728 attacks, but only 190 hijackings). While in 2004 the IMB tracked only two incidences of piracy off the coast of Somalia, between the years of 2006 and 2011 attempted attacks increased nearly 750%, successful

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7 United Nations report S/30/2011 notes that “between 22,000 and 25,000 vessels transit through the Suez Canal each year.” The report also notes that 3.3 million barrels of oil are transported through the Bab-el-Mandeb Strait, representing 30 per cent of the world’s oil supply. (S/2011/30:17)


attacks increased almost 350%,\textsuperscript{10} and the attacks became increasingly violent\textsuperscript{11} while continuing long-term patterns of geographic periodicity.\textsuperscript{12} 

If one gives credence to opportunity theory, what makes these waters especially attractive to those who would engage in piracy is a simple equation of opportunity and lax social controls, and the waters off the coast of Somalia are full of opportunity and do lack almost all sovereign forms of social control. It is the growth of opportunity, coupled with the failure of State juridical apparatuses, which has been the single largest contributor to the growth of Somali piracy.

Approximately 90% of all global trade is waterborne (including intermodal trade), accounting for 8.4 billion tons of cargo in 2010. (IMO 2012) Between the years 1987 and 2006, international maritime trade grew at over 4% per annum. On a regional basis, Asia-Europe maritime trade is expected to increase at an annualized rate of 9.4% to reach 43.8 million TEU\textsuperscript{13} by 2015; Trans-Pacific is expected to increase at an annualized rate of 7.2% reaching 43.4 million TEU by 2015; and, maritime trade to and from South America is expected to increase at a 6.9% rate reaching 38.8 million TEU in 2015.

\textsuperscript{10} International Chambers of Commerce’ International Maritime Bureau Piracy Reporting Centre annual reports. See \url{http://www.icc-ccs.org/homepiracy-reporting-centre}.
\textsuperscript{11} The International Maritime Organization spells out action needed to tackle piracy. London: International Maritime Organization Press Briefing No. 3164, February 14, 2011
\textsuperscript{12} While between the years 2006 and 2011 maritime piracy in the waters off of the Horn of Africa (the Gulf of Aden and the Western Indian Ocean) experienced the largest number of pirate attacks and the most significant growth, hundreds of attacks still occurred yearly in the waters of Southeast Asia and the Indian Subcontinent, most notably the South China Sea; on both sides of the South American continent and, have rapidly increased in the waters between the Guinean and Nigerian Coasts. During the same time period, as a result of weather related catastrophes, piracy around the Straits of Malacca significantly decreased. While, since 2011 incidence of maritime piracy off the Coast of Somalia has experienced a precipitous fall, piracy near other chokepoints has remained a significant social problem. \url{http://www.icc-ccs.org/piracy-reporting-centre/prone-areas-and-warnings} and \url{http://www.icc-ccs.org/piracy-reporting-centre/imb-live-piracy-map}
\textsuperscript{13} A TEU (Twenty Foot Equivalent Unit) is the approximate capacity of a twenty-foot-long intermodal cargo container. Although the height of an intermodal cargo container is variable, it is generally assumed that one TEU is equivalent to approximately 1,360 cubic feet of cargo space (20’ x 8’ x 8.5’).
With this increase in maritime trade has been corresponding growth in the size of container ships. Whereas in 1980 the average size of a container ship was just over 3,000 TEU, by 2007, the average had grown to over 11,000 TEU. The largest container ship, the *Emma Maersk*, holds over 15,000 TEU. Growth in maritime trade and cargo ship size is expected to continue. (UNESCAP 2007)

If one examines maritime traffic through an economic lens of supply and demand, this increase is significant not just in terms of globalization and trade, but also because larger ships are more attractive targets for maritime pirates (they offer larger targets, are less maneuverable, and offer potentially larger payoffs), and because increased traffic creates increased opportunities for piracy. (Lehr 2007) This increased opportunity is magnified because of the need for maritime vessels to pass through chokepoints, areas of congestion and compression. These chokepoints include the Panama Canal, the Suez Canal, the Bosporus Straits, the Straits of Hormuz, the Strait of Bab el-Mandab (and the Horn of Africa) and the Straits of Malacca. Because maritime vessels use these chokepoints in traversing the globe, pirates gain an advantage in both the spatial and temporal knowledge that they lack on the open sea.14 (Chalk 2009; Emmerson and Stevens 2012; Guzansky, Lindenstrauss and Schachter 2011)

Due to a number of social factors, as well as the proximity to the Bab el-Mandab chokepoint and its related shipping lanes that traverse the Gulf of Aden into the Arabian

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14 Although services that geolocate maritime vessels online, such as www.maritimetrack.com’s live ships map, are a tool of corporations, security forces and laypersons, they can also be used by maritime pirates. The ability to geolocate with greater precision may become an increasing problem for the maritime transportation industry, as well as for maritime enforcement personnel, as pirates utilize this technology. Geolocation may reduce the need for pirates to attack maritime vessels near chokepoints, as it may concurrently make it more difficult for maritime enforcement to respond to distress calls and track pirates.
Sea and the Indian Ocean to pirate bases, piracy off the coast of Somalia continued to be a growth industry through 2011. Accordingly, pirate operations become more coordinated, professional and structured. This has led to job specialization, pay commensurate with job skills and tenure, and coordination with and occasional payments to bureaucratic officials (Hansen 2009). Yet the response by the international community to Somali piracy was overwhelming in terms of resources committed and manpower employed. Over a period of ten years this has led to the temporary disappearance of piracy off the Horn of Africa.

**Praetors of the seas off the Horn of Africa**

As the incidence of piracy off the Horn of Africa rose during the first decade of the 21st century, a level of international cooperation rarely experienced in the annals of history coalesced. The genesis of this cooperation can be found in United Nations Security Council Resolution (UNSCR) 1816, the first to specifically address maritime piracy off the coast of Somalia. Embedded within this resolution are also the seeds of the reification of inequality as detailed within soft law. The official press release by the United Nations’ Department of Public Information, News and Media Division, concerning the adoption of UNSR 1816, begins by a reaffirmation of Somalia’s sovereign rights, rights that would slowly be eroded in the wording of subsequent UNSCRs: “Resolution 1816 (2008) Adopted Unanimously with Somalia’s Consent; Measures Do Not Affect Rights, Obligations under Law of Sea Convention. I highlight Somalia’s consent because by the time that this resolution was adopted, as discussed in Chapter 3, Somalia was not a single sovereign entity; it was already a group of entities preforming...
the functions of sovereigns. Within the resolution there is a condemnation of “all acts of piracy and armed robbery against vessels off the coast of Somalia” and an urging of “States whose naval vessels and military aircraft operate on the high seas and airspace off the coast of Somalia to be vigilant to acts of piracy… and, in this context, encourages, in particular, States interested in the use of commercial maritime routes off the coast of Somalia, to increase and coordinate their efforts to deter acts of piracy and armed robbery at sea in cooperation with the TFG (the Transitional Federal Government of Somalia).” Further, the resolution states that the TFG grants cooperating States the right to “[E]nter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such actions permitted on the high seas with respect to piracy under relevant international law…."

Within UNSCR 1816, there is no mention of piracy in any other location, or by any other group, only Somali piracy. This is more than strange as in 2007 while there were fifty-two cases of piracy in the territorial waters and the adjacent high seas of the countries of East Africa, there were also sixty cases of maritime piracy that took place in Western Africa, twelve cases in the Straits of Malacca, and sixty-five cases of piracy in the South China Sea. Yet there was no condemnation, no immediate need for the international community to address the social problem, no Security Council resolutions. Somali piracy was special and it commanded the attention of the international community.

What highlights this resolution as a reification of inequality in the form of soft international law is the text contained in sub-section 9 of the resolution. It states that:
the authorization provided in this resolution applies only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of member states under international law, including any rights or obligations under the Convention, with respect to any other situation, and underscores in particular that it shall not be considered as establishing customary international law, and affirms further that this authorization has been provided only following receipt of the letter from the Permanent Representative of the Somalia Republic to the United Nations to the President of the Security Council dated 27 February 2008 conveying the consent of the TFG. (UNSCR 1816 2008 [emphasis added])

The meaning behind this addition was explained to me during a discussion I had with one of the persons responsible for drafting the wording of UNSCR 1816. Capt. (Ret.) United States Navy J. Ashley Roach shared that this addition was at the request of the representative of government of Indonesia. Capt. Roach explained that persons within the government of Indonesia had concern that incursions into the territorial waters of sovereign nations by powerful or geographically nearby States as part of organized piracy-interdiction schemes could become normalized, thus infringing on the sovereignty of coastal States such as Indonesia, which has had (and still has) a significant problem addressing maritime piracy. Indonesia noted that incursions into the territorial waters of a nation, absent that covered by the rights of passage and visit, as detailed in UNCLOS (1982), were in fact contrary to international law.15

Capt. Roach’s comments were consistent with the United Nations Security Council media release SC/9344 concerning the drafting of UNSCR 1816. It states

[S]peaking prior to action on the draft, Indonesia’s representative emphasized the need for the draft to be consistent with international law, particularly the 1982 United Nations Convention on the Law of the Sea, and to avoid creating a basis for customary international law for the repression of piracy and armed robbery at sea. Actions envisaged in the

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15 Ethnographic research Rhodes, Greece, July 2014.
resolution should only apply to the territorial waters of Somalia, based upon that country’s prior consent. The resolution addressed solely the specific situation off the coast of Somalia, as requested by the Government. (SC/9344:1)\(^\text{16}\)

Of course the representative of Indonesia was correct, incursions by foreign militaries into the territory of a sovereign for the purpose of police actions are against international law.\(^\text{17}\) Further, even if a sovereign could, under international law, extend the right to execute police actions within its territory to another sovereign, or group of sovereigns, it most assuredly does not abrogate its responsibilities under international law to protect its citizens. Foreign powers pressuring a fractious State to accept international law whereby sovereign rights are transferred not only to the international community, but also to other sovereigns, and be forced to accept foreign powers on the territory of the sovereign is clearly a rebirth of the protection treaties forced on imperial conquests during the scramble for Africa in the aftermath of the Berlin Conference of 1884-85.

The adoption of UNSCR 1816 led to the militarization of the waters off the Somali coast. The European Union response was two-pronged: Euro 212 million was pledged for development assistance to Somalia over a period of seven years (2008-13),\(^\text{18}\) while the equivalent of approximately USD 450 million per annum was planned to execute Operation Atalanta. (Gilpin 2009) Operation Atalanta was launched in December of 2008. Between the adoption of UNSCR 1816 and the launch of European Union Naval

\(^{16}\) http://www.un.org/News/Press/docs/2008/se9344.doc.htm
\(^{17}\) See UNCLOS (1982) Section 3, Subsections A and C.
\(^{18}\) The European Union capacity-building effort in the Horn of Africa and the Western Indian Ocean NESTOR (of Greek mythology fame) (EUCAP NESTOR) is a civilian mission with the mandate to assist in the building of maritime security apparatuses in the Horn of Africa and Western Indian Ocean. Based in Djibouti, it is concerned with “[S]trengthening the existing legal and law enforcement frameworks related to anti-piracy and developing maritime security capacity instruments…” http://www.eucap-nestor.eu/en/mission/mission_facts_and_figures/
Force’s (EUNAVFOR) Operation Atalanta two additional UNSCRs were adopted, 1838 and 1846. The initial mission of Operation Atalanta was to protect vessels of the World Food Programme (WFP) in delivering food aid to displaced persons in Somalia, the protection of vessels off the coast of Somalia and, consistent with the wording from UNSCR 1816, to deter, prevent and repress “acts of piracy and armed robbery off the Somali coast.” This mandate would later be expanded to include the monitoring of fishing in Somali territorial waters and its EEZ. Countries initially participating in the mission included the United Kingdom, Germany, France, Spain and Greece (by December of 2010, twenty-two EU States and four non-EU States would have participated in the operation, New Zealand would add an aircraft for a period in 2014.) The command was for six vessels, three patrol aircraft and upwards of 1,200 personnel. Headquartered outside London, its mission was for an initial period of one year.¹⁹

Not only would the mission for Operation Atalanta quickly be extended in June of 2009 for an additional year (it has been extended a number of additional times, and is now slotted to terminate in December of 2016),²⁰ but also the mission would be widened within another year (in March of 2010) to include not only the enforcement of the territorial waters of Somalia, but its ports.²¹,²²

¹⁹ http://eunavfor.eu/op-atalanta-mission-launch/
http://eunavfor.eu/eu-navfor-somalia-operation-atalanta-expands-its-mission-on-piracy/
http://eunavfor.eu/mission/
²¹ The operational area of Operation Atalanta includes not only the territorial and internal waters of Somalia, but also includes the Southern Red Sea, the Gulf of Aden, and a significant part of the Indian Ocean. In total the area is over 2,000,000 square nautical miles. (see http://eunavfor.eu/mission/)
²² http://eunavfor.eu/eu-navfor-somalia-operation-atalanta-expands-its-mission-on-piracy/
While questions of the legality of particular operations of Operation Atalanta appear to be addressed (but not adequately resolved) under international law, its involvement in transferring suspected pirates to third-party jurisdictions is based on the execution of Memoranda of Understanding with willing third-party States, namely Kenya, Seychelles and Mauritius. While there appears to be no mention of the basis under which it accepts the existence and function of third-party jurisdictional piracy courts, its web-based literature does suggest that it recognizes that international law on human rights applies to those suspected of piracy. It is further noteworthy that there is no evidence that the forces of Operation Atalanta have apprehended a single suspected pirate who is not Somali. Further, I can find no evidence that if such a person were to be apprehended that he would face third-party jurisdictional piracy court justice.

While the first to form in the shadow of UNSCR 1816, Operation Atalanta was not the first multinational coalition to address piracy off the Somali coast. Combined Task Force 150 (CTF-150), operating under the Combined Maritime Forces (CMF) in association with the United States Fifth Fleet, headquartered in Bahrain, began maritime security operations in 2002. Its initial mission was to “deter maritime terrorism and promote the rule of law at sea in the Horn of Africa.” (Kraska and Wilson 2009c:243) The area of operation of CTF-150 includes much of the same maritime space covered by Operation Atalanta, the Red Sea, the Gulf of Aden, the Gulf of Oman and much of the

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23 For example, the seizing of a national of a State within the territory of that State by the law enforcement body of a third-party, only to be transported to the jurisdiction of a second third-party State in order to stand in judgment for a “crime” committed within the national’s State, under the laws of the second third-party State, and to be sanctioned under those laws if found guilty, and further sanctioned in that second third-party State, and finally, to be repatriated to the State of the National after serving part of that sentence, is clearly against the law of nations.
Indian Ocean. It, too, covers over 2,000,000 nautical miles of sea. As a multi-national task force, CTF-150 participants have included a number of countries that have participated or currently participate in EUNAVFOR’s Operation Atalanta (United Kingdom, France, Germany, Denmark, Italy, Spain, Netherlands, and New Zealand), as well as Australia, Canada, Republic of Korea, Pakistan, Singapore and Turkey. The United States has taken the lead in its organization and mission since its formation soon after the attacks on September 11, 2001. Because the mission of CTF-150 is “to promote maritime security in order to counter terrorist acts and related illegal activities…,” after the adoption of UNSCR 1816 another maritime task force was assembled to specifically address Somali piracy: CTF-151.

CTF-151 was formed within a month of the formation of Operation Atalanta, in January 2009, and it derives its authority from UNSCRs 1816, 1846, 1851 and 1897. A coalition of twenty-five nations, CTF-151’s mission is consistent with the aforementioned UNSCRs and EUNAVOR, “to disrupt piracy and armed robbery at sea and to engage with regional and other partners to build capacity and relevant capabilities in order to protect global maritime commerce and secure freedom of navigation.”

While the wording of CTF-151’s mission sounds remarkably like Grotius’ defense of the taking of Portuguese Carrick Santa Catarina by the Dutch East India Company in *Mare Liberum*, it is at once both not so grandiose as Grotius assertions and considerably more far-reaching. From a theoretical standpoint, Grotius defended the right of navigational freedom and commerce. In this respect, Grotius’ discourse concerned

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26 See Chapter 6
navigational freedoms of the entirety of the sea, not only the part of the sea off the coast of Somalia. The United States, as the leader of CTF-151, recognizes through international customary law, as it is not a signatory of UNCLOS (1982), that navigational freedoms do have certain limitations, thus a constraint on Grotius’ conceptions of freedoms of navigation and visit.27 Yet, from a practical standpoint, the mission of CTF-151 borrows the ideals of holding transgressors and their States responsible for any disruption of the rights of navigation and visit, and adds an element of jurisdictional fuzziness. Nowhere has Grotius suggested that under international law an injured State can sub-lease jurisdiction to a third-party State. This sub-leasing of jurisdiction is part of the mission of CTF-151, as the United States does not wish to address human rights issues in the prosecution of suspected Somali pirates. It has had no problem applying universal jurisdiction to other cases of piracy; however, when there is a Somali who is accused of piracy and the United States is the interdicting force, it will apply universal jurisdiction in its courts only when questions of human rights can be avoided.28

Like Operation Atalanta and CTF-151, the North Atlantic Treaty Alliance (NATO) Operation Ocean Shield’s mission is to counter piracy in the Gulf of Aden and off the Horn of Africa. Like Operation Atalanta, its mission currently runs until the end of 2016. The area of operation for Operation Ocean Shield is analogous to that of both

27 UNCLOS (1982) delineates both areas of navigational freedom and restricted navigational freedom, as well as areas of exclusive use and exclusive jurisdiction.

28 See People v. Lol-lo and Saraw (1922), United States of America v. Lei Shi (2008), and United States of America v. Ali Mohamed Ali (2012 and 2013) Ali is in fact Somali, but his case is one that is unusually high-profile. Ali was not a gun-wielding pirate, but a pirate negotiator who had been involved in a number of piracy negotiations. He was also an official in the Somali government. This made the case of Ali a non-normative case of Somali piracy, and thus of interest to the United States Attorney’s office. In the case of Ali, the United States was in fact the seizing State. See Appendix 1
Operation Atalanta and CTF-151. Militaries participating in Operation Ocean Shield include many of those who participate and/or have participated in Operation Atalanta and/or CTF-150 including: United Kingdom, Denmark, Netherlands, Italy, Norway, Spain, Italy, Greece, Portugal, Turkey, Portugal, Ukraine, Canada, and the United States.²⁹

In order to address the potential overlap and duplication of effort of the militarized coalition forces operating in the same 2,000,000 square nautical miles of the Indian Ocean, Shared Awareness and Deconfliction (SHADE) was formed to share information and minimize redundancies. SHADE serves to assist in the exchange of information and the implementation of resources, especially in coordination efforts in the Internationally Recognized Transit Corridor (IRTC). In addition to effort coordination between Operation Atalanta, CTF-151 (and CMF) and Operation Ocean Shield, SHADE works with China, India, Japan and South Korea on both interdiction and vessel escort convoys. Other countries that are involved to varying degrees with policing and interdiction efforts in the waters surrounding the Horn of Africa and the high seas of the Indian Ocean include Russia, Iran, Saudi Arabia, Malaysia, South Africa, Kenya and Seychelles.

Militarization of the waters off the Horn of Africa have been met with equally forceful and coordinated state-building and diplomatic efforts. (Bueger 2013a; Bueger 2013b) Yet, whereas militarization schemes have yielded positive results, coordinated state-building and other forms of capacity-building have generally been failures. The

²⁹ http://www.mc.nato.int/about/Pages/Operation%20Ocean%20Shield.aspx
Djibouti Code of Conduct is the result of an “IMO Sub-regional meeting on maritime security, piracy and armed robbery against ships for Western Indian Ocean, Gulf of Aden and Red Sea States, held in Djibouti in January 2009.” Seventeen of twenty-one nations in the region,\textsuperscript{30} twelve nations from outside the region,\textsuperscript{31} four United Nation bodies and programmes,\textsuperscript{32} nine intergovernmental,\textsuperscript{33} and three non-governmental organizations\textsuperscript{34} attended, a number of which are referenced and/or discussed below. The meeting yielded three substantive resolutions:\textsuperscript{35} first a Code of Conduct focused on piracy repression in the region; second, mechanisms for technical cooperation among member and assisting States; and third, programs for training of interdiction and cooperation forces.\textsuperscript{36} Initial funding for the implementation of the Djibouti Code of Conduct was provided by Japan amounting to a commitment of USD 13.6 million, with the IMO contributing USD 2.5 million to find a regional training center in Djibouti.\textsuperscript{37}

\textsuperscript{30} Absent were Eritrea, Mozambique, Mauritius, and the United Arab Emirates.
\textsuperscript{31} These countries included Canada, India, Iran, Italy, Japan, Norway, United Kingdom, and the United States. Also attending were a number of countries that have been plagued by reoccurring bouts of piracy including: the Philippines, Singapore, Indonesia, and Nigeria.
\textsuperscript{32} United Nations Department for Peacekeeping Operations (UN/DPKO), United Nations Office on Drugs and Crime (UNODC), United Nations Political Office for Somalia (UNPOS), and the World Food Programme (WFP).
\textsuperscript{33} European Commission (EC), International Criminal Police Organization (INTERPOL), League of Arab States, Regional Co-operation Agreement on Combating Piracy and Robbery Against Ships in Asia - Information Sharing Centre (ReCAAP-ISOC), Regional Organization for the Conservation of the Environment of the Red Sea and the Gulf of Aden (PERSGA), African Union (AU), Intergovernmental Authority on Development (IGAD), North Atlantic Treaty Organization and the Organization of the Islamic Conference.
\textsuperscript{34} Baltic and International Maritime Council (BIMCO), International Association of Independent Tanker Owners (INTERTANKO) and Port Management Association of Eastern and Southern Africa (PMAESA).
\textsuperscript{35} A fourth resolution consisted of the obligatory pat on the back to the host county, the financial contributors and the good offices of the United Nations.
\textsuperscript{36} http://www.imo.org/OurWork/Security/PIU/Documents/DCoC%20English.pdf
Representatives of Djibouti, Ethiopia, Kenya, Madagascar, Maldives, Seychelles, Somalia, Tanzania and Yemen initially signed the Djibouti Code of Conduct. Since that date, all countries of the region eligible to sign have done so with the lone exception of France (Reunion).\textsuperscript{38} Whereas the first resolution reinforced regional commitment to the implementation of all UNSCRs to date, the second addressed regional coordination and information sharing with existing United Nation, regional and specialty organizations. Among those organizations contributing expertise were the International Maritime Organization (IMO), the United Nations Development Programme (UNDP), the United Nations Office on Drugs and Crime (UNODC), the European Commission (EC), the Regional Co-operation Agreement on Combating Piracy and Robbery Against Ships in Asia—Information Sharing Centre (ReCAAP-ISC), and stakeholders within the maritime shipping industry.\textsuperscript{39}

Interestingly, while Article 1 of the Annex of the Djibouti Code of Conduct (Djibouti Code) provides a definition for piracy that is analogous to the one in UNCLOS (1982), Article 101, it also delineates authority to act to suppress and adjudicate piratical acts. Article 4 paragraph 3(a) states that participants are to cooperate in “arresting, investigating, and prosecuting persons who have committed piracy or are reasonably suspected of committing piracy,” while paragraph 4 notes that “[A]ny participant may seize a pirate ship beyond the outer limit of any State’s territorial sea, and arrest the person and seize the property on board.” Yet it is the text in paragraphs 6 and 7 I find most interesting. Paragraph 6 states that: “[C]onsistent with international law, the courts

\textsuperscript{38} http://www.imo.org/OurWork/Security/PIU/Pages/Signatory-States.aspx

\textsuperscript{39} See Section 12 of the Djibouti Code of Conduct.
of the Participant which carries out the seizure pursuant to paragraph 4 may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ship or property, subject to the rights of their parties acting in good faith. [emphasis added]” This paragraph is, as it states, consistent with international law, yet paragraph 7 appears to become creative in its application of jurisdiction. It states “[T]he Participant which carried out the seizure pursuant to paragraph 4 may, subject to its national laws, and in consultation with other interested entities, waive its primary right to exercise jurisdiction and authorize any other Participant to enforce its laws against the ship and/or person on board.” This is not only inconsistent with international law, an assertion I discuss and support in Chapter 7, it is merely a circumnavigation of nexus requirements inherent in the application of jurisdiction. It is clearly a maneuver to lend support for the creation of third-party jurisdictional piracy courts; an effort in which a number Djibouti Conference participants would play a significant role.

The organization, which from a standpoint of diplomatic power and effort, has had the most significant impact on affecting international policy in addressing piracy off the coast of Somalia, is the Contact Group on Piracy off the Coast of Somalia (CGPCS). Although its website no longer exists and its Facebook page has not been updated since June of 2013, its five working groups established the framework for addressing Somali piracy from the standpoints of military and operational coordination (Working Group 1), to the establishment of Best Management Practices for companies in the maritime shipping industry (Working Group 3), to the improvement of diplomatic and public information outreach (Working Group 4), to the construction of judicial regimes aimed at
prosecuting those engaged in Somali piracy (Working Group 2), and in the disruption of shore-based pirate networks and the flow of ill-gotten financial gains.\textsuperscript{40}

The CGPCS was established in the wake of UNSCR 1851 in January of 2009,\textsuperscript{41} by twenty-four nations. By 2011 over seventy member States and nearly twenty intergovernmental and non-governmental organizations would become members, with a number of maritime industry groups enjoying observer status. Legal scholar and noted expert on the oceans law and policy James Kraska noted that the CGPCS was “the broadest coalition of nations ever gathered to develop and coordinate practical solutions to the scourge of maritime piracy.” (Kraska 2011a:160)

While the CGPCS addressed a regional social problem through powerful State and international efforts, the model for a regional focus on maritime piracy was established 2006 with the support of the Association of Southeast Asian Nations (ASEAN). The Regional Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) was signed by sixteen nations in November of 2004, and entered into force in November of 2006. There are currently twenty signatories including non-Asian maritime powers Denmark, Netherlands, Norway, United Kingdom and United States of America. Like the aforementioned CGPCS, ReCAAP “serves as a platform for information exchange” for member countries, “facilitate[s] capacity building” in combating piracy in the region, and “cooperate[s] with organizations” and

\textsuperscript{40} The function of Working Group 5 is to disrupt funding and financial flows of piracy operations.
\textsuperscript{41} UNSCR 1851 paragraph 4 “[E]ncourages all States and regional organizations fighting piracy and robbery at sea off the coast of Somalia to establish an international cooperation mechanism to act as a common point of contact between and among State, regional and international organizations on all aspects of combating piracy and armed robbery at sea off Somalia’s coast[.]”
like-minded parties in order to fulfill its mandate of piracy suppression.\textsuperscript{42} ReCAAP-ISC served as a model for information-sharing among stakeholders in suppressing piracy off the Horn of Africa.

Established in 1995 with a mandate to “advance the cause of peace and reconciliation through contacts with Somali leaders, civic organizations and the states and organizations concerned,”\textsuperscript{43} the mission of the United Nations Political Office for Somalia (UNPOS) can be found imbedded in UNSCR 1863. The UNPOS has assisted in the formation of Somalia’s Transitional National Government (TNG) (2000), as well as the transition from the TNG to the Transitional Federal Government (TFG) between 2002 and 2004. Further, as set forth in the 2008 Djibouti Peace Agreement “ending” hostilities between the Transition Federal Government of Somalia and the Alliance for the Re-liberation of Somalia, it worked to facilitate long-term economic development and the establishment of structural and process security across Somalia. Finally, the UNPOS worked to assist the TFG in the process of forming of the Federal Government of Somalia in 2012. While its mandate was wide-ranging, both politically and functionally the UNPOS has consistently failed to meet expectations. As a standard marker of the recognition of bureaucratic failure, UNSCR 2093 (2013: paragraph 18) notes that the UNPOS should “now be dissolved” and “replaced by a new expanded Special Political Mission as soon as possible.”

As a capacity-building tool of the United Nations, the mission of the United Nations Development Program (UNDP) is considerably more far-reaching than

\textsuperscript{42} http://www.recaap.org/AboutReCAAPISC.aspx
addressing piracy off the coast of Somalia. Evidence of its work in Somalia can be found in its engagement with the UNPOS and the International Organization for Migration (IOM), leading to the conclusion of the Djibouti Peace Agreement in 2008. In terms of its engagement with social control apparatuses directed at Somali piracy, the UNDP works with the UNODC to provide support to Somalia-based police forces and prisons.

An outgrowth of the 2008 Djibouti Peace Agreement, The Nairobi Report (2008) noted that the rise in piracy off the coast of Somalia was a result of an inability and unwillingness of the international community to address Somalia’s terrestrial-based social and political problems. It noted that Somalia existed as a “black hole in the international community, divorced from the world economy, regional and global institutions, and rule of law.” (Ould-Abdallah 2008:33) More than a *mea culpa*, the report noted that maritime piracy was a manifestation of not only “[P]overty, lack of employment, environmental hardship, pitifully low incomes, reduction of pastoralist and maritime resources due to drought and illegal fishing[,] and a volatile security and political situation,” but also lack of any other alternatives to earn enough income to survive. (Ould-Abdallah 2008) Yet, in the end, although the report was insightful and offered a number of workable avenues to arrive at capacity-building solutions, its recommendations would be discounted in favor of increased militarization.

Perhaps more germane to this dissertation than the political considerations between the favoring of militarization schemes over “functional” capacity-building schemes, are questions of jurisdiction. In subsection 4.2.1 “Shipriders/Embarked Officers” under Section 4.2 “Legal Framework For Transfer of Pirates Ashore,” the report notes that “[W]here a shiprider arrangement is in place, transfers of suspects from
sea to shore are straightforward: they remain subject to the jurisdiction of the shiprider’s government throughout.” Not only is this subsection clear, its juridical rationale is also clear. The presence on an interdiction vessel of a third-party State law enforcement officer serves the purpose of providing a nexus between the seizing State and the State of the adjudicating body, as required under international law, notwithstanding the required existence of municipal law sanctioning the piratical act. This section clearly acknowledges the requirement for the existence of the aforementioned nexus in the application of universal jurisdiction.

While Section 4.2.1. “[L]egal Mechanisms For Transfer Ashore,” subsection 4.2.4.1 “Treaties of Other Arrangements” is less clear as to the authors’ interpretation of the application of jurisdiction in cases that fall under the SUA Convention (1988), this section can be interpreted as merely clarifying the difference between SUA (1988) and UNCLOS (1982). Whereas UNCLOS (1982) fails to address the disposition of persons who commit piracy and who have been detained at sea, “[T]he SUA Convention provides a legal basis to effect the rapid transit ashore of pirates captured at sea where both the flag State and the receiving State are States Parties to SUA.” The receiving party is required to investigate, and either prosecute or extradite, depending on under whose jurisdiction the accused falls. “Where one or both of the States concerned are not Parties to SUA (1988), ad hoc arrangements would have to be made to effect the transfer ashore.” While this subsection does not address the requirement of the presence of Shipriders on board the interdiction vessel in the transfer ashore of suspected pirates to a receiving State Party under SUA (1988), it can be assumed that because this is clearly discussed in subsection 4.2.1., it also applies in cases of transfer under SUA.
The Regional Anti-Piracy Prosecutions and Intelligence Co-ordination Centre (RAPPICCC) was established in 2012 on the island of Mahé, Seychelles. The mission of RAPPICCC was to work as a multinational center for law enforcement in cooperation with the governments of the island nations of the Western Indian Ocean in addressing regional piracy. RAPPICCC’s mission was upgraded and its name changed to reflect its widened mission: The Regional Fusion and Law Enforcement Centre for Safety and Security at Sea (REFLEC3). REFLEC3’s new mission reflects the decline of Somali piracy, as its mandate is to now combat not only piracy, but also other forms of transnational organized maritime criminal activity, including: drug smuggling, human trafficking, and environmental crime. INTERPOL had partnered with RAPPICCC in the development of a center to collect and share information on maritime piracy.

The International Maritime Organization (IMO) is a specialized agency within the United Nations that is the “global standard-setting authority for the safety, security and environmental performance of international shipping.” While the mandate of the IMO is significantly larger than merely addressing piracy *jure gentium*, through such widely acceded-to treaties such as the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), the International Convention for the Safety of Life at Sea (SOLAS), and its work in convening the Djibouti Code of Conduct, the IMO has both directly and indirectly worked to address piracy off the coast of Somalia. That said, there are two other organs of the United Nations, one with a fairly narrow mandate and significant power to influence the creation of municipal law and the interpretation of

44 http://www.imo.org/About/Pages/Default.aspx
international law, and the other with a much broader mandate and even greater power to influence not only construction of municipal and international law, but the structure and function of sovereigns.

Whereas the UNSC addresses Somali piracy by creating a framework of international law under which myriad interest groups who have carved out fiefdoms, or who have had fiefdoms carved out for their benefit, provide function (or the appearance of function) toward addressing specific facets of the social problem, the UNODC-MCP attacks Somali piracy on many levels at the same time. In examining the influence of this comparatively small, and marginally funded, organ of the United Nations, one cannot help but marvel at its influence, its power and its results. For example, on at least one very visible occasion, the UNODC-MCP had significant influence in directing regional States, as well and the United Nations, into adopting a legal strategy and framework different from that advocated by the Special Advisor to the Secretary-General on legal Issues Related to Piracy off the Coast of Somalia.45 In doing so, personnel at the UNODC-MCP convinced not only the law-enforcement community and municipal juridical apparatuses, but also diplomats and international legal scholars that a nexus that had existed for millennia, that of the seizing State to the State of the adjudicating body, was not required to prosecute cases of piracy *jure gentium* under municipal statute.

The United Nations Office on Drugs and Crime—Maritime Crime Programme (UNODC-MCP)46 was created at the same time myriad other juridical apparatuses were

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46 Like the renaming and “refocus” of the mission of RAPPICC into REFLEC3, the UNODC-CPP was renamed as its focus was broadened as a result of the decline in piracy off the Horn of Africa. Worthy of
created to address the rise of piracy off the coast of Somalia, in early 2009. Its mandate was to enhance criminal-justice capacity, assist in the creation and/or rewording of municipal law addressing maritime piracy so as to closely mirror the definition of piracy contained in Article 101 of UNCLOS (1982), and to work with certain States to create the infrastructure and legal processes to prosecute piracy *jure gentium* under municipal statute, while the United Nations addressed the legal issues of piracy on a more grand scale.

While the UNODC-MCP supports the Hostage Support Programme in repatriating hostages of Somali piracy, its most significant areas of influence are in capacity-building programs in Somalia and abroad, and rule of law programs. Capacity-building programs focus on the support of juridical apparatuses in Somalia, Seychelles, Kenya and Mauritius. One such program is the Piracy Prisoner Transfer Programme, which transfers those convicted of piracy and serving part of their sentence abroad back to Somali prisons to serve the remainder of their sentence. Other programs include the construction and/or improvement of prisons in Somalia, Seychelles, and Kenya, training of prison staff, and vocational training of those incarcerated. The structure of these capacity-building programs has been heavily influenced by its rule of law programs.

The UNODC-MCP has taken a multi-pronged approach to rule of law issues with a specific goal, the prosecution of suspected Somali pirates in third-party jurisdictional piracy courts under laws fashioned under the guidance of the UNODC-MCP where no

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study is the resilience of bureaucracies, the amazing ability for the bureaucratic entity to almost take on a life of its own. At mission’s end, its mission becomes “restructured,” its personnel reallocated or, in many cases, increased, its funding reallocated or, in many cases increased, and its life extended. Most amazingly, in many cases this transformation occurs after the social problem it was created to address no longer exists.
nexus between the seizing State and the State of the adjudicating body can be established. As will be discussed in Chapter 7, not only have these courts with this mandate never existed prior, the methodology behind the legal framework is a modern-day legal fiction.

The UNODC-MCP rule of law program includes legal assistance provided to legal scholars and legislators to craft legislation allowing for both the prosecution of piracy \textit{jure gentium} under municipal statute and for the application of universal jurisdiction in cases absent any and all juridical nexuses. Additionally, the UNODC-MCP provides administrative support, financial assistance to justice departments to acquire durable goods to assist in the prosecution of maritime piracy cases (including computers, office furniture, vans for prisoner transport, etc.), and training for prosecution teams and judges.\textsuperscript{47} Interestingly, training for defense attorneys is noticeably absent.

Noting that, to prosecute cases of piracy \textit{jure gentium} statutes criminalizing piracy must exist under municipal law, the UNODC-MCP (CPP at the time) began assisting the government of Kenya in updating its law to allow such prosecutions. Section 69(1) of the Penal Code, which criminalized piracy, was replaced by Section 369 of the Merchant Shipping Act of 2009. During this transition, an appeals case came before Justice Ibrahim of the High Court of Kenya, Mombasa (now of the Supreme Court of Kenya). In Miscellaneous Application 434 of 2009, an appeal of the Chief Magistrate’s Court at Mombasa, Criminal Case No. 840 of 2009, Judge Ibrahim noted that Section 5 of the Penal Code of Kenya states that “[T]he jurisdiction of the Courts of Kenya for the

\textsuperscript{47} Interviews with Assistant Director of Public Prosecutions Mombasa, Kenya, Alex Muteti, Criminal Attorney Jared Magolo, and other sources in Mombasa, Kenya; Senior State Council, Office of the Attorney General, Republic of Seychelles, Charles Brown and Attorney Nichol Gabriel in Victoria, Seychelles; and, Kaitlin Meredith Associate Programme Officer, Legal, United Nations Office on Drugs and Crime—Counter Piracy Program in Nairobi, Kenya in July-August of 2013.
purposes of this Code extend to every place within Kenya, including territorial waters.” He concluded that “Kenyan Courts are not conferred with or given any jurisdiction to deal with any matters arising or which have taken place outside of Kenya.” It was also noted that no Kenyan goods, crew, or vessel were involved. And while Justice Ibrahim’s decision rested on Section 69(1) of the Penal Code of Kenya and not Section 369 of the Merchant Shipping Act, a focal point of law for Justice Ibrahim was that Kenya had no connection to the alleged act of piracy. Section 369, as read with Section 371, of the Merchant Shipping Act of 2009\textsuperscript{48} conferred on Kenya the ability to hear cases of piracy \textit{jure gentium} (which Section 69 of the Penal Code did not)\textsuperscript{49} but, lacking a connection to the act, an enforcement nexus, Kenyan courts could not assert jurisdiction. Justice Ibrahim’s position was consistent not only with the laws of Kenya, but also with both an entire history of maritime piracy trials and under the law of nations. Justice Ojwang (also previously of the High Court of Kenya, Mombasa, and now of the Supreme Court of Kenya), in an unrelated decision (\textit{Republic v. Abdirahman Isse Mohamud & Three (3) Others}, May 31, 2011), would ultimately challenge Judge Ibrahim’s reasoning a mere six months later. However during that six-month period a report that challenged the direction

\textsuperscript{48} Section 369, Part XVI-Maritime Security, of the Merchant Shipping Act of 2009 of Kenya defines piracy under Section (1)(a) as: “any act 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) against another ship or aircraft, or against persons or property on board such ship or aircraft; or (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any voluntary act of participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; or (c) any act of inciting or of intentionally facilitating an act described in paragraph (a) or (b). Analogous to Article 101 of UNCLOS (1982)

\textsuperscript{49} This case was adjudicated under Section 69 of the Penal Code and not Section 369 of the Merchant Shipping Act of 2009 (Act), as the Act had not yet entered into force until after the trial for Criminal Case No. 840 of 2009 had begun.
being taken by the UNODC in establishing third-party jurisdictional piracy courts would be presented to the United Nations Secretary-General.\textsuperscript{50}

As mentioned above, on January 24, 2011, the Secretary-General of the United Nations presented the Report of the Special Advisor to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia to the President of the Security Council. The report, authored by Jack Lang, was a plan of twenty-five proposals. While the report noted much regarding the continually deteriorating situation in Somalia, and the continual rise of incidents of piracy on the waters adjacent to the Horn of Africa, it is the jurisdictional and correctional component I find most interesting.

Lang suggested the establishment, within eight months, of a court system comprising a specialized court in Puntland [Somalia], a specialized court in Somaliland and a specialized extraterritorial Somali court that could be located in Arusha, United Republic of Tanzania. The specialized court in Puntland and the extraterritorial Somali court are priorities, given the possibility of granting them universal jurisdiction.

The correctional capacities of Puntland and Somaliland would be strengthened by the immediate construction of two prisons, one in Somaliland and one in Puntland, each with the capacity to hold 500 prisoners and with protected status to allow for international monitoring… (S/2011/30 2011:3-4)

Lang noted that there were “[T]wo radically diverse options…. the creation of an international criminal tribunal on the one hand, and on the other, strengthening the capacities of States in the region without creating an addition mechanism.” (S/2011/30 2011:9) In making his decision in favor of the creation of Somali courts and an international tribunal, Lang noted that the result must “take into account the goals of

\textsuperscript{50} See S/2011/30 2011:22 fn 33.
respect for human rights, effectiveness, efficiency and consistency with United Nations policy on Somalia.” He further noted that “[R]espect for international human rights law, which requires, at the judicial level, a judgment rendered by an independent and impartial court… and, at the correction level, conditions of detention that meet international standards, provisions for social reintegration and criminal punishment that excludes the death penalty[.]” Finally he noted that a solution was needed “that helps to strengthen the rule of law in Somalia while respecting the country’s territorial integrity and sovereignty.” (S/2011/30 2011:11 [emphasis added]) While the report is quite insightful in a number of respects, it is especially noteworthy due to the focus Lang placed on alternatives to the creation of third-party jurisdictional piracy courts and his rationale for the alternative noted above.

Over a period of approximately eight and one half years, the United Nations Security Council adopted no less than fifteen resolutions concerning piracy off the coast of Somalia. Contrary to Lang’s assertion for a need to respect the “territorial integrity and sovereignty” of Somalia, each resolution appeared to erode that territorial integrity and sovereignty. As discussed throughout this dissertation, while the wording of the resolutions without fail reaffirm “respect for the sovereignty, territorial integrity, political independence, and unity of Somalia,” those who put into practice the mandates of the resolutions appear to have little understanding for the meaning of the words. For example, whereas in UNSCR 1851, paragraph 3

[I]nvites all States and regional organizations fighting piracy off the coast of Somalia to conclude special agreements or arrangements with countries willing to take custody of pirates in order to embark law enforcement officials (“shipriders”) from the latter countries, in particular countries in the region, to facilitate the investigation and prosecution of persons
detained as a result of operations conducted under this resolution for acts of piracy and armed robbery at sea off the coast of Somalia, provided that the advance consent of the TFG is obtained for the exercise of their state jurisdiction by ship riders in Somali territorial waters and that such agreement or arrangements do not prejudice the effective implementation of the SUA Convention[.]

By UNSCR 1950 all mention of shipriders is missing and countries with powerful navies have been invited to patrol and exercise jurisdiction in the territorial and internal waters of Somalia, not on behalf of the TFG, but ultimately on behalf of third-party states. Any respect for “territorial integrity and sovereignty,” had become merely rhetoric. Further, as I will discuss in Chapters 5-7, any respect for historical conceptions of jurisdiction under international law had also become merely rhetoric.
Chapter 5: A History of the Relationship of Constructions of Piracy and Sovereignty, and Conceptions of Jurisdiction

…under Article 105 [of the United Nations Convention of the Law of the Sea 1982] the flag state of the seizing ship enjoys very broad powers. These consist of the right to arrest persons and to seize property, and, through the abovementioned rights, to decide upon penalties and on action to be taken with regard to the ship, aircraft and property, the right to submit the persons arrested and the property seized to judicial proceedings. In other words, the universal jurisdiction of the seizing state’s courts is supported by international law. The language of Article 105 (‘may’) seem[s] to indicate that the exercise of jurisdiction by the seizing state’s courts is a possibility, not an obligation, notwithstanding the ‘duty’ to cooperate in the repression of piracy set out in Article 100. The rule in Article 105 does not, however, establish the exclusive jurisdiction of the seizing state’s courts. Courts of other states are not precluded from exercising jurisdiction under conditions which they establish. (Treves 2009:399)

Tullio Treves, Judge at the International Tribunal for the Law of the Sea, writes that under Article 105 of UNCLOS (1982) a state that seizes those suspected of piratical action may exercise jurisdiction over the accused. However, he proceeds to note that Article 105 of UNCLOS (1982) does not mandate the exercise of that jurisdiction. What Judge Treves points out in reading Article 105, namely the distinction between a right to act and a mandate to do so, seems obvious yet had become a point of contention between states as the number of piratical attacks rose during the first decade of the 21st century.¹ Judge Treves’ observation also brings to light a challenge inherent in international law:² the balancing of rights and obligations under a scheme where enforcement is dependent on the will of the international community and/or powerful States.

² Section 401(b) of the Restatement of the Law (Third): The Foreign Relations Law of the United States says, “International law deals with the propriety of the exercises of jurisdiction by a state, and the resolution of conflicts of jurisdiction between states.” (The American Law Institute 1987:233)
With regard to jurisdiction, Judge Treves suggests a tripartite proposition: First, there is no requirement of remedial action on the part of the State of the seizing authority. Under international law, there is no requirement for a State to interdict in cases of piracy. Second, the seizing State may use discretion in the exercise of jurisdiction: to detain or arrest or, not to detain or arrest. Should a State choose to interdict, there is no requirement under international law that the State of the seizing authority assert jurisdiction. Third, there exists the possibility that other States may assert competing, and concurrent, jurisdictional claims. While in theory the application of jurisdiction by the seizing State does not trump other claims of jurisdiction, in practice there is no provision in international law that requires a State to turn over those accused of piracy to those requesting that it do so. In fact, the seizing State is free to assert jurisdiction, present those accused to other States that may assert jurisdiction, or merely to release the accused. The options open to a seizing or interdicting State are dependent on that State’s

3 Article 5 of the 2005 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation requires those States that accede to the treaty to “make offenses set forth in articles 3, 3bis, 3ter, and 3quater punishable by appropriate penalties....” whereas Article 6 requires that “[E]ach State Party shall take such measure as may be necessary to establish its jurisdiction over the offense set forth in articles 3, 3bis, 3ter and 3quater....” Finally, Article 10 mandates “[T]he State Party in the territory of which the offender or the alleged offender is found, in cases to which article 6 applies, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case without delay to its competent authorities for the purposes of prosecution, though proceedings in accordance with the laws of that State.”

4 Paul Musili Wambua suggests that Eugene Kontorovich interprets the application of Article 105 of UNCLOS (1982) significantly more narrowly than do I. He notes that Kontorovich, in his 2009 article International Legal Responses to Piracy off the Coast of Somali argues, “Article 105 gives jurisdiction to prosecute pirates solely to capturing states.” It is my opinion (derived from a both textual evidence and discussions with both Wambua, (July 2013) and Kontorovich, (February 2013)) that while Wambua is summarizing the spirit of Kontorovich’s position, he is misquoting the source document. Kontorovich states merely “that the prosecution should be by ‘the courts of the state which carried out the seizure [emphasis added]’” (Kontorovich 2009:4)
municipal law, existing bilateral or multinational treaties and Memoranda of Understanding between the State and other interested States, and the seizing State’s political and juridical will.

UNCLOS (1982) (and, rhetorically, customary international law) allows any State to engage persons or vessels suspected of piracy, but according to Article 105, such engagement is not mandatory. It is clear that UNCLOS (1982) (and, rhetorically, customary international law) provides for jurisdiction over maritime deviance on the open ocean to any and all States using the oceans’ common, however it does not provide for a singular or a preferred jurisdiction, nor does it establish an international framework to address piratical deviance. Competing claims of jurisdiction must be considered in the exercise of State power. What happens, however, when seizing States opt not to assert jurisdiction? Further, what happens when States with potential competing claims also opt not to assert jurisdiction? Does the international community have a mandate or, for that matter, does it possess a right to jurisdictional constructivism? Perhaps the biggest question of all: What happens if universal jurisdiction is merely a reification of rhetoric, and not based in customary law at all?

This Chapter and the next provide a framework for understanding universal jurisdiction in both theory and practice and as well provide a historical account of the development of jurisdiction within the framework of international law. This chapter also questions whether the roots of universal jurisdiction are grounded in jurisprudence dating

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5 For example, in order for a state to charge and prosecute an individual for a piratical act there must exist a law, or laws, prohibiting piracy. See Chapters 6 and 7 for a discussion.
6 Seldom is there a case where two or more States assert jurisdiction over those suspected of piracy. Where this occurs, bilateral or multinational agreement is the method of dispute resolution, as no provision exists within international law to address such disputes.
back over two-thousand years, are a comparatively recent social construction based on social relations, or are, like the act of piracy itself, are amorphous and temporally constructed to support existing power relations. I also examine these legal constructs within the framework of the oceans’ common, and against the backdrop of piratical deviance. Additionally, I address the relationship of the law, the high seas, international trade, current conceptions of “the hegemony,” and piracy. In concluding, given the divergent paths between the rhetoric behind and the actual historical development and the exercise of universal jurisdiction in cases of piracy and other forms of deviance, I create and support an argument that nexus must be present for all applications of extraterritoriality, including modern constructions of universality.

A short structural history of jurisdiction and sovereignty

Within the framework of international law, jurisdiction can be understood as the projection of power by the State to affect social interaction on a juridical level. Functionally, it is the power that a constitution or other foundational law confers upon a State to exercise juridical authority. Jurisdiction is both dependent on and reaffirms sovereignty (Mann 1984). International law recognizes three categories of jurisdiction: prescription, adjudication, and enforcement. Prescriptive jurisdiction is the right of the State to fashion law that regulates activities, social relations, statuses, and the contractual interests of persons. Imbedded within the right to prescribe is the right of the State to regulate the social construction of the person, and the right of the State to regulate the

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7 For example, Regulation S §902(k)(1) of the Securities Act of 1933 defines a U.S. person as:
   i. Any natural person resident in the United States;
   ii. Any partnership or corporation organized or incorporated under the laws of the United States;
relations between persons, and between persons and institutions. This creation of law may be in the form of legislation, executive order, administrative regulation or court order.

The jurisdiction to adjudicate is the right of the State to subject persons, institutions or things to the power of its courts and/or administrative bodies. This power may be over criminal or civil matters, and may or may not include the state as a party. Finally, jurisdiction to enforce is the ability of the State to compel compliance and/or subject those who do not comply to sanction. Enforcement may take the form of civil or criminal sanction and be manifest as physical coercion via police powers, restrictions on movement, financial penalties, or as non-juridical measures.6 (The American Law Institute 1987:232)

Embedded within these three categories of jurisdiction is the understanding that the application of jurisdiction is a three-part exercise requiring the existence of law, the enforcement of law, and the adjudication of law. Thus, the exercise of jurisdiction is not merely a judicial function; it is a juridical function. However, while customary and

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iii. Any estate of which any executor or administrator is a U.S. person;
iv. Any trust of which any trustee is a U.S. person;
v. Any agency or branch of a foreign entity located in the United States;
vi. Any non-discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit or account of a U.S. person;
vii. Any discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary organized, incorporated, or (if an individual) resident in the United States; and
viii. Any partnership or corporation if:
   A. Organized or incorporated under the laws of any foreign jurisdiction; and
   B. Formed by a U.S. person principally for the purpose of investing in securities not registered under the Act, unless it is organized or incorporated, and owned, by accredited investors (as defined in Rule 501 (a)) who are not natural persons, estates or trusts.
This is but one definition of a person within United States municipal law, as different social constructions of “persons” are afforded and maintain different social and legal relationships with other persons and institutions. These varying definitions are consistent with other municipal law.
8 Certain forms of transitional justice take the form of non-juridical measures, as they may not include provisions for sanction (e.g. truth commissions).
international law place limits on the jurisdiction of the State, they provide no enforcement mechanism when those limits are exceeded or when States are not able to exercise certain types of jurisdiction due to the existence of asymmetric power relations between State actors. In practice, States that exceed the limits of international law, treaty or agreement are held in check by other members or groups within the international community, while States that are not able or are unwilling to exercise jurisdiction may turn to the international community for assistance or to exercise jurisdiction by proxy.\textsuperscript{7,8} While the exercise of jurisdiction by powerful States on behalf of comparatively weaker States, or

\textsuperscript{9} I assert that this exercise of jurisdiction by proxy is exactly what a number of powerful States have done “on behalf of” the TFG of Somalia. Yet, there are two fallacies inherent in the exercise of jurisdiction by proxy in this particular case: (1) The TFG was not the representative government of the Republic of Somalia (see discussion Chapter 3), and (2) far from the TFG requesting assistance from powerful States to assist in the policing of piracy, powerful States have dictated that they would patrol not only the high seas surrounding the Somali coast, but also the territorial and internal waters of Somalia. UNSCR 1816 states “[B]y the terms of resolution 1816 (2008), which was unanimously adopted today, the Council decided that the States cooperating with the country’s transitional Government would be allowed, for a period of six months, to enter the territorial waters of Somalia and use ‘all necessary means’ to repress acts of piracy and armed robbery at sea, in a manner consistent with relevant provisions of international law. The text was adopted with the consent of Somalia, which lacks the capacity to interdict pirates or patrol and secure its territorial waters...” UNSCR 1846 renewed the aforementioned efforts for an additional twelve months. UNSCR 1851 set the ground for the use of third-party States to prosecute piracy by establishing a “shiprider” program whereby countries could conclude special agreements with Somalia “in order to embark law enforcement officials (‘shipriders’)... to facilitate the investigation and prosecution of persons detained [under accusations of piracy].” UNSCRs 1950, 1897, and 2020 called for renewing the mandate of 1816 for three additional twelve-month periods to run consecutively. These Security Council resolutions appear to infringe not only on Somali’s international legal and Westphalian sovereignties, but also on its domestic sovereignty. Yet they do little beyond use rhetoric to address external threats to Somalia’s interdependence sovereignty.

\textsuperscript{10} Problematically, as noted prior with regard to powerful international bodies, when powerful States exceed the limits of international law, there is no provision within international law to check their power. Modern day examples of these extraterritorial power plays include: China’s occupation of Tibet since 1959; acts of rendition and illegal detention of enemy combatants perpetrated on third-party nationals by the United States during its War on Terror beginning in 2001; and, Russia’s invasion and annexation of Crimea and its subsequent involvement in creating instability in the government of Ukraine beginning in 2014.
in the name of comparatively weaker States, is normative, I assert that this exercise has always, until very recently, included a nexus, or a connection to sovereignty or action.\(^9\)

As mentioned within the framework of international law, jurisdiction can be understood as the projection of power by the State to affect social interaction on a juridical level; it is the power that a constitution or other foundational law confers upon a State to exercise juridical authority (Mann 1984). It is the State, through conceptions of sovereignty, that asserts jurisdiction, yet the State is merely a socio-political construction that serves a defined social group through the functions of socio-structural apparatuses. For it to exist and function, the State must perform a number, if not all, of the functions of sovereignty. In short, the exercise of jurisdiction by a State is dependent on State sovereignty. Yet sovereignty is not a single socio-political construct, it is a number of related socio-political constructs, all functioning and dependent on the interplay of municipal and international law and relations with other sovereigns.

Krasner suggests that while the term “sovereignty” has been used as least four ways, the “four meanings of sovereignty are not logically coupled, nor have they covaried in practice” (Krasner 1999:9). Domestic sovereignty, which refers to the organization and effectiveness of social control apparatuses within the State, has little effect on, and is little affected by, international law, international relations or the application of jurisdiction external to State borders. Conceptions of domestic sovereignty

\(^{11}\) Rubin notes only three cases through from 1705 to 2006 where universal jurisdiction was applied to acts of piracy and a territorial and/or sovereign nexus was absent. (Rubin 2006:317-319) However in each one of those cases, there were a number of nexuses present. Additionally, I assert that even absent a territorial and/or sovereign nexus, or nexuses, the application of universal jurisdiction requires a nexus between the seizing State and the State of the adjudicating body. A discussion of cases of where universal jurisdiction was applied is contained in Chapter 7.
are rooted in the writings of Jean Bodin and Thomas Hobbes. In *Six Livres de la Republique*, Bodin not only laid out a doctrine of the subordination of the church to the State, he suggested that the sovereign’s power was both absolute and limited.\(^\text{10}\) From the perspective of State sovereignty, he made the case that States should not be subject to the rule of the Holy Roman Empire, nor to the Papal rule.\(^\text{11}\) Bodin reasoned that the construction, application and interpretation of the law were absolute powers of the monarch, and that the monarch was responsible only to both the natural law and the law of G-d. In *Leviathan*, Hobbes makes clear a conceptualization of natural law that is quite fatalistic. He notes that without rules (and, as a corollary, society), existence is but a constant struggle of man against man, where violence and deceit win the day. Hobbes states, in likening man’s struggle against man absent rules and order, to his struggles in time of war:

> where every man is enemy to every man the same consequent to the time wherein men live without other security, than what their own strength and their own invention shall furnish them withal. In such a condition there is no place for industry, because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no

\(^{12}\) Interestingly, although Bodin stated that the power of the monarch was absolute, he did assert that the right of the monarch to tax was not and, as such, limited. This position is clearly supported in Bodin’s statement that “[T]o the Kings over all things belong; to individual citizens, property.” This view is in contrast to Hobbes view of the power of the monarch as absolute. (Andrew 2011:80-81)

\(^{13}\) Hobbes made a similar, if not more expansive, argument in asserting the necessity for religious institutions to be independent of the State. In discussing the dissolving power of the church (in succession the Catholic, Episcopalian, and Presbyterian churches) over the State, Hobbes wrote: “[A]nd so we are reduced to the independency of the Primitive Christians to follow Paul or Cephas, or Apollos, every man as he liketh best: Which, if it be without contention, and without measuring the Doctrine of Christ, by our affection to the Person of his Minister… is perhaps the best: First, because there ought to be no Power over the Consciences of men, but of the Word it selfe, working Faith in every one, not alwayes according to the purpose of them that Plant and Water, but of God himself, that giveth the Increase: and secondly, because it is unreasonable in them, who teach there is such danger in every little Errour, to require of a man undued with Reason of his own, to follow the Reason of any other man, or of the most voices of many other men; Which is little better, then to venture his Salvation at crosse and pile.” (Hobbes and Tuck 1991:515-16)
instruments of moving and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short. (Hobbes and Gaskin 2009:84)

This ‘solitary, poor, brutish and short’ life could, however, be ameliorated by the “social contract,” whereby individuals mutually agree to concede certain rights to the State (monarch), while agreeing to abide by certain rules and law. In exchange, the individual receives protections against other individuals, yet he does not necessarily receive protections from the capriciousness of the monarch, who is only answerable to God and the natural law. Hobbes conception of power is absolute not because of the benefit to the sovereign, but because of the benefit to society.12

Both Bodin and Hobbes set the structure for not only the definition of domestic sovereignty, but for the structure and function of law within the modern State. This structure, while not affected by international law, establishes the structures through which States interact with other States; the law between nations.

While domestic sovereignty is established vis-à-vis State authority, interdependence sovereignty is established via the ability of the State to regulate the flow of persons, goods, services, contraband and residual waste across its borders. It is an issue of control over border permeability. Krasner notes that while there is not a direct link between interdependence sovereignty and domestic sovereignty, a loss in the ability to regulate and control the permeability of a State’s borders can negatively affect that State’s ability to control what happens within its borders (Krasner 1999:13). Examples

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12 Hobbes states: “…that men who choose the Sovereign, do it for fear of one another, and not of him who they institute…” Hobbes and Gaskin (2009:137) “If a monarch shall relinquish the sovereignty, both for himself, and his heirs, his subjects return to the absolute liberty of nature” (ibid:147)
include: undocumented immigration, the unregulated movement of legal goods or currencies (e.g. tax avoidance schemes), the movement of illegal goods (e.g. non-pharmaceutical or recreational drugs), the movement of illegal services (e.g. internet gaming), and the movement of land-based, air, and ocean pollutants.

While interdependence sovereignty involves the permeability and control of a State’s borders, like domestic sovereignty, it is little impacted by, and has little impact on, international law. In contrast, international legal sovereignty concerns the status of the State vis-à-vis other States. From the standpoint of international law, international legal sovereignty has its origins in the work of Emer de Vattel. In his work *Le Droit des Gens*, Vattel reasoned that because men living free and independent within a state of nature have established civil society, sovereign States, constituted of independent free men, should be regarded as are free men living under the natural law. Vattel contended that because these free men living in civil society are naturally equal, so should sovereign nations be considered naturally equal; he stated that “[A] dwarf is as much a man as a giant is; a small republic is no less a sovereign state than the most powerful kingdom.”

(Brierly 1963:37) While recognition of equality is the basis for States to enter into treaties and agreements with other States, recognition of international legal sovereignty is the basis for State existence vis-à-vis other States. And while within international fora,

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13 While it is true that interdependence sovereignty is impacted by treaties, and treaties are instruments under international law, and are governed by the Vienna Convention on the Law of Treaties (1969), interdependence sovereignty is primarily concerned with State control of its borders and not with issues of political or territorial sovereignty (see Krasner 1999; and, Bassiouni 2001).

14 For a more modern interpretation, see also Article 2(1) Charter of the United Nations: “The Organization is based on the principle of the sovereign equality of all its Members.”
international sovereignty is a requisite credential, it does not guarantee a State’s ability to assert either domestic or interdependence sovereignties.

Westphalian sovereignty is manifest in the State’s ability to construct a political structure absent external influence. Krasner notes the etymological inaccuracy of the use of ‘Westphalian' to describe this type of sovereignty. He writes, “[t]he norm of nonintervention in internal affairs had virtually nothing to do with the Peace of Westphalia, which was signed in 1648. [Nonintervention in internal affairs of other states] was not clearly articulated [into conceptions of sovereignty] until the end of the eighteenth century.” (Krasner 1999:20) Vattel first articulated this argument in support of a sovereignty based on the right of the State to be free of the direct influence of other States. “Vattel argued that no state had the right to intervene in the internal affairs of other states.”15 As an example he noted that the Spaniards had “violated the law of nations” in judging Inca Athualpa. In citing what would later be known as extraterritorial jurisdiction, Vattel stated that “[I]f that prince had violated the law of nations with respect to them, they would have had a right to punish him;” however in condemning him under the laws of Spain they violated the principles of Westphalian sovereignty (Krasner 1999:21).

International legal and Westphalian sovereignties, in contrast to both domestic and interdependence sovereignties, are concerned with the right, power, and willingness of the State to engage in international fora, enter into treaties, and to interact in areas

17 For a more modern interpretation, see also Article 2(4) Charter of the United Nations: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”
external to the jurisdiction of any and all States. It is this engagement between States that forms the basis of, and gives rationale to, the existence of extraterritorial jurisdiction.

As alluded to above, sovereignty is a necessary prerequisite for asserting jurisdiction. Under municipal law sovereignty is also sufficient for its exercise. However, in areas external to the jurisdiction of the State, there must be a link, a nexus, to assert jurisdiction. Legal scholar M. Cherif Bassiouni notes that there is a link between sovereignty, in all its manifestations, and prescription; however, this link does not necessarily exist for adjudicative and enforcement jurisdictions. He states that the reason for this “contextual limitation is to avoid jurisdictional conflicts between States, which can threaten the stability of the international legal order. It also provide[s] consistency and predictability in the exercise of the jurisdictional functions of States so as to avoid potential denial of rights and abuse of judicial processes by exposing persons to multiple prosecutions for the same conduct.” States may be able to make laws that extend beyond their borders, yet they are constrained in the enforcement and adjudication of such laws extraterritorially due to the potential of the “denial of rights and abuse of judicial processes.” Bassiouni further notes that the foundation for the exercise of extraterritorial jurisdiction is the requirement that a nexus exist between the action and or actor, and the enforcing State in all cases of extraterritoriality except universal jurisdiction. The “[I]linking [of] jurisdiction to territoriality, though allowing it to extend extraterritorially in cases of a valid legal nexus to the enforcing state, is the most effect way to achieve these results… This is also why exceptions to territoriality are subject to certain limitations… This is particularly true of universal jurisdiction when exercised without
territorial links.” (Bassiouni 2001:86) 16 This statement by Bassiouni invites contemplation. Beyond articulating the instrumental requirements for a functional application of extraterritoriality within the law of nations, he notes the standard caution in the application of universal jurisdiction, that special care must be taken in the application of universal jurisdiction without nexus. His warning prompts two questions: first, if universal jurisdiction by definition does not require nexus, why note that “[T]his is particularly true of universal jurisdiction when exercised without territorial links”? 17 and, second, accepting the creative definitions that the courts have applied in the exercise of universal jurisdiction to acts of maritime depredation throughout history, thus referencing all three cases through 2006, why is both the application of universal jurisdiction under international law inconsistent with its prescribed meaning under international law and also inconsistent with its true theoretical meaning as a means of extending the reach of the State extraterritorially? 18

As discussed above, the application of State power is dependent on the ability of the State to assert control over and protect those who reside, permanently or temporarily,
within its borders and/or territories, as well as extend and exert that power, on a limited basis, over the actions, and on behalf of, its nationals external to its borders. Yet while this regulation and protection of persons, property and interactions is a fundamental right and obligation of sovereignty, customary international law places limits on the power of nations to exert national law extraterritorially or to exert influence in the exercise of national law within the borders of other sovereign states. For example, while Vattel states that “[W]hoever ill-treats a citizen indirectly injures the State, which must protect that citizen[, as the] sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection” (Vattel 1916:136), the only provisions in international law to seek such satisfaction are through a number of international courts and tribunals with no real power to sanction or to exact remedy. Thus the power to both project and protect can be, in practice, limited to State influence over, and State power upon, other State actors, and State relations based on the law of nations.

In practice, Vattel’s comment notwithstanding, international rules limit the application of State jurisdiction. For example, a Canadian citizen who commits an act of piracy by statute in the territorial waters of the United States can be detained, arrested, tried, convicted and sanctioned in the United States. However, should that individual flee

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21 While nationals of a State are subject to the laws of other States in which they are temporarily resident (diplomats residing abroad are in some cases, but not all cases, immune from the enforcement and adjudicative jurisdiction of the State in which they temporarily reside), these nationals may also be subject to certain municipal laws of the State of which they are a citizen while abroad (see the nationality principle below). Examples of laws applicable to United States citizens while traveling or living abroad include the payment of United States income taxes on all income including income earned abroad, prohibitions against the bribing of government officials or engaging in bribery to win corporate contacts, and engaging in consensual sexual relations with someone under the age of 16 or under the age of legal consent, whichever is greater.
to Mexico prior to his detention, while the courts in the United States maintain jurisdiction, United States authorities can merely request that Mexican authorities apprehend and extradite the accused pirate to the United States in order to stand trial. While the United States authorities maintain subject-matter jurisdiction, they do not have personal or enforcement jurisdiction; this is consistent with international law (see comment by Bassiouni above). Additionally, because Mexican authorities lack subject matter jurisdiction, they are not able to arrest and try that individual for piracy, notwithstanding his presence in the Mexico.

In summary, there are formal juridical rules and laws, both municipal and international, that govern the application of jurisdiction. Guilt, presumed or adjudicated, is not sufficient justification for a State in which municipal law has not been broken to assert jurisdiction, even if another State asserts subject matter jurisdiction. In the above case, requests by United States authorities to Mexican officials for the detention and extradition of the accused to the United States would be governed by treaty, agreement or diplomatic efforts.20

Types of jurisdiction, other than universal jurisdiction, under international law

Notwithstanding the discussion above, there are cases where the sovereign can, under the law of nations, assert prescriptive jurisdiction external to its borders.21 International law places limits on this application of prescriptive jurisdiction to five principle areas: territoriality, nationality, the protection of the State, passive personality,

22 As this is not a case of piracy jure gentium, but one solely of piracy by statute, there is not a case for the application of universal jurisdiction.
23 See the discussion above for a summary of Bassiouni’s argument for limiting the application of jurisdiction under international law to prescriptive jurisdiction.
and universality. With regard to territoriality, nationality, the protection of the state, and passive personality there are actionably two nexuses in the application of prescriptive jurisdiction: 1. The connection of the act and/or actor(s) to the sovereign; and, 2. The connection of the seizing State to the forum or agent of adjudication. It is under conditions absent the first nexus where universality can be asserted over a small number of offenses, as long as those offenses are sanctioned under both international and municipal law.

Territoriality is based on the understanding within international law that a State possesses the right to legislate, control and adjudicate activities within its borders and the territories under its control. This juridical right is based in conceptions of domestic sovereignty, or the right of the sovereign to organize and put into effect the social control apparatuses of the State. This right, both “exclusive and absolute,”22 is highlighted within the charter of the primary institutional vehicle for the creation of law among nations: the

24 In echoing Hobbes, Chief Justice Marshall of the United States Supreme Court stated that “[T]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute” and “is susceptible of no limitation not imposed by itself. Any restriction upon it deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction and an investment of that sovereignty to that same extent in that power which could impose such restriction.” Marshall 1812. The Schooner Exchange v. McFadden 11 at 136. The decision of the Court in The Schooner Exchange was an affirmation of territorial sovereignty, and a recognition of the limits of jurisdiction. The facts of the case are as follows: the United States-flagged schooner Exchange was seized without cause by France, while en route to Spain (France and Spain were engaged in the Peninsular War, 1808-1814). The Exchange was commissioned by France as a warship, the Balaou. The Balaou suffered damage during a storm, and docked for repairs in Philadelphia. While docked, McFadden, the former owner of the Exchange, filed action to seize the ship. While the District Court found that it lacked jurisdiction, the Circuit Court ordered the District Court to proceed on the merits of the case. The Supreme Court reversed the Circuit Court’s ruling, and noting lack of jurisdiction, affirmed the District Court’s dismissal. One can make claim that the series of UNSCRs from 2008 to 2014 addressing Somali piracy are in fact a diminution of Somali sovereignty. I suggest that the alternative, the rebuilding and support of the social control apparatuses of the separate and distinct (but internationally unrecognized) Somali republics, including Somaliland, Puntland, Galmudug, may have been not only a more appropriate international response under international law and recognized conceptions of sovereignty, but that it would have been both more efficacious and less costly.
United Nations. Article 2(4) states that “[A]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purpose of the United Nations.” (United Nations 1945) Territoriality not only restricts a State from extending the reach of its authority into the territory of other States, is also restricts the reach of the State to only its territory. In practice, this is precisely the issue faced by States in the exercise of jurisdiction on the high seas. Articles 87, 89 and 92, read with Article 58, of the United Nations Convention on the Law of the Sea, state that the freedom of navigation shall be observed on the high seas, that “[N]o State may validly purport to subject any part of the high seas to its sovereignty,” and that “[S]hips shall sail under the flag of one State only” and “shall be subject to its exclusive jurisdiction on the high seas.” Further, Article 110 limits the rights of vessels from States other than the flag State to visit (to board and/or assert control over) a vessel. Thus the State confers territory on vessels flying its flag, while it recognizes the sovereignty of vessels flying the flag of other nations. (Unts 1982)

A recent case that highlights the “exclusive and absolute” nature of sovereignty is the impounding of the *Ara Libertad*, an Argentinian military training vessel, by the government of Ghana.23 The International Tribunal for the Law of the Sea (ITLOS) found

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23 On October 1, 2012, while the *Ara Libertad* was at port in Tema, Ghana, an Elliott Management Corporation subsidiary, NML Capital, LTD., which owned approximately USD 370 million in defaulted Argentinian sovereign debt and who had earlier been awarded a judgment by the United States District Court for the Southern District of New York, filed a Statement of Claim against the vessel with the High Court of Ghana. NML Capital’s claim sought an order of *in rem* attachment on the *Ara Libertad* to satisfy part of the judgment it had been awarded in the United States. Based upon the outstanding judgment, the High Court of Ghana granted NML Capital’s request for an Order of Attachment. On November 29, 2012, Argentina sought relief in the form of provisional measures from the International Tribunal of the Law of the Sea (ITLOS) under Article 290(5) of the United Nations Convention of the
that sovereignty, in the form of warship immunity, extended to all maritime areas, and that territoriality by a foreign sovereign cannot be extended over territory of the domestic sovereign, notwithstanding the presence of that territory (warship) within the physical territory of the foreign sovereign (Ghana’s internal and/or territorial waters).

The ITLOS finding affirmed that for a State to assert its jurisdiction beyond its territory, it must meet two requirements: first, it must have a compelling reason to assert authority and control beyond its territory; and second, it cannot do so without the consent of the State within whose territory it seeks to act.

The principle of nationality is rooted in the connection of the person to the State. This connection is grounded in Locke’s conception of the social contract; people come together in order to form society with the State acting as a “neutral judge” and protector. Those who have come together are morally bound to the State, as they have consented to follow the laws of the State. It is through the connection of the person to the State that the person acquires a nationality.

Possession by a person of a nationality both grants that person rights and confers obligations. Rights may include the ability to obtain and use a passport, to vote and to serve in certain legislative, judicial, or executive positions. Obligations may include the payment of certain types of taxes, military or police service, and jury service. Perhaps most important among the benefits of nationality, as succinctly stated above by Vattel, is

Law of the Sea. (UNCLOS 1982) Argentina asserted that the court could rule on a prima facie basis that the Ara Libertad was a Navy vessel (warship), and as such was, under Article 29 and 32 of UNCLOS (1982), entitled to immunity, and should be released immediately. In further defining the limits of territory, while Ghana asserted that Article 32 of UNCLOS (1982) applied only to the territorial waters of a State, and that the Ara Libertad, which was in the Port of Tema, was in internal waters, ITLOS found that warship immunity extended to all maritime areas. Under ITLOS’s granting of provisional measures to Argentina, Ghana released the Ara Libertad on December 19, 2012.
protection, for it is the responsibility of the State to protect its nationals from the reach of other sovereigns. Finally, under international law, nationality is a right. Article 15(1) of the Universal Declaration of Human Rights states that: “[E]veryone has the right to a nationality.” Consistent with the differentiation between international legal sovereignty and domestic sovereignty however, while nationality is guaranteed by international law, the process of acquiring, and the conferring of, nationality is a State matter. Further, not only do States vary in the requirements to gain nationality, once acquired, States vary in the rights that nationality confers and the obligations it requires.

As a norm, a number of nations apply the principle of nationality to assert jurisdiction over their nationals for certain index-type and other serious crimes committed extraterritorially. In 2013, the United States was able to assert jurisdiction over the crimes alleged to have been committed by Edward Snowden under the 1917 Espionage Act, “unauthorized communication of national defense information” and the “willful communication of classified communications intelligence information to an unauthorized person,” on the basis of both the nationality principle and the protective principle, notwithstanding his presence in Russia.

Whereas the nationality principle bases jurisdiction on the connection of the person to the State, the protective principle bases jurisdiction on the security of the State; thus, jurisdiction based on the protective principle is not confined to nationals.

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24 Vattel 1916:136
25 See Restatement of the Law (Third): The Foreign Relations Law of the United States, Section 402(2): “the activities, interests, status, or relations of its nationals outside as well as within its territory.”
Section 401(1)(c) of the Restatement of the Law (Third): The Foreign Relations Law of the United States says that the jurisdiction to prescribe extends to “conduct outside its territory that has or is intended to have substantial effect within its territory;” whereas Section 402(3) notes that conduct directed to effect the security of the United States by non-nationals located outside the territory of the United States falls under its jurisdiction to prescribe.26 (The American Law Institute 1987:237-238) This not only holds true for the United States, it is accepted as part of customary international law.

Garrod suggests that under international law the protective principle can be applied to acts of maritime piracy that occur beyond any and all State jurisdiction, piracy jure gentium (Garrod 2014); however I assert that such application would be dependent on the qualification of modern-day international trade and commerce as a form of mercantilism27 where the political interests of the State are intertwined with the strategic business interests of multinational corporations.28 While I agree that in many States, national and corporate interests benefit from symbiotic, if not heavily dependent, parasitic and/or incestuous, relationships, in practice, State interests and those of

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26 See also Blakesley in Bassiouni 2008:108-109.
27 Mercantilism, considered the backbone of imperialistic expansion between the 15th and 18th centuries, is founded on the principle of strict government controls over the balance of payments and trade, restrictions on the trade of goods, resource exploitation, and the regulation labor, materials and finished-good production and agricultural production. Under mercantilism, colonies fueled the growth of colonist nations.
28 I make this assertion because maritime piracy is ultimately a crime against shipping and commerce and not a crime against the State. Moral entrepreneurs who state that piracy is either a crime of epic proportions or that piracy effects global commerce so significantly that it also effects the security of shipping- and coastal-nations have not reconciled the rhetoric behind maritime piracy and its true social and economic costs (see Bellish 2013). In this respect, piracy off the coast of Somalia can be understood as a modern-day moral panic (see also Cohen 1987).
corporations are often at odds,\(^2^9\) and neo-mercantilism is not the present-day reality in most western democracies. Given their different operational means, objectives, the disparate constituents they serve, and the normative tensions that exist between States and corporations, the extension of the protective principle to address cases of maritime piracy is not consistent with codified international law.

An additional point with regard to the protective principle is that consistent with Section 401(1)(c) of the *Restatement of the Law (Third): The Foreign Relations Law of the United States*, the protective principle should only be applied in cases where the result would have a significant consequence to the security of the State making the assertion. In order for the protective principle of extraterritorial jurisdiction to remain a respected mechanism for States to assert sovereignty external to their territory, it must not only be used in such a manner that gives full consideration to the sovereignty of other nations, it must be used sparingly and judiciously in areas recognized by the international community as *res communis* or *res nullius*. This principle of judicious use is consistent not only with Grotius’ defense of the high seas as navigationally free to all states in *Mare

\[^{31}\] A recent example of State interests being at odds with those of business is “corporate inversions.” A corporate or tax inversion is defined as the relocation of the corporate headquarters from a high-tax State to a comparatively low-tax State. The mechanism for such a relocation is usually the acquisition of a less-powerful corporate entity located in the desired low-tax State by a more powerful corporate entity that was located in a comparatively high-tax State. The objective is to lower the overall tax burden via tax avoidance. Examples include: the proposed acquisition by United States-domiciled Burger King of Canadian donut-coffee chain Tim Horton and the acquisition of United Kingdom-based AstraZeneca by United States-domiciled Pfizer. Corporate inversions also offer a means for United States corporations to direct overseas profits to shareholders. Because of the comparatively high tax-burden, corporations find it costly to repatriate funds earned from the profits of goods and services earned by overseas subsidiaries. Through a corporate inversion, because the corporation pays a comparatively lower tax on income generated outside the United States, those funds then become available for capital or financial investment, to pay ongoing costs, or to return to shareholders in the form of dividends. Critics in congress and the United States Treasury, including Treasury Secretary Jacob Lew, maintain that the practice is merely tax avoidance, hurts the United States economy as a whole, and is inherently unfair to employees and to national and state coffers.
Liberum, it is also consistent with Articles 87, 89 and 92, read with Article 58, and Article 110 of UNCLOS (1982). Assertions beyond this scope may signal territorial grabs or sovereignty extensions in violation of international law.

As discussed above, the basis of both the nationality principle and the passive personality principle is the right of the State to exercise jurisdiction extraterritorially by reference to the conduct of a person. While through the nationality principle the State applies jurisdiction to the actions of its nationals, through the passive personality principle the State can assert jurisdiction external to its territory based on the nationality of the individual at whom an action was directed. (The American Law Institute 1987:240) The case of the Maersk Alabama illustrates not only the flexible nature of the application of extraterritorially (choice in principles) but also that, in practice, those who prosecute crimes that take place on the high seas and those who both adjudicate municipal law and weigh the impact of international law against municipal law with regard to crimes committed on the high seas, recognize that nexus is a requisite for its application.

On April 3, 2009 the United States-flagged container ship Maersk Alabama departed from port in Djibouti, en route to Mombasa, Kenya. The vessel was carrying over 17,000 metric tons of cargo, including over 5,000 metric tons of food and related aid for famine victims in Somalia, Uganda and Kenya. On board the 500 foot long, 80-foot wide ship was a crew of twenty, all of which were American citizens. On the 7th of April the United States Maritime Administration issued an advisory recommending that ships traversing the seas of the Gulf of Aden stay at least 600 nm off the coast of Somalia. At this time the Maersk Alabama was less than 250 nm off the coast. On both the 6th and 7th of April, two separate poorly executed pirate attacks were perpetrated against the
Alabama. Against the warnings and against the very real threat of additional attacks, the captain of the Alabama had her stay her course.

Five days out at sea and approximately 240 nm southwest of the Somali city of Ely in Puntland, on the 8th of April, a group of four skiffs engaged the Alabama. All but one disengaged after it was believed by the attackers that United States military vessels were under way to provide assistance. The one remaining skiff, holding four Somalis from Puntland, attacked the Alabama in an attempt to seize the ship and hold it and its crew for ransom. The leader of the group was purported to be Abduwali Abdukhadir Muse, a young man not yet out of his teens. As the skiff approached the Alabama, warning shots were fired indicating an intention to commit piracy, as defined within Article 101 of UNCLOS (1982) and international law. As the skiff pulled up alongside the Alabama, a portable ladder was attached to the Alabama, and two of the pirates boarded the ship, headed for, and took control of the bridge. The captain then communicated to the crew, many of whom had, per company and International Maritime Organization protocol, entered the ship’s Safe Room, that two pirates had taken control of the vessel. One of the few men who had not entered the Safe Room then proceeded to shut down the Alabama’s electrical power, effectively thwarting the pirates plans to pilot the ship toward safety off the coast of Eyl, Somalia. Additionally, as a result of active defensive maneuvers by the piloting crew, the skiff used by the pirates to engage the Alabama was scuttled.

Since the rise of piracy off the Horn of Africa, it had been the norm for pirates to take control of the ship and effectively park the ship a short distance off the coast of a number of cities and towns in Puntland, or present day Galmudug. This “parking”
allowed the pirates to acquire provisions for themselves and their hostages, and to mitigate any risk of intervention by enforcement agents of the international community. As discussed in Chapter 3, since the fall of the Siad Barre regime in 1991 and the ensuing civil unrest, Somalia has lacked functioning juridical apparatuses; thus, pirates are able to operate both on land and off the coast of Somalia with relative impunity.

After the two remaining pirates had boarded the *Alabama*, the leader, Muse, emptied the ship’s safe of its contents, approximately USD 30,000. He then attempted to gather all of the crew that were not on the bridge and move them to the bridge. During his search for crewmembers, Muse was overpowered and subdued; he was eventually escorted to the *Alabama’s* Safe Room. The remaining pirates negotiated with the crew for Muse’s release by agreeing to leave the ship in a shipboard lifeboat. The captain was forced by the pirates to give instruction on the operation of the lifeboat, and upon entering remained under the control of the four pirates. Contrary to what was depicted in a recent movie on the hijacking, the captain did not offer his life in exchange for the crew. The lifeboat was then piloted toward the coast of Somalia, with the *Alabama* following. In the possession of the pirates were two loaded AK-47 assault rifles, six AK-47 magazines, one magazine for a handgun, and a number of cell phones and handheld radios.

On the 9th of April, the *USS Bainbridge* (a United States Navy guided missile destroyer) and the *USS Halyburton* (a United States Navy frigate), responding to distress calls, met up with the *Alabama*. The *Alabama* was escorted to Mombasa, Kenya, by a third United States naval vessel, while the *Bainbridge* and *Halyburton* continued to follow the lifeboat. It was purportedly the plan of the pirates to gather a “pirate flotilla”
consisting of four other vessels that had successfully been pirated and which held 54 hostages (all located on two of the vessels) to maneuver as a group back to the coast of Somalia. In using this tactic, it was the plan of the pirates to collectively use each of the pirated vessels and the hostages as “human shields” for the others. These four pirated vessels headed toward the lifeboat. They did not arrive in time to assist Muse and his group.

On the 11th of April as the seas began to get rough due to high winds, the commander of the Bainbridge was able to convince the pirates to come under tow. The following day, Muse asked to board the Bainbridge to receiving medical care for a wound he received while being subdued by the crew of the Alabama and to begin direct negotiations for the release of the captain of the Alabama. The three remaining pirates stayed aboard the lifeboat guarding their hostage.

Later that day, three marksmen from the United States Navy SEAL Team Six, at a distance of approximately 25 to 30 meters, simultaneously targeted and killed the three pirates holding the captain of the Alabama hostage from the fantail of the Bainbridge. Muse was immediately arrested and detained on the United States Navy amphibious assault vessel USS Boxer. He was later flown to the United States and arraigned in the United States District Court for the Southern District of New York.

Muse was charged with violations that included: Title 18, United States Code, Sections 1651, 3238 and 2, piracy jure gentium, robbery, aiding and abetting the seizure and robbery of a United States flagged ship beyond the outer limit of the territorial sea of any country; Section 2280, conspiracy; Sections 2280(a)(1)(H) and 3238, while in the act of committing a conspiracy, seizing and exercising control over a ship by force or the
treat of force, armed with firearms, and hijacking a United States flagged ship that was navigating beyond the territorial sea of any country; Section 924(c)(1)(A)(iii), 3238, and 2, in the prosecution of a violent crime did possess, use and discharge a firearm; Sections 1203, 1203(a), and 3238, both unlawfully detained and threatened to kill or injure another person and conspired with others to do the same; and, Sections 924(c)(1)(A)(ii), 3238, and 2, using a firearm in the commission of the crime of unlawfully detaining a person.

The prosecution noted in the complaint that extraterritorial jurisdiction applied in each of the five counts, citing United States v. Yousef, 327 F.3d 56, 86 (2d Cir. 2003), as support for the flexible interpretation of extraterritoriality where such interpretations exist. In Yousef the court reasoned, “jurisdiction is consistent with three of the five principles of customary international law criminal jurisdiction - the objective [territorial], protective, and passive personality principles....” (at n91) The court also stated “because it had jurisdiction over the substantive crimes charged... it also had derivative jurisdiction over the conspiracy charges.” (n52) With respect to choice in principles of extraterritoriality, perhaps the strongest case for the application of jurisdiction with respect to the Alabama can be made in applying the passive personality principle. Based upon the action taken by the pirates, both against the crew of the ship (all American citizens), and the Alabama itself (a United States flagged vessel), United States law enforcement as well as its courts had jurisdiction under international law over the crimes committed.

32 See also United States v. Bowman, 260 US 94 (43 S.Ct. 39, 67 L.Ed. 149)
33 UNCLOS (1982), Article 91(1) states, “[S]hips have the nationality of the State whose flag they are entitled to fly.” Article 94 (1) states, “[E]very State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.” Article 94(2)(b) notes that the flag State “assume[s] jurisdiction under its internal law over each ship flying its flag....”
Given that under international law a State has the ability to assert not only prescriptive jurisdiction, but also enforcement and adjudicative jurisdiction extraterritorially (in all areas considered res communis or res nullius) to actions it prescribes as criminal, based on its territory, its nationals, and its security interests, what is the purpose of universal jurisdiction in cases where the heinousness standard has not been met? This is an especially relevant question to ask in light of the plea agreement reached between Muse and the United States government. While Muse was accused of piracy jure gentium, and charged with piracy by statute, he was not convicted of piracy. Muse pled guilty to hijacking, kidnapping, hostage taking and conspiracy; he was not found guilty of, nor did he plead guilty to piracy. He is currently serving a 33 year and 9 month sentence in a United States federal prison.

When one reads of the application of universal jurisdiction to maritime piracy, it is reasonable and rational to assume that there is a rich history of its application. While there is a rich history, it is one of rhetoric, not of application. In fact, prior to 2006, there existed only three known cases of the application of universal jurisdiction to maritime piracy. Yet, while piracy is considered not only the original crime of universal jurisdiction and the only true case of universal jurisdiction under international law, piracy jure gentium is the only iteration of piracy addressed by international law. There is a two-part pragmatic rationale for this. International law recognizes that within its

34 R. v. Green (1705), People v. Lol-Lo and Saraw, (1922) and In re piracy jure gentium (1934) are the only cases involving maritime piracy where universal jurisdiction had been applied prior to 2006. See Appendix 1 for a listing of cases from the United States, Kenya and Seychelles from 2006 through 2014. 35 President Guillaume of the International Court of Justice stated that “…international law knows only one true case of universal jurisdiction: piracy” (42). Other examples of universal jurisdiction emanate from conventions. (Democratic Republic of the Congo v. Belgium 2002 ICJ Rep 3 – 11 April 2000)
territory the State is not only the exclusive agent of enforcement and adjudicative jurisdiction, consistent with Krasner’s conception of domestic sovereignty, it also maintains the sole power of prescriptive jurisdiction. So while there is no provision under international law that requires a sovereign to prescriptive jurisdiction sanctioning piracy, in order for a State to sanction piracy jure gentium, it must sanction piracy by statute. In other words, under international law, in order for a State to assert jurisdiction over a particular action extraterritorially, it must prescribe jurisdiction over that action at home. Yet, even when nations prescribe jurisdiction addressing piracy, they do not, in practice, assert universal jurisdiction in addressing piracy jure gentium.

A short history of piracy and universal jurisdiction

The roots of piracy, as the original crime of universal jurisdiction, extend nearly two millennia. In his Ethical Writings, in 65 BCE, Cicero wrote: “…Nam pirata non est ex perduellium numero definitus, sed communis hostis omnium: cum hoc nec fides debet nec jus jurandum, esse commune” (“For a pirate is not included in the list of lawful enemies, but is the common enemy of all; among pirates and other men there ought be neither mutual faith nor binding oath.”) (Cicero and Peabody 1887:90; Tai 2003:21 en 9) Here, Cicero forgoes what would later be considered an admiralty-law based legal explanation in detailing piratical actions and sanctions and instead comments on moral and ethical social relations, noting that obligations and oaths between pirates and others were not binding because the pirate was the common enemy of all; communis hostis
omnium.\textsuperscript{34} This social versus legal distinction is important because far from suggesting that pirates were the juridical enemy of all, and, as such, should be the sanctioning object of all persons and states, Cicero was stating that oaths and obligations exacted by pirates were not binding because those who would exact such oaths and obligations from persons under the threat of piratical action were not part of the normative social fabric;\textsuperscript{35} they were enemies of all.\textsuperscript{36}

Cicero noted that piracy was unique not because piratical action was any more heinous than other forms of criminal deviance,\textsuperscript{37} but due to a combination of the social

\textsuperscript{34} While Rubin suggests that the phrase hostis humani generis is generally accepted as a shortening of Cicero’s quote above, he notes that its origin is unknown. He does mention however that in Commentaries on the Laws of England (American Edition) Sir William Blackstone attributes its general usage to Sir Edward Coke, (Blackstone 1790:71, Rubin 2006:55 en 61) Tai however suggests that the origins are much earlier, citing “…the commentary by fourteenth-century jurist Bartolus de Sassoferato (1313-1357) on the forty-ninth book of Justinian’s Digest, who in turn cites James of Arena (fl. 1261-1296); see Bartolus de Sassoferato, Lucernae iuris, omnia quae extant, opera, 11 vols. (Venice 1590-1602), Tomus sextus: Commentaria, Digesti novi partem (Venice 1596).” (Tai 2003:21 en 9) See also Ayala 1912:59-60.

\textsuperscript{35} The normative social fabric would include both normative and pathological social interactions. There are “…two distinct types of phenomena which must be designated by different terms. Those facts which appear in the most common forms we shall call normal, and the rest morbid or pathological.” (Durkheim, 1982:91) Because piracy is both perpetrated by those external to society and perpetrated external to the territory of the sovereign, piratical behavior can be considered external to the normal social fabric.

\textsuperscript{36} Interestingly Cicero notes that although oaths and obligations given under duress were not enforceable, those given freely, even between pirates, belligerents, and thieves, were necessary for the maintenance of social relations. There must exist honesty among thieves, “[F]or he who takes anything by stealth or force from a fellow-robber cannot maintain his place in a band of robbers… Indeed, it is said that even among robbers there are laws which they obey…” (Cicero and Peabody 1887:54) This second social commentary on pirates by Cicero further reinforces my assertion that Cicero’s comments on piracy should be understood within a social context and not a juridical one. In his work, Enemies of Mankind: Vattel’s Theory of Collective Security, Walter Rech supports this position. He states “[W]hat is safe to say is that although Cicero put forward a notion of universal hostility he did not invent or even hint at universal jurisdiction, for he never mentioned the issue of jurisdiction over the crime of piracy or a moral duty to repress pirates.” (Rech 2013:31)

\textsuperscript{37} There are those of the opinion that piracy is in fact a heinous crime and that it should be aggregated with genocide, war crimes and torture as a crime against humanity. While it is not the primary aim of this dissertation to take a position in this debate, elsewhere in this dissertation I address the issue within a discussion of the relationship of international law and maritime piracy. In summary, I find little empirical evidence, legal or sociological, to support a heinousness thesis with regard to maritime piracy. For example the Princeton Principles on Universal Jurisdiction, in stating “that certain crimes are too heinous to go unpunished” and “warrant the application of universal jurisdiction” (Macedo 2001:18, 48), lumps piracy with crimes that do meet the heinousness standard: slavery, war crimes, crimes against
position occupied by the pirate and location of piratical action: the high seas. Cicero’s comments are not primarily an indictment of piratical action; they are a discourse based on Rome’s desire to assert hegemony over the Eastern Mediterranean. If the individual is not part of the social, he must be external to it. If he is external to the social, he is external to its control, and Rome’s assertion of control was the foundation of the early Roman Empire.

Yet while the framework of Cicero’s argument was not meant to proffer pirates as the object of enmity from a juridical standpoint, from a standpoint of relative social position and social relations he suggests that pirates did in fact occupy a “special” space external to society. Cicero comments that a pirate “…cannot be considered a criminal, because he does not belong to a city-state; yet he also cannot be counted among the foreign opponents of war, since he also cannot be ‘included in the number of lawful enemies’.” (Heller-Roazen 2009:16) Thus when the pirate commits a deviant act on the

peace, genocide and torture. However, this grouping appears solely based on the “piracy analogy,” piracy being considered the original crime of universal jurisdiction. Nowhere else in that report is it suggested that piracy is any more heinous than other index crime, none of which is subject to universal jurisdiction. (See Kontorovich and Art 2004) What is important to note, however, whether or not one concurs that piracy should be categorized as a “heinous” crime, piracy jure gentium is a crime under the law of nations. This is unique because the law of nations primarily deals with sovereign State structures and interactions (public international law) and conflict of law (private international law). It is rarely called upon to address relations involving persons (as defined by sovereigns and under international law), and only in cases where the reach of municipal law is limited, conflicted, hampered or non-existent. As such, whether it is due to its relative heinousness or due to a combination of the location of the act and the relationship of the antagonist to the sovereign, piracy is a crime that demands being addressed by extraterritorial means. I find it rather perplexing that there are venues under the auspices of international community, and governed by international law, to adjudicate and sanction other crimes of universal jurisdiction, including cases where a State could assert extraterritoriality via territoriality, nationality, protective or passive personality principles, but chooses, for whatever reason, not to assert jurisdiction, but none exist for piracy. Regardless of the opinion of the international community concerning the degree of heinousness inherent in the act of piracy jure gentium, I contend that there is a need for the existence of international fora to adjudicate and sanction those accused of piracy jure gentium that is distinctly separate from municipal juridical apparatuses. See Arrest Warrant, per Judge Higgins et al. (J. Sep. Op.), pp. 78, 81; per Judge Van den Wyngaert (Dis. Op.), ibid, p. 166; United States v. Yunis, 681 F Supp. 896 (1988); UNSC S/2011/30 Report of the Special Advisor to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia.
high seas he does not directly fall under the jurisdiction of the municipal laws of the State. He is a “criminal,” but he has not directly broken municipal law absent extraterritorial jurisdictional reach; he has violated internationals law prohibiting piracy *jure gentium*, which may or may not be sanctioned under municipal law.\(^{38}\) When the pirate attacks a vessel on the open sea, because he is not acting under the power of the sovereign, he cannot be considered a foreign opponent of war, nor can he enjoy the protections of representing the sovereign’s interests as a member of the admiralty. The pirate breaks the law of nations, and because he is not a national of the sovereign, he is subject only to the law of nations. This is somewhat a paradox. Although the pirate breaks the law of nations, there are no international juridical apparatuses of jurisdiction. Until the modern era, there did not exist a universal mechanism of prescriptive jurisdiction; and even in the modern era there exists no universal mechanisms of enforcement and adjudicative jurisdiction.

This lack of a universal international juridical apparatus over the space that is external to the territory of any and all nations is both a functional and a theoretical problem within international law. And while there is much written on extraterritorial jurisdiction, there is little scholarship, and even less scant evidence of practice, concerning the formations of international juridical apparatuses governing that space.\(^{39}\) Functionally this is a problem recognized by the international community, yet it is a

\(^{38}\) Under the law of nations, a State must have municipal law sanctioning piracy in order to prosecute piracy *jure gentium*. See IMO LEG 96/7 and http://www.un.org/depts/los/piracy/circular_letter_3180.pdf

problem that the international community has chosen to address only tangentially, temporally, and on a cursory basis. In creatively interpreting the history and boundaries of customary international law, the international community addresses piracy *jure gentium* via disparate definitions in near universally acceded-to international treaties and documents; the sanctioning of piracy *jure gentium* and the encouraging of United Nation member states to create or refine legislation criminalizing piracy, but at the same time not requiring standardization in sanctions for piracy; the spending of approximately USD 1 billion per annum for the militarization of protection schemes that primarily

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41 For example piracy is defined under Article 101 of UNCLOS (1982) (167 signatories), as

“(a) any illegal act 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 internationally facilitating an act described in subparagraph (a) or (b).”

Note that under UNCLOS (1982), only acts committed on the high sea and for private ends are considered piracy. Thus this definition excludes acts committed by law enforcement personnel, militaries or certain private contractors operating in positions of vessel security that would, if committed by others, be considered piracy. Further note that piracy by definition may be no different in function than robbery on land.

Under SUA (1988), unlawful acts against maritime navigation (essentially piratical acts) are defined under Article 3 as: the seizure of a vessel by force or threat; acts of violence against persons aboard ship if those acts affect navigation; destruction or damage to a vessel or its cargo; and the placing of devices aboard ships which are likely to destroy or cause damage to it; other acts that endanger safe maritime navigation; and, the injuring or killing of a person in connection with any of the aforementioned. Interestingly, SUA does not make mention of the vessel’s location when the act of depredation occurs. This creates considerable ambiguity with regard to jurisdiction, especially as no method or mode of sanction is written into SUA.

A division of the International Chambers of Commerce, the International Maritime Bureau’s (IMB) definition of piracy is: “an act of boarding (or attempted boarding with the intent to commit theft or any other crime and with the intent or capability to use force in furtherance of that act.” Under the IMB’s definition, from a juridical perspective, there are a number of jurisdictional and clarity issues. As with the SUA definition, is no mention of location. Additionally, there is no differentiation in motive for action, whether for private or political ends. Finally, there appears to be a preferencing of property over person. While the IMB is not a treaty, its members are corporations and persons who are nationals of a broad array of nations.
benefit large corporate entities and persons of exceptional wealth: the owners of ocean going vessels; and the funding of regimes to sanction piracy in third-party states where no nexus to the piratical act can be established. To highlight the inequality inherent in the system, the last two of these practices are confined to addressing piracy off the coast of Somalia. They exist in no other location where piracy has been deemed a social problem, nor have they ever existed in this manifestation prior. Theoretically, this is a problem that legal scholars and the courts have, for the most part, chosen to address via a “reinterpretation” of judicial precedents and legal scholarship. I do not suggest here an evolution of a living law as understood by Ehrlich, but a recasting of the law to address a specific social problem. While there is no doubt that functionally the law is working differently than it did prior, a fact that a number of legal scholars suggest is due to the uniqueness of Somali piracy, from a theoretical standpoint, legal scholars have had to reframe the understanding of social relations within international law to justify this shift and the creation of third-party jurisdictional piracy courts that prosecute Somali piracy in Kenya, Seychelles and Mauritius. More directly, to suggest that establishing nexus is not a requisite of universal jurisdiction in the establishment of third-party jurisdictional piracy courts to address Somali piracy is to ignore both social and legal scholarship

44 See discussion on the economic cost of piracy in Chapters 1 and 2. See also Bowden 2010; Bowden 2012; Bellish 2013
45 Eugen Ehrlich makes an important distinction with regard to the “…law that [which] lives and is operative in human society…” and law as the “…judicial administration of justice.” A scientific (positivistic) sociology of law not only informs the praxis of law; it is necessary to the functioning of judicial administration, adding meaning to practice. (Ehrlich 1962:10) See also Hunt 1978, 1993:302-303.
extending back nearly two millennia that acknowledges the requirement and over three hundred years of precedents. This creative reframing of historical juridical praxis not only creates inequality in practice, but it blatantly reifies that inequality in the creation of international law.

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46 See Chapter 7 for a discussion concerning all cases where universal jurisdiction was applied to maritime piracy prior to 2006, and for cases of the application of universal jurisdiction from 2006 to 2014 within the jurisdiction of the courts of the United States, Kenya and Seychelles.

47 See Chapters 6 and 7.
Chapter 6: The Framing of Conceptions of Jurisdiction: A Historical Summary from Cicero to the Early 19th Century

Whereas in the previous chapter I provided a framework for the understanding of universal jurisdiction as applied to maritime piracy, in this chapter I provide a socio-historical account of the development of jurisdiction within the framework of international law through the early 19th century. Via an examination of social commentary by jurists and legal scholars, I build a case to assert that the application of universal jurisdiction to maritime piracy is structured on social commentary and not juridical practice. Through this socio-historical analysis a structure will be developed that will assist in showing that the application of universal jurisdiction to maritime piracy requires a nexus between the seizing State and the State of the adjudicating body. This is the goal of Chapter 7.

Cicero’s social commentary on pirates was the forbearer of uniquely amorphous conceptions of piracy to come. Over a period of centuries and in a variety of social settings, pirates have occupied a quasi-amorphous social space that has been and continues to be difficult to define.\(^1\)\(^2\) Today, those who commit acts of piracy are still noted to be different from enemies at war, and different from belligerents, thieves, and other common criminals.\(^3\) Perhaps an artifact of their social status in pre-modern times or

\(^1\) Rubin notes that even the act of arriving at an internationally accepted legal definition of piracy has for centuries been an elusive endeavor. (2006:312-313)

\(^2\) The law defining piracy is dependent on institutional meaning: “Piracy” has one meaning in the insurance industry, another in the international shipping industry, another in international law, another in criminal law and yet another in the “common law.” (Passman 2009:61-62) Rubin (2006) and Kahn (1996:293 295-296) too note multiple meanings that are context dependent.

\(^3\) Heller-Roazen notes four distinctive traits that, while he asserts are tied historically and structurally to piracy, have commonality with all types of enemy combatants (thereby conflating the act of piracy with
the social space they occupy, perhaps a function of the actions in which they engage or the juridical frameworks that have developed around them, or perhaps merely because in centuries past, as today, pirates swore allegiance to neither monarch nor State, they have been defined, and are currently defined, by the nature of their existence vis-à-vis all others, in a state of perpetual undeclared war against all: hostis humani generis.

Cicero’s characterization of pirates as hostis humani generis is considered to be the foundation for the principle of universality. Based on that characterization, it is proffered that pirates were the universal enemy of all, owing allegiance to neither nation nor sovereign they existed as the object of universal enmity and universal sanction. Yet, placing Cicero’s words in the then-existing socio-political context may result in a different interpretation. Rubin suggests that distinguishing “pirates”, who existed within “political societies” external to the influence of Rome, from brigands and thieves, who were considered criminals under Roman law, may have simply been a matter of social control and the extension of territorial hegemony. In support of this thesis, Rubin states “[T]he legal rationalization found by the Roman Senate for suppressing the communities of “pirates” was not an asserted Roman right to police the seas (although Plutarch seems to have thought that rationale would have been better than the one actually used by the Senate), but the quite different assertion of a Roman right to territorial as well as non-piratical acts committed by enemy combatants). First, is exceptional jurisdiction; second, antagonism for indiscriminate targets; third, a “…collapse of the distinction between criminal and the political categories; and, fourth, the creation of a new paradigm in addressing the aggressor.” (2009:176-180) Yet, I take issue with Heller-Roazen; I do not agree that there is any inherent collapse between the criminal and political in piracy. In fact, I assert that pirates by definition are apolitical, as they owe allegiance to no State (those that do should be considered enemy combatants), and are criminal only on the high seas, as if they engage in criminality in territorial seas or on land, they have not engaged in piracy jure gentium, but in piracy by statute.
maritime jurisdiction in the Eastern Mediterranean... The word [“piracy”] did not imply criminality under any legal system, roman or law of nations.” (Rubin 2006:12) Pirates, it appears, were simply a threat to Roman hegemony and to Roman sea-borne trade (a point not lost on later socio-judicial theorists such as Ayala, Gentili, and most famously, Grotius).

Rome was not at war with brigands and thieves; they fell within its social control apparatus. Pirates, in contrast, posed a two-fold problem for Rome: first, they lived in areas where Rome wished to assert control; and, second, they engaged in behavior that not only threatened Roman trade and commerce, but also did it in an area beyond the reach of Rome’s normal social control apparatus. Because those engaged in piracy were external to Rome’s control, coupled with the fact that they engaged in piratical deviance in an area external to Rome’s control, Rome entered into a legal state of war with the pirates. However, it was due to the nature of this war that posed a special problem for Rome. Because piracy was a problem that could not be addressed by domination over a territory and population alone, Rome’s war with pirates was a perpetual war. This created the recursive problem of Rome’s inability to extend postliminium, as postliminium was a requisite for the ending of hostilities. (Ayala 1912:11, 50) Ultimately, the problem for Rome was not control over land or land-based peoples, but one of location and action. Cicero recognized this unique nature of piratical deviance in noting that those who engaged in piracy were communis hostis omnium. Some thirteen hundred years after

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4 Postliminim is part of Roman Law and refers to the restoring of person, status and property to those deprived of such as the result of war. Rubin notes that Postliminim’s “modern descendant is visible in the classical law of prize and salvage.” (Rubin 2006:55 fn62) For further explanation see Verzijl, Heere and Offerhaus (1968) and Fassbender et al. (2012).
Cicero’s death his words would have been changed to *hostis human generis*. Yet stranger still, over a period of two thousand years Cicero’s social commentary would not only be cited as a legal definition, it would be used as support to create a juridical apparatus nearly as arbitrary as “trial by ordeal.”

Thus Cicero’s words were merely social commentary. And while the formulation of a legal theory of universal jurisdiction based on later interpretations of these words might fulfill a mandate of constructing law as codified hegemonic morality, it does not fulfill a broader function of constructing a formal juridical rationality around praxis. And while it may fulfill a socio-legal purpose, if that purpose results in the law as a reification of an instrumental inequality or inequalities, the international community must find that both the means and end are not acceptable.

Although Cicero’s characterization of those who engage in piracy as *communis hostis omnium* (*hostis humani generis*) was not a legal opinion, from the standpoint of the historical development of international law, it is considered by scholars and jurists of international law as the “authority for the original Roman legal conceptions of ‘piracy.’”(Rubin 2006:10) From the time of Cicero, six centuries elapsed before codified Roman law addressed piracy. The Justinian Digest of 534 C.E. cites the opinion of Paulus (c. 230

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5 As mentioned in Chapter 5 fn 36, Tai notes that earliest known reference to the labeling of pirates as *hostis humani generis* can attributed to Perugian legal scholar Bartolus de Sassoferrato (although she notes that he cited James of Arena (fl. 1261-1296)). Heller-Roazen states that “[B]artolus … introduced into his *Apostilla* on the *Digest* the following remark on the formal difference separating the bandit of the seas from the lawful enemy: “enemies [hostes] are not to be compared to pirates [pyrate], for the later have renounced [diffidati], by the law itself, the very principle of faith.” … Bartolus then explained, rewriting Cicero, that such unworthy opponents are most properly said to be “the enemies of the human species” (*hostes humani generis*).” (2009:103)

6 Rubin notes, “there are many reasons for regarding this [Cicero’s] statement as not indicating any considered legal opinion. Hugo Grotius himself, the great Dutch scholar and jurist of international law of the first half of the 17th century, criticized this passage on the ground that the observance of an oath is wed to God, not to the person receiving the benefit of the oath.” (Rubin 2006:10)
C.E.): “[P]ersons who have been captured by pirates or robbers remain [legally] free.”

(Rubin 2006:11) Paulus’ point is significant because under Roman law persons captured incident to conflict became property of the captors. In noting that those captured by pirates were in fact legally free, he was making a commentary concerning the relationship of sovereignty to social relations. Pirates were not part of the social fabric of society, as they did not abide by its obligations, therefore they were not entitled to its benefits.

Thus, through Paulus’ commentary we see the construction of law based on social relations, a construction we had not seen subsequent to Cicero’s commentary on piracy. Although Paulus’ opinion is not a validation of universal jurisdiction, it does lend support not only to the socio-legal and socio-political stigma of piracy, but also suggests that because pirates are external to society, they could be construed as the “enemy of all”, and external to society.

Post Paulus, a discourse on universal jurisdiction seems to disappear. There is no mention of an application of universal jurisdiction to Norse raiders of the North Sea during the 9th to the mid-11th centuries, although there exists a bilateral treaty between Alfred of Wessex and the Viking Guthrum of East Anglia addressing both borders and *wergild*, the value of property and life. The discourses surrounding the Varangians, who engaged in piracy at the same time around the Caspian Sea, and the Moorish raiders who pirated around the Balearic Islands, Crete and the northern Mediterranean, also lack legal or social commentaries concerning universal jurisdiction. Similarly, there does not appear

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7 Here again, this may be a function of Rome being engaged in a perpetual war with those communities engaged in piracy. Rome’s inability to reconcile *postliminim* with perpetual war, may have led Paulus to construe those captured by pirates as legally free.

8 See Hezser 2003:149.
to be a discourse of universality surrounding the Wōkōu, who raided along the coasts of East Asia during the 13\textsuperscript{th} to the 16\textsuperscript{th} centuries. In fact, a discourse of universality and the stigma of *hostis humani generis\textsuperscript{9}* appears only with the concurrent rise of European mercantilism and property rights; thus, the concepts of universality and pirates being the “enemy of all” appears to be a unique social construction of European thought at the time of the Enlightenment.\textsuperscript{10}

The Treaty of Tordesillas between the Don Ferdinand and Dona Isabella, King and Queen of Spain and Dom John, King of Portugal, on June 7, 1494,\textsuperscript{11} which modified and clarified Pope Alexander VI’s Papal Bull of May 14, 1493,\textsuperscript{12} set the boundary delimitation between Spain and Portugal’s colonial expansion 370 leagues west of the Cape Verde Islands. While there were a number of important questions that arose as a result of the Papal Bull and the Treaty of Tordesillas that impact questions of jurisdiction beyond the right of the Holy See to grant territory and the right of sovereigns to divide

\textsuperscript{9} See Chapter 6 fn 3 (Heller-Roazen).
\textsuperscript{10} There does seem to be one example of a quasi-universal condemnation of piracy prior to the Enlightenment. Canon 24 of the Third Lateran Council of 1179 states, “[C]ruel avarice has so seized the hearts of some that though they glory in the name of Christians they provide the Saracens with arms and wood for helmets, and become their equals or even their superiors in wickedness and supply them with arms and necessaries to attack Christians. There are even some who for gain act as captains or pilots in galleys of Saracen pirate vessels. Therefore we declare that such persons should be cut off from the communion of the church and be excommunicated for their wickedness, that catholic princes and civil magistrates should confiscate their possessions, and that if they are captured they should become the slaves of their captors. We order that throughout the churches of maritime cities frequent and solemn excommunication should be pronounced against them. Let those also be under excommunication who dare to rob Romans or other Christians who sail for trade or other honourable purposes. Let those also who in the vilest avarice presume to rob shipwrecked Christians, whom by the rule of faith they are bound to help, know that they are excommunicated unless they return the stolen property.” In summary, those Christians who aid or cavort with Muslim (Saracen) pirates should be refused communion, excommunicated, have their possessions confiscated and if captured, become slaves. No mention is made of Christians who “pirate” against Muslim possessions, or Christians who “pirate” against other Christians.
\textsuperscript{11} English translation: http://avalon.law.yale.edu/15th_century/mod001.asp
\textsuperscript{12} English translation: http://www.papalencyclicals.net/Alex06/alex06inter.htm
that which was not within their dominion, it appears that navigational freedom between
signatories was not one. Item 4 of the Treaty states:

inasmuch as the said ships of the said King and Queen of Castile, Leon, Aragon, etc., sailing as before declared, from their kingdoms and
seigniories to their said possessions on the other side of the said line, must
cross the seas on this side of the line, pertaining to the said King of
Portugal, it is therefore concerted and agreed that the said ships of the said
King and Queen of Castile, Leon, Aragon, etc., shall, at any time and
without any hindrance, sail in either direction, freely, securely, and
peacefully, over the said seas of the said King of Portugal, and within the
said line. And whenever their Highnesses and their successors wish to do
so, and deem it expedient, their said ships may take their courses and
routes direct from their kingdoms to any region within their line and
bound to which they desire to dispatch expeditions of discovery, conquest,
and trade. (Treaty of Tordesillas 1917)

In effect, while the bilateral Treaty of Tordesillas both partitioned the sea between
its signatories and established ownership thereof, it simultaneously guaranteed the
Spanish the right of undisturbed navigational passage on Portuguese waters. While this
does create a host of conflicts within international law, conceptually it frames two
questions that are central to the intersection of piracy and jurisdiction: If the seas can be
conceived as property, what are the juridical obligations and rights of ownership? And, if
the seas are free, what are the juridical obligations and rights of those who use, foster and
act as guardians of the commons? The responses to these questions inform not only legal
theory, but also juridical practice. Of specific concern is the juridical and social
construction of universal jurisdiction (as it still appears to be undefined under
international law), and the application of jurisdiction to acts of piracy on the high seas.\(^\text{13}\)

\(^{13}\) At this time the high seas were defined as that territory external to the control of any and all sovereigns;
that area beyond the territorial sea. The work of Vattel (1853:Book 1, 180, 208) and Cornelius Van
Bynkershoek (Akashi 1998:126), which linked territorial jurisdiction with military reach, detailed what
had been customary international law with regard to the limits of the territorial sea. They defined the
These questions would become central to the very practical case of navigational freedoms argued as falling under the purview of the law of nature and divine law by Grotius and Selden just over one hundred years removed.

**The formation of universal jurisdiction during the Age of Empires: The relationship of piracy *jure gentium* and universal jurisdiction**

From the doctrine above set forth, it follows that the Portuguese, even if they were the owners of the regions sought by the Dutch, would nevertheless be inflicting an injury if they prevented the Dutch from entering those regions and engaging in commerce therein. How much more unjust, then, is the existing situation in which persons desirous of commerce with peoples who share that desire, are cut off from the latter by the intervention of men who are not invested with power either over the said peoples or over the route to be followed! For there is no stronger reason underlying our abhorrence even of robbers and pirates than the fact that they besiege and render unsafe the thoroughfares of human intercourse. (Grotius and Feenstra 2009:30)

Through the early 17th century, conceptions of jurisdiction under international law with regard to piracy appear to be based on Cicero’s social characterization of piracy, and not on any subsequent jurisprudence addressing piracy. During the 16th and 17th centuries, a number of social and legal scholars examined the relationship of the seas to social relations, commerce and the expansion of empires. Central to the development of international law and understandings of not only navigational, trade and property rights and obligations, but also the laws of conflict, prize and booty, and war are the works of Pierino Belli (1502-1575), Bathazar Ayala (1548-1584), Alberico Gentili (1552-1608) and Samuel von Pufendorf (1632-1694); yet it is Grotius’ (1583-1645) *Mare Liberum* and

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territorial sea as the furthest distance a canon shot carried when fired from shore, approximately three miles. It was not until the 1982 United Nations Convention on the Law of the Sea that the international community nearly unanimously agreed on a 12-nautical-mile limit to the territorial sea. (Unts 1982)
British jurist John Selden’s (1584-1654) response, *Mare Clausum*, concerning the freedom of the oceans that established the framework for State relations on the high seas.

The early 17th century saw the rise of the Dutch Republic and the challenge by the Dutch of Portuguese domination in South East Asia, along with British hegemony in North America and its ultimate challenge to Dutch expansion in South East Asia. By this time, as evidenced by Spanish and Portuguese expansion, sea power and sea trade had proven the vehicles of imperial domination. Yet, as alluded to above, Spanish and Portuguese forms of imperial dominion were being tested by the Dutch form of mercantilism, which favored trade over territorial domination. Dutch jurist Grotius addressed Spanish and Portuguese conceptions of the sea as an extension of territory, in his work *Mare Liberum*.

In 1608 Hugo Grotius (1583-1645) applied the theories of natural law and the rights of the sovereign under *ius gentium* to reason for navigational freedoms of the seas and freedom of exploitation of the resources of the seas as natural rights. (Grotius and Feenstra 2009:69) He reasoned his case by addressing the right, or lack thereof, of the Holy See to extend ecclesiastical jurisdiction to political and territorial jurisdiction over sovereigns, and further the right of the Holy See to “grant” and divide territory to and among particular sovereigns, not only at the expense of other sovereigns but, as a general principle, the extension of sovereignty by one sovereign over another. He fashioned his argument by exclaiming that that which has existed and still exists as a sovereignty

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14 While the Republic of the Seven United Netherlands was established in 1581 (carved out of Philip II’s Spanish Netherlands), it was not until the 1648 Peace of Munster that the Netherlands achieved full independence from Spain. The Peace of Munster was part of the Peace of Westphalia that ended the hostilities of the Thirty and the Eighty Years Wars.
cannot be “claimed” as having been discovered by another sovereignty, and can therefore
neither be passed from the dominion of G-d, who has no dominion over territory and only
over men, or to the dominion of a sovereign who would rule over another sovereign.
While Grotius reasoned that it was both the desire of and within the power of Pope
Alexander VI to settle the disputes between the Portuguese and the Spanish (as he was
their chosen arbiter), he also surmised that even if it was the Pope’s “intention to bestow
almost a third of the whole earth upon each of the two nations above mentioned… it
would not necessarily follow that the Portuguese had become owners (sovereign) of the
Orient… in order to give validity to such a claim, it would be necessary to add the title of
actual possession to the title of donation.” 15 (Grotius and Feenstra 2009:39)

Grotius based his claim on two rights: first what he deemed natural rights,16 those
rights that are not contingent or dependent on a municipal or ecclesiastical systems of

15 To buttress this point Grotius noted that while the Portuguese “maintain[ed] that those territories have
passed into their hands as a reward for discovery,…discovery consists, not in perceiving a thing with the
eye, but in actual seizure… [T]he Portuguese cannot in any sense at all be said to have found the East
Indies, a region exceedingly well known for so many centuries past[?]” And even if they had “discovered
the East Indies,” “discovery imparts no legal right save in the case of those things which were ownerless
prior to the act of discovery.” Grotius pointed out that religious identification had no bearing on
ownership rights. He cited Francisco de Vitoria (1486-1546) who “declare[d] that ‘Christians, whether
laymen or clerics, may not deprive infidels of their civil power and sovereignty merely on the ground that
the latter are infidels, unless they have been guilty of some other wrong’. For the factor of religious faith,
as Thomas [Aquinas] rightly observes, does not cancel the natural or human law from which ownership
has been derived [emphasis added].” (Grotius and Feenstra 2009:33-37) Vattel supported this line of
thought in stating that “navigators going on voyages of discovery, furnished with a commission from
their sovereign, and meeting with islands or other lands in a desert state, have taken possession of them
in the name of their nation: and this title has been usually respected, provided it was soon after followed
by a real possession. But it is questioned whether a nation can by the bare act of taking possession,
appropriate to itself countries which in question it does not really occupy, and thus a much greater extent
of territory than it is able to people or cultivate. It is not difficult to determine that such pretension would
be an absolute infringement of the natural rights of men and repugnant to the view of nature…. “ (Vattel
1853:Book I, 98-99) Additional support for Grotius’ argument is supplied by Gentili who in De iure belli
libri tres stated “theologi silete in munere alieno (Let the theologians keep silent about matters which are
outside of their province).” (Gentili 1995:Book I, Chapter 12, 92)

16 “[E]very nation is free to travel to every other nation and to trade with it.” While in stating this Grotius
did not explicitly call the right of trade and visit a “natural right;” he did, however, state that “God
law, but those which are universal and unalienable;\textsuperscript{17} and second, property rights.\textsuperscript{18} In

\textit{Mare Liberum}, Grotius was quite clear that it was his legal opinion based on social
relations, and international and natural law, that first and foremost the seas are \textit{res nullius}

\begin{quote}
A modern example of natural rights is the United Nations’ Universal Declaration of Human Rights;
although Grotius would certainly not have included slavery among those rights. Grotius had a bipartite
position on slavery: slavery as a prize or booty seized in conflict and slavery a right of liberty. Grotius
stated that “for although slavery has fallen into disuse in Christian practice… ‘Things captured in war
shall be acquired by the captors.’” (Grotius 2006:87). Tuck, in interpreting Grotius’ position on voluntary
slavery states that, “one’s own liberty, which was undoubtedly used to do things in the material world,
counted as property—with the implication that it could, if legal circumstances were right, be traded like
any other property.” This was consistent with the work of scholars on whose work Grotius’ treaties were
framed. “Vitoria remarked that ‘liberty cannot rightfully be traded for all the gold in the world: it can be
traded for life, which is more precious that any gold.’” Molina stated that “[M]an is \textit{dominus} not only of
his external goods, but also of his own honour and fame; he is also \textit{dominis} of his own liberty, and in the
context of the natural law can alienate it and enslave himself.” (Tuck 1979:29, 49, 54) “Grotius stated,
‘[I]ndeed, to borrow Aristotle’s admirable explanation, ‘Whatever each person’s understanding has ruled
over him regarding a given matter, that to him is good.’ For God created man ‘free and \textit{sui iuris},’ so that
the actions of each individual and the use of his possessions were made subject not to another’s will but
to his own.” (Grotius 2006:33) Thus, for Grotius, liberty, in its various manifestations, was governed by
divine law and the natural law, and, with some equivocation, I also suggest, the positive law.

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divine law and the natural law, and, with some equivocation, I also suggest, the positive law.

\textsuperscript{18} Grotius takes an absolutist, yet libertarian, position on property rights, which is evident in his opinion on
liberty. He noted that if an individual may sell his labor, then that individual should also be able to sell
his liberty. Furthermore if he sells all of his liberty, then he has sold himself into slavery. (Grotius and
Tuck 2005:1.3.8.1) Grotius formulated his position on the works of Ulpian, Hermogenianus and Gratian.
In stating that “everyone was born free under the law of nature” and that slavery was the product of \textit{jus
gentium}, “the agreement of men over what redounded to their mutual benefit,” Ulpian was noting not
only was freedom of person assumed \textit{a priori} under international law, but that that which was not
specifically \textit{dominia distincta} (private property) was either \textit{res nullius} or \textit{res communis}. And while
usufruct may have been attributed to which that was \textit{dominia distincta} or \textit{res communis}, the natural
condition of that which was \textit{res nullius} or \textit{res communis} was not private property. Hermogenianus echoes
Ulpian in stating that “[U]nder the \textit{ius naturale} everything had been held and used in common.” In
further defining the relationship of \textit{ius naturale} and \textit{res communis}, \textit{aut publicu furigentiu dicatur} (see fn
19 below) and/or \textit{res nullius} [see Grotius and Feenstra 2009:48], Gratian states that [T]he \textit{ius naturale}
is common to all nations; it is what is received everywhere by natural instinct, and not by any conventions.
It includes the union of men and women, the bringing up of children, common possession of everything
(\textit{communis omnium possessio}), and freedom for everyone.” (Tuck 1979:18) These conceptions of
property and liberty were not only reflected in Grotius’ defense of navigation and visit, but also of his
view on piracy.
(unowned).\textsuperscript{19} However, in the above excerpt Grotius introduced a proviso. He noted that even if the seas could be construed as being “controlled” by States, those States that assert ownership must balance their assertions of ownership with the right of all nations to innocent passage (navigation) and freedom of visit.\textsuperscript{20} Grotius stated that “the thoroughfares of human intercourse” facilitate exchange, trade and commerce, and social interaction, and must remain open to, and accessible by, all. Further, he asserted that the rights of navigation and visit are natural rights protected under the law of nations. So fundamental are these rights, Grotius pointed out, that they [pirates and robbers] [who] besiege and render unsafe the thoroughfares of human intercourse" should meet with general social condemnation. (Grotius 2006:305) While this statement of universality, or universal condemnation, appears to be merely a social commentary and that, as with Cicero over fifteen hundred years before, there appears to be no juridical or legal remedy in theory or practice offered, Grotius does, in fact, construct a legal argument. According

\textsuperscript{19} In Chapter V of \textit{Mare Liberum} Grotius explains that the seas are not subject to private ownership. According to Roman law, which he contends is the basis for international law (the primary law of nations or the natural law), the seas are either nobody’s, common to everybody (common ownership) or public to everybody (common use). “[D]e maria tem prima fit cofideratio, quod cum paffim in iure aut nullius, aut comune, aut publicu iurifgentiu dicatur, hae voces quid significet ita commodifime explicabitur...” While in this context he does not specify the exact disposition of the seas (although later in Chapter V he does suggest that the seas are the property of no sovereign and for the use of all sovereigns), he does make clear what the seas are not; they are not the sole possession of a single sovereign. (Grotius 2009:49) See also the comments by Ulpian, Hermogenianus and Gratian regarding property rights during the Roman Empire in Chapter 6, fn 18, from which Grotius formulates his opinion.

\textsuperscript{20} It is precisely this right of visit that Freitas misunderstood in his response to Grotius. Vieira states that “Freitas concludes accordingly that under permissive (natural) law any prince is free to prevent foreigners from entering, dwelling, and trading on his lands, as well as to forbid his subjects to trade with foreigners, if he deems it necessary. (Vieira 2003:365) Grotius is not arguing against domestic sovereignty and the right of the prince over what is his. What Grotius is stating is that no third State, no third prince, has, under the law of nations, the power to prohibit two other nations from trade. I believe that is also reasonable to extend this prohibition of third-party State intervention to the sanctioning of deviance. It is consistent with Grotius’ position to assert that no third-party State has, under international law, the power to punish action where verifiable nexus exists between the injured or aggrieved and the aggressor. This takes on special meaning in spaces external to the control of any and all sovereigns, especially in cases involving the rights of navigation, visit, and trade and commerce, especially with regard to acts of maritime piracy.
to Grotius, navigational rights are guaranteed by natural law, by international law, and, as such, those who impede navigation and/or trade, another right guaranteed by natural law, should be subject to not only to the condemnation of such acts by all nations, but also to sanction and/or retribution.

This thesis was the rationale for *Mare Liberum*. Grotius’ work was the result of a commission by the Dutch East India Company (*Vereenighde Oostindische Companie*) in response to the taking of the Portuguese carrack *Santa Catarina* in the Straits of Singapore by Dutch Admiral Jacob van Heemskerck on the 25th of February 1603. Grotius reasoned that, based on his understanding of the theory of natural rights, not only were the seas free to navigation and all states free to trade with whomever they wished, but also that privateering against the assets of a State was a justified response to ill-treatment of those who, in fulfilling their freedom of navigation and trade, were harassed by representatives of that State. In fact, this was the exact rationale used by van Heemskerck in the taking of the *Santa Catarina*. In his 1608 treatise *De Jure Praedae* (*On the Law of Prize and Booty*), Grotius suggested that the Dutch East India Company had entered into a just war with the Portuguese. “He produced evidence…that resistance against the Portuguese and the seizure of the *Santa Catarina* was fully legitimate according to the laws of war as a rebuttal to violent attacks, as a means to preserve one’s property, in order to restore one’s rights or guarantee the return of goods, and as a punishment of committed crimes.” Grotius further noted in *De Jure Belli ac Pacis* (*On the Law of War and Peace*) that “[A]uthorities generally assign to wars three justifiable causes, defence, recovery of property, and punishment.” (Grotius and Feenstra 2009:XII, XIII, XIII fn 13) Thus the taking of the *Santa Catarina* by the Dutch East India Company
was a just and legal response under the law of nations and the law of war in defense of the Netherlands’ navigational and trade freedoms in South Asia, the recovery of property, and in order to punish the Portuguese for acting against the interests of the Netherlands and against the law of nations.

By creating a framework structured on navigation and trade being natural rights under the law of nations, Grotius was able to construct a universalist argument that those who sought to impede those natural rights were engaging in piratical deviance. Thus *Mare Liberum* lent support to conceptions of maritime depredation as a crime of universal condemnation. And, while Grotius did not lay out a judicial response to the crimes of navigational and trade interference, he did note that privateering was a legal remedy under the law of nations.²¹

Cicero stated, “‘nothing is by nature private property.’” Yet, over time, based on use, “occupation” led to ownership, and those “things which have been occupied for a long time become the property of those who originally found them unoccupied.” (Grotius, Magoffin and Scott 1916:61, 63) Yet where Selden would take issue with Cicero’s assertion of the negation of *dominia distincta*, he most certainly would have agreed with his assertion of the connection between occupation and private property. Thus rests the argument of John Selden in his 1636 response to Grotius’ *Mare Liberum*.²²

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²¹ By noting that privateering was a legal remedy under international law against “they [who] besiege and render unsafe the thoroughfares of human intercourse,” (Grotius and Fenstra 2009:30) specifically referring to the taking of the *Santa Catarina*, Grotius lends support to counter later social and legal arguments that pirating was (is) a heinous act. Because privateering and piracy are analogous acts, one committed for solely for private ends and without the support of the sovereign, and one committed for “mostly” private ends with the support of the sovereign, and because privateering has not been described in a legal context as a heinous act, the act of piracy cannot be considered as a heinous act.

²² In 1618 the British monarch requested that Selden write a response to Grotius’ *Mare Liberum* in defense of its claims to sovereignty in the North Sea and North Atlantic. Selden’s initial paper was not published,
Although *Mare Clausum* was written in response to *Mare Liberum*, its primary purpose was not to refute the latter, but to state the case of dominium by the British monarchy over its imperialist interests. While Selden accepted Grotius’ account of dominium and ownership use rights, he diverged with Grotius on whether the oceans could be “apportioned as private property along with the land.” (Tuck 1979:87) This divergence was a function of the aims of the two jurists. As stated prior, Grotius’ aim was to show that navigation and trade were natural rights, whereas Selden’s aim was to present the argument that the seas could be appropriated, and construed as private property. Selden’s claim rested on Talmudic scholarship’s understanding of the earth being bequeathed to Adam as part of divine law, and its subsequent inheritance by Noah and his issue. Selden stated

[D]ominion, which is a Right of Using, Enjoying, Alienating, and free Displfing, is either Common to all men as Possessors without Distinction, or *Private* and peculiur onely to fom; that is to fay, distributed and set apart by any particular States, Princes, or perfons whatsoever, in such a manner that others are excluded, or at leaft in fom fort barred from a Libertie of Ufe and Enjoiment… This right of dominion is a divine right inherited from Adam, as “wee finde divers paflages plainly pointing out this state of Communitie, in that Divine Act of Donation, whereby Noah and his three fons Shem, Cham and Japhet (who represented as it were the person of Adam, for the reforing of mankind after the flood) become Joint-Lords of the whole world. (Selden et al. 1652:Book I, Chapter IV, 17-18)

According to Selden, divine law did not only establish rights of property, the law of man formalized them. He noted that Noah, having “revived [after the flood] this kind of distribution or private Dominion; which they say also hee did by Command from God” conveyed this right to his sons. Noah cautioned them “that no man shoule invade the
Bounds of his Brother, nor should they wrong one another; because it would of necessity occasion Discords and deadly Wars among them....” (Selden et al. 1652:Book I, Chapter IV, 19) It is the origin of property rights that is most significant to Selden, and that origin is a divine bequeathment.

Selden does not refute the natural law, but subjugates it to the divine law. Where, to Grotius, a divine law of dominion (property rights) is consistent with a natural law that affirms the right to navigational freedom and the freedom to trade, to Selden, property rights are first subject to divine law and secondarily subject to the natural law. While his reliance on divine law to create an argument of dominion over the land yields a similar result to Grotius’ position based on the natural law regarding the division of the land into private property, this is also the point where Selden’s argument is least compelling in its support for dominion over the seas. In Chapter V of *Mare Clausum*, Selden is clear that G-d’s bequeathing of territory to the issue of Noah sets the seas as boundary and not as possession. So, in essence, Selden sets up the seas to be defined as bequeathed by G-d under divine law, yet acknowledges that G-d had not done this. It is here that Selden relies on occupation under permissive law, as being sufficient for the establishment of not only dominion, but also private property. He states

suppose at last it were granted, that the Seas came not into those more ancient distributions of Territories, then it remain’s next to be consider’d, whether they might not lawfully bee acquired afterwards by Title of occupation, as things vacant and derelict; that is, either by the *Natural or Divine universal Law* which is *Permissive*\(^2\), or by the Law of divers *Nations, Common or Civil*, which, in judging matters of this nature is best Interpreter of the *natural Law* which is *Permissive*... then (I suppose) it

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\(^2\) “As far as Selden is concerned, the issue belongs to that part of natural and international law that he calls *permissive* and *intervenient*; *permissive* in the sense that ownership of the sea is not something either forbidden or commanded and *intervenient* in that it evolves out of custom and usage” (Ziskind 1973:539)
will not be doubted, but that the Seas are, by all manner of Law, every way capable of private Dominion, as is the Land. (Selden et al. 1652:Book I, Chapter IV, 26-27)

Whether Selden aptly dug himself out of his self-designed quagmire is the subject of debate yet, in Book II of *Mare Clausum*, Selden discusses the essence of England’s dominion over the North Atlantic and the North Sea. Selden addresses Grotius’ claims that dominion over the sea is a *de facto* infringement of the liberties, as guaranteed by the natural law, of navigation and trade in Chapter XX. (Ziskind 1973:538) While Selden suggested that the rights of innocent passage were not prejudiced by ownership of the sea, he did note that while England was at war with Spain “the Kings both of Denmark and Sweden, together with the Hanf Towns, very often and earnestly begged of Queen Elisabeth, that they might have free passage through the English Sea with Provisiions towards Spain… I know that such Licence was denied them…” (Selden et al. 1652:Book II, Chapter XX, 346) So while Selden supported the right of navigation and visit, these were not guaranteed rights, but rights subject to the positive law of nations; thus further subjugating *ius gentium* to municipal law in areas that the international community considers, as defined by UNCLOS 1982, Article 86, the high seas.

Selden built his argument on the property status of the seas not in contrast to Grotius’ position, but as a clarification of Grotius. By citing the same jurists of the Roman Empire as did Grotius, Selden suggested that Grotius’ focus on navigational freedoms did not preclude assertions of dominium. He suggested that because the sea was not subject to the same type of use and demarcation as the land, dominion over it should also be conceived differently. Selden noted that Grotius cited Ulpian to support a position that the seas were not subject to the same principles of ownership as the land. Ulpian
argued that that which was not specifically *dominia distincta* was either *res nullius* or *res communis*. And while usufruct may have been attributed to that which was *dominia distincta* or *res communis*, the natural condition of that which was *res nullius* or *res communis* was not private property. Grotius further suggested that that which is common to all, and which cannot be possessed by occupation, could not become *dominia distincta*. Selden distinguished his position by noting that that which was common was not necessarily public, and that which was public could be used by few for the benefit of society. He cites Pomponius who stated that “public property was leasable and the lessee was protected, and the sea could be hired in the same way as land.” Selden built upon this idea of possessing the commons. Whereas Grotius perceived the *diverticulum* as an anomaly and insignificant, Selden conceptualized it as the bounding and possessing of the sea. “For Selden, the step from *diverticulum* of Lucullus24 to Pompey’s *imperium* under *Lex Gabinia*25 is a very short one.” (Ziskind 1973:545, 551)

While Grotius and Selden both understood international law as the law of nations, there were other jurists and philosophers who argued that international law was the law between nations. Hobbes and Pufendorf are representative of this group. They argued “each sovereign nation pursues its own interests on the authority of the law of nature.” They understood international law as not a “law ‘of’ nations” as conceived by Grotius, but a “law ‘between’ nations.” ([Blom in] Grotius and Tuck 2005:Responses and Critics, 2) While their work does not address questions of jurisdiction with regard to piracy, this line of thought is important to how one conceptualizes jurisdiction on the high seas.

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24 In *Mare Liberum*, Grotius discussed the diverting of the seas to the villa of Lucullus, and his subsequent possession of it and its resources. (Grotius and Feenstra 2009:69)

25 See Ayala (1912:122)
Whereas Selden suggested that the seas can be considered property as an extension of the land, Hobbes’ and Pufendorf’s line of reasoning, although starting from a different point, led to a similar conclusion. If international law is merely the law between nations, it is necessary for nations to enter into treaties to determine the extent of dominion over the that which is possessed via occupation or restricted use by the sovereign. So, like Selden, Hobbes and Pufendorf saw no conflict under international law between res nullius or res communis and use restricted by a sovereign. Yet, in diverging from Selden, use restriction for Hobbes and Pufendorf was based on possession and exclusive use, and these were ultimately dependent on the laws of war and prize, treaty, political will and a sovereign’s ability to project power.

Because of the central role Grotius’ and Selden’s work played in the formation of international law in general, and jurisdiction in particular, I question if Mare Liberum, along with Grotius’ subsequent works, De Iure Praedae and De Jure Belli ac Pacis, and Mare Clausum shed any light on questions of jurisdiction with regard to piracy. As with Cicero, while expectations for answers were high, the yield, based on textual evidence, was less so. With the exception of providing justification for the taking of the Santa Catarina by the Dutch East India Company there is little explicit mention of piracy in their works. Yet these works do provide wide support for asserting jurisdiction based on property rights. Mare Clausum provides support for the application of municipal law in those waters where a sovereign asserts control or property rights. Mare Liberum, in contrast, provides support for the application of extraterritorial jurisdiction under international law on those waters considered beyond the control of any and all sovereigns. The Netherlands could make the assertion of extraterritorial jurisdiction
based on its duty as a member of the international community to guarantee freedom of navigation and commerce on the high seas as a natural right. Thus, while not explicitly stating it, Grotius’ work not only supports the application of jurisdiction extraterritorially, it suggests that its application should be the province and responsibility of the entire international community under *ius gentium*. In this respect, Grotius is calling for universal jurisdiction, because depredation need not touch the sovereign directly for the duty of policing the high seas to be invoked. This position on jurisdiction not only distinguished Grotius from other jurists of the early 17th century, it set the framework for the construction of juridical responses to deviance in areas external to the territorial control of the sovereign under *ius gentium*.

Writing at the time of Grotius and Selden, British jurist and philosopher Francis Bacon (1561-1626) noted in *Dialogum de Bello Sacro* that not only can any means be used “utterly to extinguish and extirpate pirates, which are the common enemies of mankind (*communes humani generis hostis*), and do much infest Europe at this time,” but also that “a war upon pirates may be lawfully made by any nation, though not infested or violated by them.” Here Bacon uses a decidedly universalist tone in addressing piracy: they are *communes humani generis hostis* and, as such any nation, whether touched by piratical deviance or not, may try and sanction them for their crime. He stated this as social commentary not because of the criminality in which they engaged, but because they existed external to the fabric of “human society” and they engaged in piratical deviance, which, by definition, is external to “human society.” (Bacon et al. 1900:176-177, 212-213)
In contrast to Grotius and Bacon, English jurist Edward Coke (1552-1634) held piracy not to be a crime of universal jurisdiction under *ius gentium*, but simply a crime against statute. In *The Third Part of the Institutes of the Laws of England*, Coke defined piracy from the Latin *Pirata*, which he noted was a derived from the Greek *peiratis* - “a Robber upon the Sea.” The operative words for Coke were “robber” and “sea.” For Coke, a “pirate” was one who robbed on the sea. It was not that he had removed himself from the fabric of society and the protection of the sovereign, it was that he acted in a treasonous manner against the interests of society and against the sovereign. In Coke’s view, the pirate did not remove himself from the fabric of society, he tore at it; he did not sever a relationship with the sovereign, he committed a crime specifically against the sovereign. It was this equating piracy with treason that was reified in statute. Coke noted that “[B]efore the Statute of 25 E.326 if a subject had committed Piracy upon another … this was holden to be petit Treafon, for which he was to be drawn and hanged: because *Pirata e{f}r hoftis humani generis, and it was contra ligeancie fue debitum:27 But if an Alien, as one of the Normans, who had revolted in the reign of King John, had committed Piracy upon a subject, this offense could be no Treason, for though he were *hoftis humani*

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26 Coke stated that “before this Statute, Piracy or Robbery on the high Sea was no felony, whereof the Common Law took any knowledge, for that it could not be tried, being out of all Towns and Counties, but was only punifiable by the Civil Law, as by the Preamble it appearith; the attainer by which Law wrought no forfeiture of Lands, or corruption of blood.” (Coke 1680: Chapter 49, 112) Rubin notes that the first statute against piracy was enacted in 1535 (27 Hen VIII c.4), which was supplanted in 1536 by a nearly identical statute 28 Hen. VIII c.15. He further states that the statute not only criminalized piracy under the Common Law, because of the ineffectual nature of addressing piracy under the admiralty’s civil law, but also sought to “classify ‘piracy’ as an Admiralty term for breach of feudal relationships, equivalent to the master-servant bond in days when status seemed more important legally than contracts.” (Rubin 2006:36-37) For a further discussion on the creation of statute to formalize status relations and control labor see Chambliss (1964) and Chapter 1 of this dissertation.

27 Against an allegiance owed to the crown.
generis, yet the crime was not contra ligeanciæ fuæ debitum, because the offender was no subject….” (Coke 1680:Chapter 49, 113)

Coke further suggested that while admiralty law was the applicable body of law in those waters that under UNLCOS 1982 would be defined beyond the low-water line along the coast (Article 5) including the territorial sea, but not including a state’s internal waters (Article 8), statute (common law) in this regard applied to subjects of the sovereign, and only to subjects of sovereign. This is not to suggest that “Aliens,” as mentioned by Coke, were not the subject of sanction under the law of England; they were addressed by Civil Law and the Law of the Admiralty.28 In his treatise, Coke’s discourse on piracy by statute reifies conceptions of piracy as committed by subjects of the crown. Subjects are accountable to municipal law on the high seas, aliens are not. Aliens, in contrast, are held accountable to the Law of Admiralty. So far from creating a case against universal jurisdiction, Coke was merely defining the reach (the high seas) of jurisdiction under the nationality principle. Coke did not, as legal scholars from the continent had, create a discourse around divine and/or natural law, nor did he invoke ius gentium.29 It appears that Coke understood statute against piratical deviance to be restricted to subjects of the realm and to the territory of the realm, including its ships operating on the high seas.30 (Rubin 2006:38-39, 42)

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28 The challenge to prosecuting crimes under this statute of Admiralty Law is that it required the accused must confess or be identified by “witnes indifferent… which in these cafes cannot be gotten but by chance, or very rarely….,” (Coke 1680: Chapter 49, 112) See Statute 35 H.8 Chapter 2 [British Admiralty Law].


30 For a later example of this line of reasoning see the United States Act of March 3, 1819. This act legislated United States vs. Palmer (1818). It was recognition by the United States judiciary that piracy by statute must specify the reach of the law. Pre-Palmer, the federal bench found that piracy within the Act of April 30, 1790, did not apply to non-nationals. The Act of March 3, 1819, expanded the reach of
In what appeared to be a “universal” expansion of statute, “[I]n 1569 Queen
Elizabeth had by proclamation denounced “all pyrats and rovers upon the seas” and
declared them “to be out of her protection, and lawfully to be by any person taken,
punished, and suppressed with extremity.” Rubin clarifies that although this appears to be
“the earliest document found setting forth a basis for what later came to be asserted as
‘universal’ jurisdiction in all countries to enforce their domestic laws against foreign
‘pirates’ for their acts solely directed against foreign victims,” in reality the “roots of that
concept lay in the municipal (English) law of ‘outlawry’ and not in any international
practice of Roman law.” He further states that “[T]his proclamation apparently rested on
the assumption that ‘piracy’ was not illegal at international law but only at English
municipal law, and that the English Jurisdiction was felt to be grounded in the
relationship between subject and sovereign, not in any jurisdiction over the acts of
foreigners.” (Rubin 2006:40, 62 fn 179, 42) Thus, what on the surface appeared to be
early practical formations of universal jurisdiction in England through the early 17th
century were merely expressions of municipal law.

For their part, the Admiralty judges had wide berth in addressing piracy, although
the manner in which they did so was both local and temporal. Yet, in practice, piracy was

the courts to piratical acts by non-United States nationals. This issue of limiting jurisdiction resurfaced
nearly two hundred years later and half a world away in the form of territorial limitations on asserting
jurisdiction over acts of maritime piracy. In Republic [Kenya] v. Magistrate’s Court, Mombasa Ex-parte
Hashi & 8 Others (2010) presiding Judge Ibrahim stated that per §5 of the Penal code of Kenya “[T]he
jurisdiction of the Courts of Kenya for the purposes of this Code extend to every place within Kenya,
including territorial waters.” He concluded that “Kenyan Courts are not conferred with or given any
jurisdiction to deal with any matters arising or which have taken place outside of Kenya.” He further
suggests that this territorial limitation is due to a lack of nexus between the State and the piratical act.
(Interviews with Paul Musili Wambua (Nairobi, Kenya) and Jared Magolo (Mombasa, Kenya July 2013)
Where Coke and Marshall noted that statute limited the reach of the courts to nationals, Ibrahim noted
the territorial limits of statute based on the lack of a clear territorial nexus to the act that would allow
extending jurisdiction extraterritorially.
connected more with conceptions of property, as understood as *dominia distincta*, than with conceptions of criminality. Universal jurisdiction as such was not yet understood as addressing “pirates” as “*hostis humani generis,*” but to addressing 16th through 18th century conceptions of prize and booty.

Bassiouni suggests that a universalist view of piracy and the adoption of a universal sanction of piracy was only accepted by all states because it was “dictated by *ius gentium.*” (Bassiouni 2001:14) He directs us to Gentili31 and Ayala32 as adopting this view; however, Rubin cautions that although “dictated by *ius gentium,*” universal condemnation was due not to the character of the act of piracy, but due to the social position of those engaged in the act. Rubin states that “‘[P]iracy" to Gentili was apparently any taking of foreign life or property not authorized by a sovereign, synonymous with brigandage or robbery on land [*praedones* or land-based pirates under Roman Law].”33 (Rubin 2006:20) These were persons operating outside the control of the sovereign. A reading of Ayala confirms this view, again not with a repudiation of the act of piracy as one of universal approbation, but under preemptory norms, *jus cogens,* concerning prize and salvage. Ayala states:

[F]or the same reason, the laws of war and of captivity and of postliminy, which apply to enemies, do not apply to rebels, any more than they apply to pirates [*piratis*] and robbers... Our meaning is that these persons themselves can not proceed under the laws of war and so, e.g., they do not

31 *De Jure Belli* (1995)
32 *De Jure et Officiis Bellicis et Disciplina Militari* (1912)
33 Rubin’s interpretation of Gentili’s view is consistent with my interpretation of Grotius’. In the passage above Grotius condemns both land-based robbers (*latrones*) and pirates (*piratas*) for “besie[ing] and render[ing] unsafe the thoroughfares of human intercourse.” (Grotius and Feenstra 2009:30) He makes no distinction regarding the act’s location (whether it occurs external to the territory of all sovereigns or within the territory of a sovereign), issues of sovereignty, or the relative heinousness of the crime. Grotius’ commentary appears confined to navigational freedom and not to applications of jurisdiction under municipal and international law.
acquire the ownership of what they capture…; but all the modes of stress known to the laws of war may be employed against them, even more than in the case of enemies, for the rebel and the robber merit severer reprobation than an enemy who is carrying on a regular and just war and their condition ought not to be better than his.34 (Ayala 1912:11-12 [see also Rubin 2006:19])

Like those noted above, the work of Pierino Belli supports praxis being based on the social position of those who engage in piracy. Rubin notes that Belli, resting on Baldus Ubaldu’s (1327-1400) interpretation of Cicero and Plutarch, stated that “while war should not be begun without a declaration, ‘it is customary to make an exception in the case of pirates [piratae], since they are both technically and in fact already at war’.” (Rubin 2006:18) Belli further states that “it should be permissible for anyone to attack them…even persons in private life may assault such outlaws - and to the point to killing them.” (Gould 2013:30) There is little differentiation between the position of Belli, Ayala, and Gentili with respect to the defining of piracy as an ill that demands social condemnation, yet to which a juridical remedy had not been applied. Pufendorf followed in this tradition of social commentary as, in De Jure Naturae et Gentium Libri Octo, he reengaged Cicero’s discussion on oaths exacted by extortion. Pufendorf differentiated oaths as those given freely, those given under duress and those given to G-d. He noted that oaths given under duress to men, even those calling on G-d as a witness, are not binding because unless the oaths were accepted by G-d (a task which G-d wont preform due to the nature of the duress), for if it was not accepted by G-d it was not an oath. He further clarified that G-d, knowing the innocence of a person, wont deprive that person of

34 Like Grotius and Gentili, Ayala groups pirates (piratis) and robbers (latronibus) as a specific type of deviant. Here he is making a distinction that these deviants cannot be considered enemies, because they, like rebels (rebellibus), are not legal combatants at war.
their goods “and bestow them on an imperious rascal.” He suggested that an oath to a person such as a pirate was non-binding because a pirate, as evidenced by his actions and manifest in his character, does not “highly esteem God.” He further cited Cicero in noting that “[S]ince a pirate is the common enemy of all, that is, a man who without having been injured robs and murders any person whomsoever that he meets, and therefore, on his own confession, disturbs and destroys that social relationship between men which has been instituted by God; he has, in consequence, no right to avail himself of that bond, whereby men are accustomed to engage themselves to a social life, according to the command of God… Therefore, a sworn promise will have no force, if made on a matter which is unlawful by natural and divine law…. ” (Pufendorf et al. 1934:504-505 [emphasis added]) In summary, Pufendorf calls upon divine law to buttress the argument of universal social condemnation of piratical acts under the natural law.

It appears that little changed through the mid-eighteenth century on the continent of Europe with respect to a direct juridical construction of universal jurisdiction addressing piratical deviance; however, indirectly, Vattel’s thesis on sovereign rights built on Grotius’ claim that not only were the seas free to navigation, they were equally open to policing. In Droit des Gens, Vattel not only supported Grotius’ understanding of freedom of navigation and resource exploitation on the high seas under ius gentium, but stated that “the nation that attempts to exclude another from that advantage [freedom of navigation and resource exploitation] does her an injury, and furnishes her with sufficient grounds for commencing hostilities, since nature authorizes a national to repel an injury…,” (Vattel 1853:Book I, Chapter XXIII, 125-126) thus supporting Grotius’ defense of the Dutch East India Company’s taking of the Santa Catarina. So, if, for
Vattel, the seas are either *res nullius* or *res communis*, it reasons that his position should be similar to Grotius in attaching a universalist view of keeping the seas free of those who would interfere with the “thoroughfares of human intercourse.” (Vattel 1853:Book II, Chapter VI, 163) In fact, Vattel, takes the social commentary of those before him, adds Grotius’ notions of a nascent universal jurisdiction, and suggests that penalties are appropriate in cases of the application of universal jurisdiction. He states that “pirates are sent to the gibbet by the first into whose hands they fall,” noting that they are “*hostis human generis*.” (Vattel 1853:Book II, Chapter XIX, 108, Book II, Chapter IV, 320) Vattel does not suggest that a sovereign has the right to punish a man located within his jurisdiction for crimes committed within the jurisdiction of another sovereign; in fact, he states the contrary. What Vattel states is that because piracy *jure gentium* is by definition an act of depredation committed external to the territory of the sovereign, that any sovereign may sanction, under municipal law, those convicted of the crime. Thus, Vattel not only supported piracy as a case for the application of universal jurisdiction, he supported at minimum an application of enforcement and sanction nexus between those tried and sanctioned, and the enforcement agent. For example, he stated that the King of Spain had the right under international law to “destroy pirate towns of Africa, those nests of pirates, that are continually molesting their commerce and ruining their subjects.” This is significant because in this case Vattel is suggesting that under the principles of freedom of navigation and visit, Spain, who had recognized the sea as possession, had, under *ius
gentium, applied extraterritorial jurisdiction; the nexus not being dominion, but the seizing agent.\textsuperscript{35} (Vattel 1853:Book III, Chapter IX, 366)

Different from Queen Elizabeth’s aforementioned universal expansion of statute in 1569, and perhaps the introduction of universal jurisdiction into the workings of the Admiralty, were the instructions given by Sir Leonine Jenkins to the Grand Juries during admiralty sessions at the Cinque Ports and the Old Bailey in early part of the latter half of the 17th century. Jenkins noted, “[T]here are some Sorts of Felonies and Offences, which cannot be committed anywhere else but upon the Sea, within the Jurisdiction of the Admiralty… the chiefest in this Kind is Piracy. You are therefore to enquire of all Pirates and Sea-rovers, they are in the Eye of the Law Hostes humani generis, Enemies not of one Nation…only, but of all Mankind.” And invoking the Law of Nations, Jenkins suggested “[E]very Body is commissioned, and is to be armed against them, as against Rebels and Traytors, to subdue and to root them out.” Yet, Jenkins goes further. Where Coke was merely interested in the application of municipal law to subjects of the sovereign, Jenkins suggested that the Admiralty had a duty under international law to stretch its jurisdiction beyond the “four seas, which are in the particular Care, and as it were, part of the Domaine of the Crown of England.” He stated, “his Majesty hath a Concern and Authority… to preserve the public Peace, and to maintain the Freedom and

\textsuperscript{35} I assert that not only is Vattel noting the obvious connection between the State as the seizing agent and the State as the forum of adjudication, but that absent: (1) A territorial and/or nationality nexus; (2) A compelling argument for extradition; and, (3) Agreement by the seizing State and the State requesting extradition, that a nexus between the seizing State and the State of the adjudicating body is necessary under international law to try and sanction acts of piracy \textit{jure gentium} and maritime depredation by statute. This enforcement nexus has been the minimum connection required to address piracy \textit{jure gentium} since the time of Cicero, only changing with the advent in 2009 of third-party jurisdictional piracy courts in Kenya, Seychelles and Mauritius under the guidance of the UNODC-MCP.
Security of Navigation all the World over.” He further stated that the reach of this “Authority” included the infliction of any injury to “any of his Subjects, or upon his Allies or their Subjects,” and that this right of protection “is but in concurrence with all other Sovereign Princes that have Ships and Subjects at Sea.” In summary, Jenkins not only laid out a clear case for the extension of jurisdiction extraterritorially, he stated that it was a right of all sovereigns, and that nexus based on connection to the sovereign and/or to the enforcement agent was a requisite for the application of universal jurisdiction. (Rubin 2006:87-88, 117 fn 70, fn 71, fn 72) Present day constructions of universal jurisdiction for acts of piracy seem to be rooted in Jenkins’ assertion that municipal law must exist sanctioning piracy (piracy by statute) in order for the sovereign to assert piracy _jure gentium_, although it appears that Jenkin’s mechanism, Admiralty Law, is different from current legal structures surrounding maritime piracy. (Common Law or Continental Civil Law) It is also important to note the commonality between Jenkin’s comments and those of Grotius. Whereas Grotius wrote from the standpoint of guaranteeing the freedoms of navigation and visit, Jenkins wrote from the standpoint of asserting municipal law on the oceans’ common; yet they seem to have arrived at a similar place: both advocating for the need to keep the seas free of those who would disrupt the “thoroughfares of human intercourse.”

Jenkins’ jury instructions regarding universal jurisdiction were expanded upon in _Rex v. Dawson_ (1696). Justice Hedges wrote:

> The king of England hath not only an empire and sovereignty over the British seas, but also an undoubted jurisdiction and power, in concurrence with other princes and states, for the punishment of all piracies and robberies at sea, in the most remote parts of the world; so that if any
person whatsoever, native or foreigner, Christian or Infidel, Turk or Pagan, with whose country we have no war, with whom we hold trade and correspondence, and are in amity shall be robbed or spoiled in the Narrow Seas, the Mediterranean, Atlantic, Southern, or any other seas, or the branches thereof, either on this or the other side of the line, it is piracy within the limits of your enquiry, and the cognizance of this court. (Rubin 2006:92, 117 fn 82 [13 How. St. Tr. 455])

This was the first truly expansive definition of universal jurisdiction from a court. Not only did it detail the location of jurisdiction as the totality of the seas, but it did not discriminate based on relationship to a sovereign or religious affiliation. Additionally, it was both a fair and equitable declaration of universality. As expansive as this declaration was, however, Rubin suggests that it was perhaps “puffery;” the case was against royal subjects, and municipal law was applied. Regardless, a grand jury brought bills against the defendants, who were found guilty and hanged.

In somewhat of an amalgam between Grotius’ conception of international law as the law of nations, and Coke’s vision of international law as the law between nations, William Blackstone (1723-1780) understood international law as the national law of many nations. Blackstone suggested that the law of nations is adopted into the common law, and thus becomes part of the common law. He stated that “in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills, there is no other rule of decision but this great universal law collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of.” In the case of piracy Blackstone noted, within the “Commentaries of the Laws of England (1769), that positive law grew out of the natural law, just as universality grew out of municipal law. A pirate, according to Sir Edward Coke, hostis humani generis... has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him... to inflict [that]
punishment upon him… [T]he offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there. (Rubin 2006:109)

Like Jenkins, Blackstone writes of an expansive view of universal jurisdiction, yet adds a critical element; he defines the crime of piracy as only those acts deemed felonious on land under the common law. In fact, the Piracy Act of 1698 provided for admiralty courts to try those suspected of “all piracies, Felonies, and Robberies committed in or upon the Sea, or in any Haven, River, Creek, or Place, where the Admiral or Admirals have Power, Authority, or Jurisdiction… in any Place at Sea, or upon the Land”; and to sentence those and those sentenced as accessories to piracy to “suffer such Pains of Death, Loss of Lands, Goods, and Chattels.” (Rubin 2006:362, 366)

I leave this chapter on the framing of conceptions of jurisdiction with a discussion regarding the first and only (until the 20th century) case where universal jurisdiction was applied to maritime piracy. Thomas Green was a British privateer, captaining a Scottish vessel with a Letter of Marque to suppress piracy from King William III. In 1705, he was charged with piracy under Scottish civil law for allegedly plundering another Scottish vessel off the Malabar Coast in Southern India. Upon arriving in Edinburgh, Green and two of his crew were charged under Scottish civil law (the 1536 English statute on piracy did not apply as the Scottish and English parliaments were not united, and English law did not govern, until two years after the trial). In applying universal jurisdiction the tribunal noted:

That though the competency of the judge in criminals be ordinarily said, to be found either in loco delicti (the place where crime was committed) or in loco domicilii (place of habitation of the delinquents) or in loco originis (the place of their birth) yet there is a superior consideration, and that is
the *locus deprehensionis* (place where they were taken) where the criminal is found and deprehended, which doth so over-rule in this matter, that neither the *locus domicilii*... nor the *locus originis*... doth found the judges competency, * nisi ibi reus deprehendatur* (except the criminal be apprehended there). And so it is that here the panels [defendants] were and are deprehended, which happening in the cause of piracy, a crime against the law of nations, and which all mankind have an interest to pursue, wherever the pirates can be found; the Procurator Fiscal’s [Prosecutor’s] interest to pursue is thereby manifest, and the panels being deprehended, cannot decline the admiral's jurisdiction as incompetent. (Rubin 2006:93-94)

The tribunal’s reasoning for universality was shocking. While Green was not Scottish, his Scottish ship was deemed not Scottish for purposes of jurisdiction, and although the alleged act of piracy was not committed in Scotland, the ship he allegedly preyed upon was Scottish, its crew was Scottish, the goods were Scottish, and the agents of enforcement and adjudication too, were Scottish. Resting on universal jurisdiction, in absence of other more compelling jurisdictions, the court found Green, his first mate and another of his crew guilty, and all were hanged. The crew of the alleged pirated ship was later found alive and well in India; no act of piracy had occurred. So, while this may be the first application of universal jurisdiction, it is, on many grounds, an extremely weak case to cite as precedent for its future application.

While a number of jurists and jurisprudence scholars suggest that by the end of the 18th century a firm case for piracy as a crime of universal jurisdiction had been part of international law for centuries (Guillaume 2002:42; Macedo 2001:45; Randall 1988), it appears that beyond a single application of universal jurisdiction by the High Court of Admiralty of Scotland in the case of *R. v. Green*, which, according to Rubin, went significantly beyond the implied precedents, a discussion of universality as an outgrowth of the municipal law in its applicability to maritime depredation by Blackstone, Hedges’
expansive definition of universality to the court in *Rex v. Dawson*, Jenkins’ instructions to Grand Juries regarding the scope to universality with regard to piracy, Queen Elizabeth’s condemnation of ‘pyrats,’ Grotius’ claim of universal condemnation of piratical acts and the rights and duties of sovereigns to make “the thoroughfares of human intercourse” safe for navigational freedom and the right of visit, and the claims of social condemnation directed toward those who because they engage in piracy were external to the fabric of society by such scholars as Cicero, Paulus, Belli, Ayala, Gentili and Pufendorf, there appears little support for conceptions of those who engaged in piracy as the juridical *communis hostis omnium* and for piracy as a crime of universal jurisdiction. Additionally, in the one case of universality, nexuses other than the nexus of the seizing State to the State of the adjudicating body (which also existed) existed on many levels.

The beginning of the 19\(^{th}\) century brought with it a changing landscape of social relations between and among nations that had an effect on conceptions of universality and was the impetus for the first crime of universality based on maritime piracy. As imperial powers moved from expansion toward colonialism and mercantile exploitation, changes in modes of exploitation resulted. Instead of merely pillaging the empire, the British led by example in colonizing and, through marriage of the State and the corporation, control and exploitation of trade. This move effectively reduced the need of the British for slave labor. Other imperialistic nations did not have the bureaucratic structure in place to compete. As a consequence of the British Slave Trade Acts of 1807 and 1824, The Treaty of Ghent in 1814, The Congress of Vienna 1814-1815, and a number of ensuing acts of, and treaties between, sovereigns, the trading of slaves began to be construed as a crime of universal jurisdiction, based on the piracy analogy. Yet, I
assert that the addition of slavery as a crime of universal jurisdiction had no effect on the application of universal jurisdiction to piracy. In fact, post-Green there have only been two additional cases where universal jurisdiction has been applied to piracy *jure gentium* through 2006. Concurrent with slave trading being accorded universality status with piracy, and imperial powers starting the long-path toward colonization, there was a move to end the nearly perpetual state of war on the European continent in favor of a system of sovereign relations based on international law and recognition of sovereignty. I assert that concurrent with changing social relations between sovereigns and changes in the function of international law, were changes in conceptions of extraterritoriality and specifically universal jurisdiction. In this chapter I have shown that by the 19th century a nascent discourse of universality had begun to develop and assert that, if not in practice, within the legal discourse it continued to develop.

In the following chapter I provide a summary of findings in examining the relationship of nexus, or nexuses, to the application of universal jurisdiction as applied to maritime piracy. The goal of that chapter is to elucidate the seizing State/State of the adjudicating body nexus requirement for the application of universal jurisdiction to maritime piracy. But before summarizing my findings I first direct a discussion to an examination of nexus. Near the end of the chapter I will explain how my findings place me at odds with both legal scholars and the legal establishment, and further why they are both missing the nexus point.
Chapter 7: Nexus and Its Definitional and Use Ambiguity within the Law

This chapter not only provides a historical account of the application of universal jurisdiction to maritime piracy, it is the first systematic analysis of the relationship of nexus to jurisdiction with regard to maritime piracy. Using data from Westlaw, the Kenyan National Council for Law Reporting, and the Seychelles Legal Information Institute, I examine each judicial decision where charges of maritime piracy have been adjudicated upon under municipal law and list the judicially attributed nexus. While prior work by Kontorovich and Art (2010) examined the exercise of universal jurisdiction and noted an increase in its application concurrent with the rise of piracy off the coast of Somalia, it failed to note the attribution of nexus to its application. For the legal community this appears to be a non sequitur, as the vast majority of scholars within that community suggest that, by definition, universal jurisdiction does not require nexus. I will demonstrate that any presupposition by scholars and/or jurists of a lack of connection in the application of universality is in fact erroneous and that, not only is there a normative connection between the seizing State in the act of piracy and the adjudicating and/or sanctioning body, but that, historically, this has always been the case, that is, until just prior to the advent of third-party jurisdictional piracy courts in the Kenya and Seychelles (and later Mauritius) that address Somali piracy, and only Somali piracy. Trying those charged with piracy in these courts is not only a reification of inequality in social practice, it is both a refashioning of conceptions of jurisdiction under the law of nations and within municipal law hundreds of years in the making.
Background

In their article, *An Empirical Examination of Universal Jurisdiction for Piracy* (Kontorovich and Art 2010), one of the leading scholars on the relationship of the law to maritime piracy, Eugene Kontorovich, and his collaborator Steven Art, state that “[U]niversal prosecution of piracy turns out to be exceeding rare under normal circumstance, and fairly rare even in high-profile crisis.”¹ (Kontorovich and Art 2010:56) They continue in noting that not only does this “reveal a significant gap between agreeing to universal jurisdiction through treaties and having those norms put into practice, but that this gap is manifest in the fact that there are only three countries that have exercised universal jurisdiction over piracy, with “only two hav[ing] undertaken more than one case or proceeded to a finalized conviction.”² (Kontorovich and Art 2010:57) Given the characterization of pirates as *hostis humani generis*, that piracy is not only the original case of universal jurisdiction, it is the “one true case of universal jurisdiction” (Guillaume 2002:42; Kraska 2011a:129) and that piracy by analogy lent support for the application of universal jurisdiction to a number of crimes based on heinousness (Dubner 1997; Dutton 2011; Dutton 2010; Gathii 2010a:377 fn 65; Gould 2013; Kontorovich 2004; Kontorovich 2009c; Macedo 2001; Murphy 2007:173; Murphy 2009; Pemberton 2011; United States District Court 2010),³ it would stand to reason that universal jurisdiction, if

² Since the publication of *An Empirical Examination of Universal Jurisdiction for Piracy*, in 2010, Seychelles and Mauritius, with the assistance of the UNODC, have joined United Kingdom, the United States and Kenya as countries that have exercised universal jurisdiction over piracy. While a part of the United Kingdom at the time, theoretically Scotland could also be included in this group as *R. v. Green* was decided “before the High Court of the Admiralty of Scotland…, as the [piracy] statute of 1536 did not apply…until two years after Green’s trial.” (Rubin 2006:93)
³ These references unpack the discourse regarding whether piracy is a crime based on heinousness (or conversely if it is based on the location of the act and relationship of the actor to the State), and whether
not applied ubiquitously throughout the over two thousand years of the recorded history of piracy, should at least have been applied with regularity. Additionally, it should also be reasoned that, not only has consensus on the construction of piracy as a crime been consistent both temporally and cross-nationally, but also that the sanctions for piracy have been applied with uniformity and equity. Unfortunately, reason does not seem to hold sway in the application of the law to acts of piratical deviance. Interestingly, prior to 2006, the number of cases of piracy where universal jurisdiction was applied could be counted on the fingers of one hand. Further, definitions for piracy are comparatively more numerous than the application of universal jurisdiction to cases of piracy during that same period. This pattern of incongruity appears to have continued with renewed vigor in the first decade of the twenty-first century, albeit in a novel way.

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4 Kontorovich and Art (2010) point to Rubin’s findings regarding the application of universal jurisdiction where they reference a quote that universal jurisdiction has been applied “very few times,” from a section where Rubin is making an analogy between aircraft hijackings and piracy. (Rubin 2006:302, 348 fn 50) They note “Rubin enumerates no more than five cases in a 300-year period.” They further suggest that between 1998 and 2007 “only four universal jurisdiction prosecutions” had taken place (Kontorovich and Art 2010:32). Rubin notes three cases between 1705 and 1934: 1705, Thomas Green before the High Court of Admiralty of Scotland; 1922, People v. Lol-Lo and Saraw (United States), even though the conviction was for rape and not for piracy, and the act of “depredation” took place within the territorial waters of a foreign State; and, 1934, In Re Piracy Jure Gentium (United Kingdom). (Rubin 2006:93-94, 317-319)

5 There is no single accepted definition of piracy, nor commonly accepted understanding of what legally constitutes an act of piracy, save the definition agreed to by the signatories of the United Nations Convention on the Law of the Sea (Unts 1982, Rubin 2006:312), and those nations that follow UNCLOS as part of customary law (Rubin 2006). However, the UNCLOS definition is not necessarily the definition used within legislation or regulations sanctioning piracy; additionally and importantly, there is no accepted nor standardized sanction for the act of piracy. (Kahn 1996, Rubin 2006) The law defining piracy is a social construct dependent on institutional meaning: “Piracy has one meaning in the insurance industry, another in the international shipping industry, another in international law, another in criminal law and yet another in the ‘common law’.” (Passman 2009:61-62) Both Rubin (2006) and Kahn (1996:293 295-296) suggest at least six different commonly used definitions of piracy. (See also Rubin 2006:313, 344)
Whereas Kontorovich and Art’s analysis was a temporal/location comparison of the application of universal jurisdiction, it did not address two important issues: 1. The meaning ascribed to nexus within the law; and 2. The relationship of nexus to universal jurisdiction. Providing historical context of and for universal jurisdiction and nexus, and empirically addressing the two significant issues noted above are the goals of this chapter. Further, whereas Kontorovich and Art accepted as normative the application of universal jurisdiction and marveled at the numerically and statistically significant increase in its post-2006 application, they failed to ask the question why the iteration of piracy that sparked its application, Somali piracy, is different from all other iterations of piracy; and if one asserts it is not in fact different, why has it met with such a creative application of law in the form of third-party jurisdictional piracy courts?

Building on the previous two chapters, this chapter is divided into five discrete sections, the first three of which focus on the construction of a scaffold that allows for an examination of the contextual meaning of the relationship of universal jurisdiction and nexus beyond the existent legal façade. Section one concerns a discussion on “nexus” and its definitional and use ambiguity within the law; section two is an empirical review of early United States case law concerning the relationship of piracy and universal jurisdiction; and section three is a methods review and discussion of cases where charges of maritime piracy were heard before municipal courts in the United States (Federal), Kenya and Seychelles. Research findings are presented in section four. The concluding section includes the presentation of a theoretical framework and a discussion on Somali exceptionalism and, as a parting salvo, some structural and substantive suggestions combined with some suggestions for further research and study.
Nexus

Black’s Law dictionary defines nexus as:

\[ n. \] A connection or link, often a causal one <cigarette packages must inform consumers of the nexus between smoking and lung cancer>. “Pl. nexuses; nexus. 2. Roman law (ital.) In very early times, a debtor given in bondage to creditors until the debts have been paid. Pl. next. See NEXUM. (Garner and Black 2004:1070)

In defining nexus it is important to note that Black’s Law makes no distinction with regard to a type of connection, only that nexus is a “connection.” It is telling that the legal community has not seen fit to define the term with greater precision. This is quite significant because the language of the law is not merely descriptive, it is instrumental.

As Stroup reminds us, the:

[L]aw is language - not only language, but a very special kind of language, for law is an attempt to structure the realities of human behavior though the use of words. When a legislature passes a law or a court hands down a decision, it is altering the status of individuals, changing their relationship to other individuals, to possessions and objects, to the state. Legal language does not merely describe these relationships; it affects what it describes. (Stroup 1984:331-332)

While Stroup is providing insight into the workings of municipal law, the relationship of the law to language is not limited to municipal and federal legislation and court decisions. In fact, because of cultural and language differences, it is perhaps of greater significance in the international arena, especially within public international law.

One need not look far for evidence. Multi-party discussions regarding the United Nations

\[ 6 \] Within the law, while there is scholarship regarding “nexus” (this scholarship appears to cover a broad area of legal research including, war crimes (Cassese 2012), refugee status (Hathaway 2002), product liability (Strain 2009), and the American disability law regime (Harvard Law Review 2013), although it appears to be most prevalent in the area of taxation (Congressional Research Service at the Library of Congress 2015), there appears to be little scholarship regarding defining nexus with regard to universal jurisdiction as applied to maritime piracy. That which exists notes the absence of a nexus, or notes a connection that is not related to territory or nationality, or based upon State protection.
Convention on the Law of Sea began in earnest in 1973, culminating in a treaty in 1982.\(^7\) UNCLOS (1982) came into force in 1994, taking twelve years for the requisite sixty nations to accede, and requiring a subsequent implementing agreement\(^8\) to be negotiated concerning exploration and exploitation of the benthic environment. Due, in part, to concerns of interpretations of language within the treaty, the United States has, as of May 2015, still not acceded.

Through its definitions, the legal language can constrain legal action or leave the door open to allow for juristic and juridical interpretation. It is precisely this lack of definition for nexus in the context of extraterritoriality that has allowed for the creative application of universal jurisdiction to maritime piracy. Yet, the significance of this obtuseness in meaning is rendered inconsequential if the legal community does not address the issue or is not called upon to address the issue. In this opaque light, the problem of a lack of clarity becomes a non-issue, yet clarity can be brought to bear if there is a shift in operational focus. The objective of this focal shift is nothing greater than holding the law and, functionally, those responsible for interpreting the law, accountable for social outcomes. Yet, for this to become a reality, those who fashion the law must acknowledge the instrumental nature of the law, and focus on the law as a tool of social equity and not one of capital protection and generation. Engineering this shift in

\(^7\) It is worth noting that the negotiations for UNCLOS (1982) did not start from ground zero. There were a number of agreements in place governing relations on the sea, and in the pelagic and benthic environments. As a group these are known as UNCLOS (1958), severally: The Convention on the Territorial Sea and Contiguous Zone (1958—entered into force in 1964); The Convention on the Continental Shelf (1958—entered into force in 1964); Convention on the High Seas (1958—entered into force in 1962); and, Convention on Fishing and Conservation of Living Resources of the High Seas (1958—entered into force in 1966).

\(^8\) Agreement relating to the implementation of Part XI of the United Nations Conventions on the Law of the Sea of 10 December 1982
focus may be a challenge, given that the law is an incestuous institution; it self-credentials, self-polices and, to a great extent, it self-regulates. It has a language that is unique and which requires a very specific education to understand. It has become an entry-level credential to run for and serve in law-making bodies and in the senior echelons of the executive branch, and of course the entirety of the judiciary is made up of those who have been indoctrinated in its halls to think and act in a lawyerly fashion. Yet the law does not exist in absence those it serves. In this respect, the law is as Durkheim conceived it, a “social fact.” It is a representation of social relations. Yet, as Alan Hunt reminds us in his discussion regarding the importance of law to Durkheim’s sociology, the law is more significant than merely a normative social fact; it is perhaps the quintessential social fact as it is representative of “all that is essentially social.” (Hunt 1978:65) As evidence of its import, the law is situated at the convergence of three Durkheimian hypotheses. First, Durkheim understood the law as “an ‘external’ index which ‘symbolizes’ the nature of social solidarity.” (Durkheim, Lukes and Scull 1983:1) Secondly, a shift in juridical processes is representative of societal shifts in the nature of solidarity. As societies move from religious governance and a “conscience collective” to secularism and individualism, the nature of the law shifts from one of repressive penal law to restitutive civil, commercial, procedural and administrative law. (ibid:1) Thirdly, the law defines and constructs normative and pathological behaviors; functionally it is a

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9 A “social fact is any way of acting, whether fixed or not, capable of exerting over the individual an external constraint; or, which in general over the whole of a given society whilst having an existence of its own, independent of its individual manifestations.” (Durkheim, Lukes and Halls 1982:59) Social facts are external to the individual and they are objective, thus not reducible to states of the individual consciousness. Yet, at the same time, they are social constructs, unable to exist in absence the social realities that give them birth. Finally, “[T]hose facts which appear in the most common forms we shall call normal, and the rest morbid or pathological.” (ibid:91)
means for society(ies) to condemn certain acts that it deems non-normative or, in extreme cases, abhorrent. As Durkheim stated: “[W]e do not condemn it [certain non-normative behavior] because it is a crime, but it is a crime because we condemn it.” (Durkheim and Coser 1984:40) And while, for Durkheim, the primary purposes of the law were to create social solidarity, cohesiveness, and behavioral borders via the recognition of deviance and the exercise of punishment via a juridical apparatus, the law, a social fact external to the individual, was a qualifiable representation of social relations.

From an epistemological standpoint, for Durkheim, the study of society occurred a posteriori; it was knowledge that was unknown until it was empirically proven. Thus, to study a given social phenomenon, e.g. the instrumental nature of the application of international law in protecting capital and fostering its growth at the expense of consistency within the “rule of law” and juridical equity, a “social fact,” an external symbol that reflects social change, is required. It is required because certain social phenomena are “not amenable to exact observation and especially not to measurement.” To arrive at an explanation or classification, it is necessary to “substitute for this internal datum… an external one which symbolizes it.” (Durkheim and Coser 1984:24) The law, or more specifically, the apparent subitaneous change in the application of nexus to maritime piracy only off the coast of Somalia and nowhere else, is a social fact that can be used to investigate not only international law as an instrument of social inequality wielded by powerful States and actors, but also instrumental social inequality as a result of structural power disparities.

One point that deserves clarification in regard to Durkheim as method in the examination of law is the part morality plays in the construction of law. For Durkheim,
the visible aspects of the law, both the legal definition of crime—as manifested through municipal statute, case law administrative ruling, and international treaty—and sanction are not merely societal constructs, they are functional societal constructs. As such, they affirm hegemonic rituals, practices and structures, assist in the creation, definition or clarification of moral boundaries, increase the strength of the conscience collective via the determination of in, out and sub-groups, and encourage social change via the introduction of new practices and/or by challenging existing practices of the collective. (Coser 1962:172; Mead 1918:591) In short, they affirm cultural values and norms via the exercise of juridical constructs. In terms of sanction and/or punishment “[W]hat we are avenging, and what the criminal is expiating is the outrage to morality.” (Durkheim and Coser 1984:47) Thus the law is the not only the representation of cultural morality, via hegemonic constructs of what constitutes normative social morality, the law is the instrumental tool by which power is wielded within the global socio-political economy.

Of course, Durkheim is not alone in understanding the law as merely part of a greater social system. One need not move from the juristic science to the sociology of law to note that the law is not an autopoietic system. None other than jurist Oliver Wendell Holmes, Jr., argued that the law could not be considered absent the social situation. He wrote that “[T]he life of the law has not been logic; it has been experience.” ([Holmes 1881:5 in] Deflem 2008:99) To buttress this point, Holmes noted that, although the common law is based on precedent, precedent is not manifest; it is chosen based upon the convictions and moral understanding of those presiding over the process. The practice of

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10 See Luhmann 2004.
law must be understood as a process, historically based and subject to a variety of levels of meaning. And while Holmes gives a nod to morality in judicial interpretation by using the words “historically based and subject to a variety of levels of meaning,” what is implicit is that the law is a manifestation of culture.

Recognizing the relationship of culture to law broadens conceptions of law beyond being a mono-functional formal juridical apparatus of social control. While law is “an institution operating within a larger social context that functions to regulate social processes with the objective of securing and protecting society's interests” (Treviño 1996:65-66) or rights, we cannot relegate the law to merely being the most effective form of social control absent a larger social interest. Pound noted that in addition to the law providing general security for individuals, their personal and business interests, and for the integrity and independence of institutions (political, religious and economic), it was instrumental in securing the general moral sentiment and “individual rights to opportunity, minimum living standards and self-help where not guaranteed by law.” (Pound 1943:33-39)

In summary, language imbibes within the law particular meaning to those who speak the language of the law. That meaning is informed by and informs culture. Yet, it is the meaning that gives rise to not only the law, but also the interpretation of the law. Further it is that interpretation that defines juridical action. This brings us back to the challenge of legal application in areas where legal definitions are lacking. From a juristic standpoint, as I have already pointed out, this is unproblematic if juridical structures are constructed without following historical precedent, or are a fungible instrumental tool of powerful actors. The law can be fashioned to confront social problems in the manner
most beneficial to those who structure the law, those who benefit from the accumulation of capital and power. From the perspective of a sociology of law, where inequality in the application of the law is given equal weight to the “rule of law,” this lack of definitional precision is substantially more problematic. It is so because meaning, the meaning imbued within the application of universal jurisdiction within the juristic science, as Marx might have suggested, is made of history. That history is not made as the jurists might or might not please; they “make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly found, given and transmitted from the past. The tradition of all the dead generations weighs like a nightmare on the brain of the living.” (Marx, Engels and Tucker 1978:595) Jurists operate under the weight of culture, under the weight of past cultural practices, and under the weight of socio-political realities. So, while it is true that meaning within the law determines the application of the law, it is just as true that the application of the law determines the meaning within the law. Therefore, for some within the legal community to suggest or to state that nexus is not a requisite in the application of universality, I thank Marx for elucidating the obvious. And for those not so taken with Marx, I find solace in the words of one of the foremost authorities of international law of the late 20th and early twenty-first centuries, M. Cherif Bassiouni. Bassiouni states “[L]inking jurisdiction to territoriality, though allowing it to extend extraterritorially in cases of a valid legal nexus to the enforcing state, is the most effect way to achieve these results… This is particularly true of universal jurisdiction when exercised without territorial links.” (Bassiouni 2001:86 [emphasis added])
It seems obvious to one not schooled in the juristic science that because the language of law serves as an instrument of law, legal language transmits meaning not only by what is stated, but also by what is not stated; not only by what is done, but also what is not done. In the case of the application of universal jurisdiction to maritime piracy off the coast of Somalia, nexus has been defined in very narrow terms, as a territorial or nationality connection. As I have explained in Chapters 5 and 6, this definition is inconsistent with a long history of juristic practice and an even longer history of social commentary. Therefore, when legal scholars suggest that universal jurisdiction does not require, by definition, nexus, one must ask how nexus is defined. For if we accept legal scholarship at face value, we find in examining past cases where universal jurisdiction has been applied that there is in fact a clear nexus absent territorial, or nationality link; that nexus, a sovereign to sovereign connection, is the relationship of the seizing State to the State of the adjudicating body. I assert that until very recently that nexus has always existed in the application of universal jurisdiction to maritime piracy.

So how does a non-lawyer come to understand the law in apparent opposition to those who practice the law? Simply by reading international law and mapping it to its application or social outcome. John Noyes in noting the same Restatement of the Law (Third): The Foreign Relations Law of the United States (1987) §404 that I noted earlier in this dissertation states

[S]tandard formulations of international law principles of jurisdiction support the view that each state has jurisdiction to prescribe punishment for offenses such as piracy that are recognized as of universal concern, even if they are offenses committed by non-citizens against noncitizen on board foreign vessels on the high seas. That is, even absent normal jurisdictional connections of nationality or territoriality, a nation may exercise “universal jurisdiction” over pirates. Furthermore, according to
the international law governing jurisdiction to adjudicate and enforce, a state generally will be entitled to punish noncompliance with its piracy laws by means of court cases and to take other enforcement measures reasonably related to those laws. (Noyes 1990:113-114)

Interestingly Noyes states that a nation “may exercise “universal jurisdiction” over pirates, and be entitled to punish noncompliance with its piracy laws....” He says nothing about pawning off suspected pirates to third-party jurisdictions. Yet, Noyes is but one legal scholar. What does international law in the form of multinational treaty say on the subject?


Again both UNCLOS (1958) and UNCLOS (1982) are clear on this subject: “a state may seize a pirate ship and decide on the penalties to be imposed against pirates....” Again, there is no mention of “jurisdictional osmosis” or of delivering suspected pirates to be tried in third-party jurisdictions with no connection to the act. In fact, it is clearly stated that the State that seizes is the State that imposes penalties.

Both legal scholarship and international law in the form of treaty support the understanding that nexus must exist between the Seizing State and the State of the adjudicating body for the application of universal jurisdiction to maritime piracy. But what does the application of law suggest?
United States case law: Some early examples of the relationship of piracy, the application of universal jurisdiction and nexus

In United States v. Chapels et al (1819), United States Attorney Robert Stanard, citing Vattel, stated, “pirates are brought to the gibbet by the first into whose hands they fall.” He does not suggest that they be deposited with third-party sovereigns, tried under their laws, and sanctioned under their rules and/or confined in their prisons. The Circuit Court for the District of Virginia, concurring with Stanard’s assessment of piratical deviance noted the Crime Act of 1790, which states that:

‘[A]n act for the punishment of certain crimes against the United States,’ (among others, the crime of piracy,) the 8th section of which is in these words: ‘And be it enacted, that if any person or persons shall commit upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offense which if committed within the body of a county, would, by the laws of the United States be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise, to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defense of his ship or goods committed to this trust, or shall make a revolt in the ship; every such offender shall be deemed, taken, and adjudicated to be a pirate and felon, and being thereof convicted shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought.

And while much surrounding the Crime Act of 1790 as applicable to maritime piracy was unpacked by the federal courts during the period from the start of the War of 1812 to the beginning of the Jacksonian era,11 what is of significant interest with respect

11 See United States v. Tully (1812); United States v. Jones (1813); United States v. Ross (1813); United States v. Jones et al (1814); Dias et al v. The Revenge. Bustamento et al v. Same (1814); United States v. Hutchings (1817); United States v. Palmer (1818); United States v. Howard et al (1818); Juando v. Taylor (1818); United States v. Bass (1819); United States v. Chapels et al (1819); United States v. Klintock (1820); United States v. Smith (1820); United States v. Furlong (1820); The Josefa Segunda,
to this dissertation is that which is written after the final semicolon of a rather confusing run-on sentence: “and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may first be brought.” This statement makes clear the question of jurisdiction: “in the district where the offender is apprehended, or into which he may first be brought.” There is no ambiguity as to whether the accused should be transported to the district of his domicile, the district in whose port the alleged pirate vessel or the alleged pirated vessel is or was located, the district which had the court with the clearest docket, or the district that was to receive an incentive to prosecute pirates by an international body or by powerful third-party States. The alleged pirate was to be tried, absent territorial or nationality nexuses, where there existed a nexus between the enforcement and the adjudicative bodies.

In United States v. Palmer (1819) the Supreme Court made clear that universality under international law was not sufficient for its application within municipal law and that congress need fashion law to criminalize piracy *jure gentium*.12 The courts also made clear that piracy was an act committed in “any place out of the jurisdiction of any particular state,” which included the high seas, then defined as the distance of a marine league from the low water mark of shore or if at anchor, in an open roadstead within a marine league of the low water mark of shore.13 Further, addressing United States’

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Carricabura et al. Claimants (1820); United States v. Smith (1820); The Bello Corrunes, The Spanish Consul, Claimant (1821); The Marianna Flora (1822); The Marianna Flora, The Vice Consul of Portugal, Claimant (1825); United States v. Robinson (1826); and The Palmyra, Escurra, Master (1827).

13 Juando v. Taylor (1818); United States v. Furlong (1820).
courts’ inability to apply universality to the crime of piracy *jure gentium* within its jurisdiction, congress passed the Piracy Act of March 3, 1819. Section 5 states:

*And be it further enacted.* That if any person or persons soever, 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, before the circuit court of the United States for the district into which he or they may be brought, or in which he or they shall be found, be punished with death.

This Act, along with the Crime Act of 1790, made piracy *jure gentium* a crime subject to universal jurisdiction in United States’ federal courts.\(^\text{14}\) Yet while the legislation states that any offender who attacks the vessels of any nation can be tried under United States municipal law, it does not state that those who do so and are in the possession of agents of enforcement of the United States and/or within United States jurisdiction can be delivered\(^\text{15}\) to a third-party sovereign who lack territorial or nationality nexuses. Further, the wording of this section of the Act is clear, as it mandates the application of jurisdiction based on location of the offender: “every such offender or offenders shall, upon conviction thereof, before the circuit court of the United States for the district into which he or they may be brought, or in which he or they shall be found” (emphasis added). As discussed above in the section regarding the use of language within the law, if it were the intent of Congress to structure the law in a way to include a provision for third-party jurisdictional piracy courts to try cases of piracy, it would have worded the legislation to reflect that intent. Whether that would have passed constitutional muster then, or now, is another story. A lack of ambiguity on this subject is

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\(^{14}\) Clarified in Chief Justice Marshall’s decision in *United States v Klintock* 1820.

\(^{15}\) The word “delivered” is used intentionally, as use of the word “extradited” would imply a nexus to the act or actor(s).
illuminating. There is no question that the existence of third-party jurisdictional piracy courts was not anticipated by either the legislature, nor addressed by the courts. And the reason that the courts did not address this issue is that it had never occurred in practice or in theory.

In *United States v. Smith* (1820), the judiciary of the United States recognized that, while piracy was a crime against the law of nations, municipal law was requisite in adjudicating and sanctioning acts of piracy and that those convicted of piratical acts were subject to the sanctions enumerated within municipal law. Justice Story wrote, “whether we advert to writers on the common law, or the maritime law, or the law of nations, we shall find that they universally treat piracy as an offense against the law of nations, and that its true definition by that law is robbery upon the sea. And the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offense against any persons whatsoever with who they are in amity is a conclusive proof that the offense is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment.” (at 162) The words that resonate are not necessarily those regarding the ability to adjudicate and sanction acts of piracy but that the “general practice of all nations” offers “conclusive proof” of juridical intent (emphasis added). The general practice of all nations with regard to the application of universal jurisdiction, when no territorial or nationality nexuses are attributed, has been the nexus of the seizing State and the State of
the adjudicating body; that is, it has been the general practice until very recently. The courts’ subsequent opinions continue to support this nexus requirement.

In the court’s opinion concerning *The Marianna Flora: The Vice Consul of Portugal Claimant* (1825), Justice Story of the United States Supreme Court stated that not only may “[P]irates… be lawfully captured on the ocean by the public or private ships of every nation,” but also “foreign ships thus offending within our [United States] territorial jurisdiction, may be pursued and seized upon the ocean, and brought into our ports for adjudication.” While Justice Story seems to suggest that offenses by foreign vessels must take place in United States’ territorial waters to be pursued and seized on the high seas, the court has addressed this issue and come to the conclusion that vessels engaged in piratical deviance may be pursued and seized on the high seas, even if such piracy commences upon the high seas. Yet it is what Justice Story states next that clearly elucidates practice with regard to adjudication: vessels may be pursued and seized on the open ocean, “and brought into our ports for adjudication [emphasis added].” There is no provision under the law for those seized on the high seas for the commission of piratical acts to be brought to third-party jurisdictional piracy courts for adjudication. Further, there are procedural mechanisms within international law whereby a State injured by piratical acts can seek to assert jurisdiction by requesting extradition to the seizing State of those it accuses of piracy. Further supporting this point, Justice Story states that “not only [did an act of Congress [Piracy Act of 1819]] authorize[s] a capture,

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16 Although through 1820 the entirety of cases of universal jurisdiction consisted of *R v. Green* (1705), in theory and in discourse, all cases where a territorial and nationality nexus, or nexuses, do not exist include a nexus between the seizing State and the State of the adjudicating body. In this case we must include the legal and the social discourses as “conclusive proof” of the “general practice of all nations.”

17 *The Marianna Flora* at 22, 23.
but a condemnation in our Courts, for such aggressions.” Again Justice Story is unambiguous; no act by Congress existed, nor does one exist now, that allows adjudication and sanction of those suspected of piracy and seized by United States forces to be tried in any jurisdiction other than that of the United States. The lone exception would be for a foreign sovereign to assert jurisdiction via a territorial or nationality nexus, and request extradition. However, as stated in Chapter 6, without the compliance of the seizing State holding the person(s) alleged to have committed the act of maritime depredation, the requesting State would be unable to assert adjudicative jurisdiction.

In *United States v. Gilbert* (1834) Justice Story repeats the nexus requirement that “[T]he Crimes Act of 1790 (chapter 9, §8) provides that the trial for those indicted with the charge of piracy on the high seas or outside the jurisdiction of any and all States, ‘shall be in the district where the offender is apprehended, or into which he may first be brought.’” Here again, Justice Story clearly states that when the seizing State is the United States (assuming the application of universal jurisdiction), or there is an issue of United States territory, nationality, security or flag, adjudicative jurisdiction rests within the district courts of the United States. (at 28 [emphasis added])

The United States Federal Courts are clear; the application of universal jurisdiction to maritime piracy requires a nexus between the seizing State and the State of the adjudicating body. Again quoting Justice Story, “the general practice of all nations” offers “conclusive proof.” Yet to this point I have yet to provide conclusive proof that this is in fact the general practice of all nations, and thus part of customary international law. That is the goal of the next section of this chapter.
Table 7.1 Summary of the Application of Universal Jurisdiction to Nexus in Legal Cases Concerning Maritime Piracy in the Courts of the United States (Federal), Seychelles and Kenya (see Appendix 1 for details)

<table>
<thead>
<tr>
<th>Nation</th>
<th>Cases of Maritime Piracy</th>
<th>Cases heard on Appeal</th>
<th>Universal Jurisdiction Applied</th>
<th>Not a Case of Universal Jurisdiction</th>
<th>Universal Jurisdiction Lacking All Nexuses</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>41</td>
<td>3</td>
<td>4</td>
<td>37</td>
<td>0</td>
</tr>
<tr>
<td>Seychelles</td>
<td>14</td>
<td>2</td>
<td>7</td>
<td>7</td>
<td>6</td>
</tr>
<tr>
<td>Kenya</td>
<td>15</td>
<td>8</td>
<td>15</td>
<td>0</td>
<td>15</td>
</tr>
<tr>
<td>Totals</td>
<td>70</td>
<td>13</td>
<td>26</td>
<td>44</td>
<td>21</td>
</tr>
</tbody>
</table>

Methodology and discussion

There have been seventy cases of maritime piracy brought before the courts of United States (Federal), Kenya and Seychelles combined since the establishment of their independent judiciaries. When the United Kingdom is added to the three aforementioned States, the total number of cases where universal jurisdiction has been applied to

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18 Three additional cases either discuss piracy or use the piracy analogy—United State v. Robinson (1826), Charge to the Grand Jury – Treason and Piracy (1861) and Kadic v. Karadžić (1995). A further case is one of the application of universal jurisdiction to a crime not cognizable as a crime of universal jurisdiction—United States of America v. Lei Shi ((2008).

19 The initial prosecution of one Seychelles case is not included within my analysis, and therefore not included in Appendix 1, because information on the trial is not available. Information on the appeal is included. This case is one of the application of universal jurisdiction absent all nexuses. Two cases included in the “Not a Case of Universal Jurisdiction” column are cases the courts referred to as having applied universal jurisdiction, but where territorial and/or nationality nexuses existed, and were obvious. In both cases in the “Cases Heard on Appeal” column, the appeals court overturned the convictions; one was a case of the application of universal jurisdiction absent any and all nexuses, and one was not a case of the application of universal jurisdiction.

20 The initial prosecution of one Kenyan case is not included within my analysis, and therefore not included in Appendix 1, because information on the trial is not available. Information on the appeal is included. This case is one of the application of universal jurisdiction absent all nexuses. Four of the cases noted in the “Cases Heard on Appeal” column concern the question of jurisdiction to piracy jure gentium. In only one of those cases did the courts find an inability to assert jurisdiction absent any and all nexuses: Republic v. Magistrate’s Court, Mombasa Ex-partre Mohamud Mohamed Hashi & Eight (8) Others.
maritime piracy before 2006 can be counted on a single hand. If we add the application of universal jurisdiction to maritime piracy by all other nations to the aforementioned, the pre-2006 number remains at three; three cases where universal jurisdiction has been applied to maritime piracy during the entirety of recorded legal history. Since 2006 that number has grown by almost a factor of three; twenty six cases adjudicated, all in the United States, Kenya and Seychelles; and, twenty one of those cases, all in Kenya and Seychelles, are cases where universal jurisdiction has been applied absent any and all nexuses. Yet, even though the number of cases where universal jurisdiction has been applied to maritime piracy has increased nearly 900% over a mere eight-year period from a recorded history extending hundreds of years, because the entire universe of the application of universal jurisdiction to maritime piracy is twenty six cases and the total number of cases involving maritime piracy in the United States, Kenya and Seychelles is only seventy, the methodology used to support my hypothesis is one of examining each case of piracy and, from the details of the case and the opinion of the court, delineating the nexuses (see Appendix 1). In cases where universal jurisdiction has been applied it is noted if there exists a nexus between the seizing State and the State of the adjudicating body.

In order to find all cases of maritime piracy within the United States, Kenya and Seychelles, I consulted three secondary sources that severally compile court cases adjudicated in each of the aforementioned jurisdictions. Westlaw Next21 was used to
search for all cases of maritime piracy in the United States; and Kenya law\textsuperscript{22} and Seychelles Legal Information Institute\textsuperscript{23} were used to search for the same in both Kenya and Seychelles respectively. In cases of missing data, or where additional information was required, the United Nations Database on Maritime Piracy Court Cases was consulted.\textsuperscript{24} Additionally, in a number of cases, court officials, prosecutors and/or defense council provided additional non-confidential information.

Consistent with the findings from the historical research discussed in the preceding chapters, it is my hypothesis that before the advent of third-party jurisdictional piracy courts in Kenya and Seychelles,\textsuperscript{25} absent a territorial or nationality nexus, a clear nexus between the seizing State and the State of the adjudicating body existed in each and every case of maritime piracy. In those cases where universal jurisdiction was asserted but a clear territorial and/or nationality nexus, or nexuses, was present, that nexus, or those nexuses, is noted. In those cases, we can assume that the courts were attempting to “live large” on a descriptive, yet unfounded, history of the ubiquitous application of universal jurisdiction based on the wording of prior opinions citing pirates as \textit{hostis humani genesis}. It is my assertion, as made clear above, that historical, socio-

\textsuperscript{22} \url{http://kenyalaw.org/caselaw/}

\textsuperscript{23} \url{http://www.seylii.org}
“The Seychelles Legal Information Institute provides free access to the legislation of the Seychelles, statutory instruments, acts as enacted and case law from the superior courts in the Seychelles.”

\textsuperscript{24} \url{http://unicri.it/topics/piracy/database/}

\textsuperscript{25} In October of 2013 Mauritius tried its first piracy case under support of the same UNODC-CPP program as Kenya and Seychelles (correspondence with Sulakshna Beekarry, Principal State Counsel, Office of the Director of Public Prosecutions, Republic of Mauritius, September 2013).
legal, and juridical narratives of pirates as *hostis humani genesis* are primarily social commentary and not legal descriptions or definitions. Further, this commentary does not condemn piracy as a heinous crime, as clearly elucidated in *An Empirical Examination of Universal Jurisdiction for Piracy* (Kontorovich and Art 2010), but condemns it because of the location of the act (high seas) and the relationship of the pirate to the sovereign. It is for this reason, and this reason only, that piracy is a crime of universal jurisdiction. Clearly the theoretical discourse surrounding universal jurisdiction as applied to maritime piracy is problematic, as it lends support to its application in the juridical sphere. As M. Cherif Bassiouni cautioned in his discussion regarding the limits of adjudicative and enforcement jurisdictions extraterritorially, universal jurisdiction must be applied in a judicious manner so as to “avoid jurisdictional conflicts between states, which can threaten the stability of the international legal order,” and to provide “predictability in the exercise of the jurisdictional functions of states so as to avoid potential denial of rights and abuse of judicial processes by exposing persons to multiple prosecutions for the same conduct.” (Bassiouni 2001:86) It is my assertion that the three-case, pre-2006 history of the application of universal jurisdiction to maritime piracy is one of misapplication,26 that

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26 While on the merits of the cases prior to 2006, a defensible claim of a true application of universal jurisdiction to piracy *jure gentium* can only be made for a single case, *In re piracy jure gentium* (1934), I assert that the facts of the case support this as being yet another example of a misapplication of universality. In *In re piracy jure gentium* it is clear that the seizing State and the State of the adjudicating body were acting via proxy on behalf of the Chinese government, given the roles of the British navy in the South China Sea and the British “advisors” within the operating of the central and provincial governments of China this during this period of time. As *In re piracy jure gentium*, was not referred to the Privy Council for a ruling on the merits of the case, but only to gain administrative clarity, the case for territorial nexus is considerably stronger than the one for universal jurisdiction. A final point of clarification is necessary. One might be tempted to draw a comparison between the relationship of the British to the government of China in the early 1930’s and the international community to the government of Somalia today, and further suggest that the application of universal jurisdiction to piracy is warranted in both cases. This parallel is fraught with challenges beyond the obvious. Much of China
a descriptive misinterpretation of the meaning of universal jurisdiction, and its relationship with nexus, within both the legal and socio-legal discourses has led to a justification for the misapplication of universal jurisdiction to piracy off the coast of Somalia since 2006, and trying those charged with piracy in third-party jurisdictional piracy courts in Kenya and Seychelles (and now Mauritius) is not only a reification of inequality in legal and social practice, it is also a refashioning of conceptions of jurisdiction under the law of nations and within municipal law hundreds of years in the making.

While the first decision on charges of piracy by a United States federal court was handed down in October of 1812, it was not until United States v. Smith (1820) (18 US 153), when the subject of universal jurisdiction was discussed; and within Smith it was discussed at length. In delivering the opinion of the court, Justice Story concluded with a comprehensive list of citations “[T]o show that piracy [was] defined by the law of

was under the political control of foreign powers and as such had lost much of its ability to assert juridical control. Under current conceptions of both domestic and international legal sovereignty, this is an infringement on Chinese sovereignty. While this is the case currently in Somalia, these actions are clearly in violation of the Article 2(4) Charter of the United Nations which states that “[A]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.” And while many within the international community would suggest that Transitional Federal Government (the predecessor to the Federal Government of Somalia) has delegated, or more aptly ceded, the functions of social control over its territorial waters to the international community, as I stated earlier this dissertation, this government is not representative of the whole of Somali, and as such one must question not only its legitimacy to represent the entirety of Somalia but, more importantly, its power to resist the ceding of enforcement and adjudicative functions to foreign powers, coalitions, and international organizations.

27 United States v. Tully et al (1812), violation of the Crime Act of 1790 §9 [1 Stat. 112]. Although the first decision where piracy was at issue, United States v. Owners of the Unicorn (1796), concerned the outfitting of a privateer in violation of the Neutrality Act of 1794 [1 stat. 381].

28 The subject of universal jurisdiction was touched upon in United States v. Palmer (1818), United States v. Howard (1818) and United States v. Chapels et al (1819). In all three cases the limits of prescriptive jurisdiction were discussed and the subject of universal jurisdiction was alluded to in discussions regarding the relationship of piracy by statute to piracy jure gentium. These subjects were addressed in greater detail in United States v. Smith (1820).
nations.” Presumably the point of these citations was to note the Court’s position regarding the definitional clarity of the act of piracy. The citations make abundantly clear that piracy *jure gentium* is expressly defined within the law of nations and that piracy by statute need not be defined by congress further the definitions within the law of nations. That said, they also lend support to the position that, although piracy *jure gentium* is clearly defined within the law of nations, it is within the purview of Congress, and only Congress, to prescribe legislation addressing piracy (piracy by statute). Finally, the citations elucidate the point that, in order for the State to prosecute piracy *jure gentium*, piracy by statute need be prescribed within municipal law.

Justice Story supported the Court’s position regarding a definition of piracy within the law of nations by noting the works of Grotius, Pomponius, Ulpianus, Paulus, Bynkershoek, Gentili, Azuni, Martens, Rutherford, Coke, Hedges, Marshall and others. It is through this definitional and legal framework that the Court was able to address universality. Given the definitional certainty suggested by Justice Story, he stated that piracy was “an offence against the universal law of society” and that the pirate was “an enemy of the human race.” (at 161) He further stated that “the general practice of all nations in punishing all persons, whether natives of foreigners, who have committed this offense against any persons whatsoever, with whom they are in amity, is a conclusive proof that the offense is supposed to depend, not upon the particular provisions of any

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29 *United States v. Smith* (1820:fn h).
30 Justice Livingston dissented, noting that the power to define piracy was conferred upon the national legislature only (at 172).
municipal code, but upon the law of nations, both for its definition and punishment."³¹ (at 162) Lastly he noted, echoing Blackstone (fn h), that “all nations” may punish “all persons” who have committed piracy,” a clear statement of universality.

While it is interesting that Justice Story’s opinion carefully guided municipal law toward a definition of piracy from within the law of nations, and he crafted an argument of piracy being a crime subject to universal jurisdiction, it is worth noting that United States v. Smith (1820) was not a case where universal jurisdiction was asserted. Smith was a citizen of the United States, the Irresistible was a United States-flagged vessel, Smith was brought to United States Federal Court by enforcement agents of the United States, and he was tried and sentenced within the federal court system of the United States.

Universal jurisdiction is mentioned in United States v. Furlong (1820): “[R]obbery on the seas is considered as an offense within the criminal jurisdiction of all nations. It is against all, and punished by all… It is an offense too abhorrent to the feelings of man to have made it necessary that it also should have been brought within this universal jurisdiction.” (at 197); in Charge to the Grand Jury - Treason and Piracy (1861): “[P]irates are sea robbers or highwaymen of the sea, and all civilized nations have a common interest and are under a moral obligation to arrest and suppress them; and the constitution in express terms confers upon the United States the power to perform this

³¹ Again, here the juristic rhetoric regarding the ubiquitous application of universal jurisdiction does not represent actual use. Justice Story appears merely to be reiterating the social and socio-legal discourse, as he is unable to provide precedent.
duty, as one of the family of nations.” (West Headnote 4);32 in United States v. Smith (1861): “[A]s the sea belongs to no nation, but to all nations, and as the offense is usually committed without the particular municipal jurisdiction of any nation, it is an offense against the law of nations, and may be punished by any nations, whether committed by natives or foreigners.” (at 1135); and in United States v. Baker (1861): “[A]nd, as general robbers and pirates upon the high seas are deemed enemies of the human race, - making war upon all mankind indiscriminately, the crime being one against the universal laws of society, - the vessels of every nation have a right to pursue, seize, and punish them.” (at 965)

Interestingly, there is no mention of third-party jurisdiction in any of these decisions, not as evidenced by an actual historical account, not even where the discourse on universal jurisdiction is unpacked. In fact third-party jurisdiction is not even alluded to. The substantial discourse on universal jurisdiction is confined to reasons and rationale that support the right and, for some jurists, the duty, for all nations to “pursue, seize and punish” those suspected of piracy jure gentium.

Thus, we have a three-part juridical exercise that is part of customary law, prescription, enforcement and adjudication, and in all cases there have been at least two nexuses—a territorial or nationality nexus, and a nexus between the seizing State and the State of the adjudicating body. The landscape of universal jurisdiction, however, seems to abruptly change. This change is not supported by historical analogy, judicial precedent or theoretical arguments; it just seems to appear. Its appearance was no act of apparition

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32 This case is not included in Table 7.1 as it is definitional in nature; it is included in Appendix 1.
however, it was the result of a well-orchestrated effort by a number of politically powerful States to push the prescriptive and adjudicative functions (problems) of the juridical apparatus which were directed to address piracy off to less-developed nations, while retaining the power of enforcement.

While a concise history of this juridical “power-sharing” arrangement was presented in Chapter 4, a few details will elucidate the relationship of the parties involved and the resultant juridical (re)constructivism that led to the establishment of third-party jurisdictional piracy courts in Kenya, Seychelles and Mauritius. I present these details within the following discussion on the relationship of the application of universal jurisdiction to nexus with regard to maritime piracy off the Coast of Somalia.

The first case of universal jurisdiction, as noted by Rubin (2006), is *R. v. Green* (1705). As stated above, the application of universal jurisdiction to *Green* was a judicial attempt to expand the social and socio-legal discourses surrounding universality into practice. This is evident in an examination of the details of the case and the decision, as there was both territorial and nationality nexuses. While the reasoning behind the application by the court appears to be lost to history, the effects on future social and jurisprudence discourses, and upon judicial decisions, is evident.

Post-*Green*, 217 years would pass before another case of universal jurisdiction would arise within a court of law. Like *Green*, the decision to apply universal jurisdiction to *People v. Lol-Lo and Saraw* appears to be based on flawed methodology on many levels. *Lol-Lo and Saraw* were convicted of boarding a Dutch vessel within the territorial waters of the Dutch East Indies (a colony of the Netherlands), raping the women on the vessel, and sinking the vessel while the men were still aboard. The defendants were
convicted of piracy by an American court in the Philippines. On appeal, Lol-Lo was given the death penalty for committing rape. The application of universal jurisdiction in this case is quite problematic. The act of piracy did not take place on the high seas, but within Dutch territorial waters; rape, while a particularly heinous crime, is not a crime of universal jurisdiction, so it is more than odd that an American court without jurisdiction would render a decision on that crime; and, finally, whereas the American courts clearly lacked jurisdiction, the Dutch courts did have jurisdiction over the crime. (Rubin 2006:318)

The third known case of the application of universal jurisdiction to maritime piracy was before a British court in Hong Kong. The case centered on whether “actual robbery was an essential element in the crime of piracy *jure gentium,*” and concerned an incident, presumably on the high seas, where a Chinese cargo junk was piratically attacked by two other Chinese junks that were crewed by armed Chinese nationals. Although shots were fired at the cargo junk, two Chinese merchant vessels interceded allowing enough time for the arrival of the British warship *H.M.S. Somme.* The *Somme* was able to take charge of, and arrest, the individuals who initiated the attempted taking. While the guilty decision of the Hong Kong court was final, the case was referred to the Judicial Committee of the Privy Council for clarification on a particular question under the law concerning piracy. The Committee found that a frustrated attempt at piratical robbery was equal to piracy *jure gentium.* (Judicial Committee of the Privy Council 1934; Rubin 2006:317)

In respect that the vessels were Chinese, the nationals were Chinese, and the location of the piratical act was on the high seas, it appears that this could be construed to
be the first true application of universal jurisdiction to maritime piracy. However, given the socio-political situation during the interwar years between China and a number of European powers, namely the British, a much stronger argument can be constructed around the territorial and nationality principles. It can be asserted that while the nationality of the accused, the nationality of the victims, and the flag of ships were Chinese, through the Treaty of Nanjing (1842), the British enjoyed not only extraterritorial rights, but juridical hegemony in China until Japan’s invasion of China in 1937. Additionally, the focus of the Privy Council’s decision was not the determination of guilt or the application of jurisdiction, but whether actual robbery is an essential element in the act of piracy *jure gentium*. Finally, of note is the fact that the seizing State was also the State of the adjudicating body, a nexus that exists in all cases of piracy *jure gentium* through 2006, absent only since then, and only in cases of Somali piracy tried in third-party jurisdictional piracy courts in Kenya, Seychelles and Mauritius.

The first case of the application of universal jurisdiction to piracy *jure gentium* where no nexus was present was *Republic [Kenya] v. Hassan M. Ahmed and Nine (9) Others* (2006). Ahmed and nine others were charged with jointly attacking and detaining the Indian vessel *Safina Al-Birsarat*, and demanding a USD 50,000 ransom for the release of the crew and vessel. It was noted in the judgment that the accused were all Somali, that the alleged piratical act took place on the high seas, that the crew and the flag of the alleged pirated vessel were Indian, and that the vessel that intercepted the
Safina Al-Birsarat was a United States warship. On appeal in 2009, Judge Azangalala, of the Chief Magistrate’s Court at Mombasa, Kenya, affirmed the finding of the lower court that an act of piracy jure gentium had occurred, while addressing the fundamental question of jurisdiction. The judge found that not only did Section 69(1), read with Section 69(3), of the Kenyan Penal Code apply, but that because Kenya had acceded to UNCLOS (1982) and because “there are certain crimes which are regarded as so destructive of the international order that any State may exercise jurisdiction in respect of them,” Kenya could apply universal jurisdiction to the crime of piracy jure gentium. In deciding to bring the accused to Mombasa, United States Ambassador William Bellamy noted that they could have been “charged in India, or at the US navy base at Guantanamo Bay in Cuba, but that it would be best if they were charged in Kenya.” Why Kenya? Ambassador Bellamy noted that it was the “nearest port.” Reuters noted that the judicial hearing was unprecedented, presumably not for it being the first case of universal jurisdiction without any nexus, which it undoubtedly was, but because it was the first piracy in post-colonial Kenya.

As discussed above, this was the first documented case where the United States delivered a person(s) apprehended by United States’ agents of enforcement to a State with no nexus to the act of piracy. Title 18, Part I, Chapter 81 Section 1651 of the United

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33 The first Memorandum of Understanding between the United States and Kenya, under which Kenya agreed to try those accused of piracy and captured by the United States, was not be signed until January 16, 2009.
34 “Any person who, in territorial waters or upon the high seas, commits any act of piracy jure gentium is guilty of the offence of piracy.”
35 “Any person who is guilty of the offence of piracy is liable to imprisonment for life.”
37 http://news.bbc.co.uk/2/hi/africa/4677148.stm
States Code states: “[W]hoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.” Clearly the law does not mandate an action to adjudicate and, in practice, a number of suspected Somali pirates have been released after interdiction efforts. But more importantly, there is no provision to deliver suspected pirates apprehended by United States agents of enforcement to any other jurisdiction, for that is the purpose of extradition. This assertion is exemplified in the definition of extradition.

Black’s Law dictionary defines extradition as:

The official surrender of an alleged criminal by one state or nation to another having jurisdiction over the crime charged; the return of a fugitive from justice, regardless of the consent, by the authorities where the fugitive is found. (Garner and Black 2004:623 [emphasis added])

Black’s law makes clear that in order to extradite, jurisdiction is requisite. So in the case of Safina Al-Birsarat, the appropriate action, notwithstanding Ambassador Bellamy’s witty assertion that the “nearest port” would serve the interests of justice, would have been as stated in the Crime Act of 1790 to try the suspected pirates “in the district where the offender is apprehended, or into which he may first be brought.” United States law, international law, precedent, and the discourses surrounding jurisdiction all support this assertion.

The High Court of Kenya, Mombasa would adjudicate the application of universal jurisdiction without nexus opaquely in 2010. In Miscellaneous Application 434 of 2009, an appeal of the Chief Magistrate’s Court at Mombasa - Criminal Case No. 840 of 2009, Judge Ibrahim noted that Section 5 of the Penal Code of Kenya states that “[T]he jurisdiction of the Courts of Kenya for the purposes of this Code extend to every place
within Kenya, including territorial waters.” He concluded that “Kenyan Courts are not conferred with or given any jurisdiction to deal with any matters arising or which have taken place outside of Kenya.” It was also noted that no Kenyan goods, crew, or vessel were involved. In personal discussions with defense council, the meaning of the decision was deeper than merely territorial or nationality jurisdiction. Jared Magolo made clear that a focal point of law for Justice Ibrahim was that Kenya had no connection to the alleged act of piracy. Section 369, as read with Section 371, of the Merchant Shipping Act of 2009\(^\text{38}\) conferred on Kenya the ability to hear cases of piracy \(jure\) \(gentium\) (which Section 69 of the Penal Code did not),\(^\text{39}\) but lacking a connection to the act—an enforcement nexus—Kenyan courts could not assert jurisdiction. Justice Ibrahim’s position was consistent not only with the laws of Kenya, but also with an entire history of maritime piracy trials and under the law of nations.

In total, there have been documented fifteen maritime piracy trials in Kenya through the end of 2014; over half (eight) have been either appeals or clarifications on questions of jurisdiction.\(^\text{40}\) Each and every one is a case of the application of universal

\(^{38}\) Section 369, Part XVI-Maritime Security, of the Merchant Shipping Act of 2009 of Kenya defines piracy under Section (1)(a) as: “any act 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) against another ship or aircraft, or against persons or property on board such ship or aircraft; or (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any voluntary act of participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; or (c) any act of inciting or of intentionally facilitating an act described in paragraph (a) or (b). Analogous to Article 101 of UNCLOS (1982).

\(^{39}\) This case was adjudicated under Section 69 of the Penal Code and not Section 369 of the Merchant Shipping Act of 2009 (Act), as the Act was in force until after the trial for Criminal Case No. 840 of 2009 had begun.

\(^{40}\) Based on news accounts (http://www.nytimes.com/2009/04/16/world/africa/16somalia.html? r=0, http://www.cnn.com/2009/WORLD/africa/05/03/kenya.pirates/index.html?ref=hpmostpop), and information contained in the judgments and sentencing, it appears that a case heard before the Chief Magistrate’s Court at Mombasa is missing from Kenya Law as it appears to be heard later on appeal,
jurisdiction without territorial or nationality nexuses; each and every one is a case of the application of universal jurisdiction absent an enforcement nexus; each and every one involves Somalis, and only Somalis charged with piracy. In summary the entirety of prosecutions for the crime of maritime piracy within the jurisdiction of the courts of Kenya involve no territorial nexus, no nationality nexus, and no nexus between the seizing State and the State of the adjudicating body. Kenya is the only jurisdiction with a history of a total absence of nexus with regard to the crime of maritime piracy. Kenya is also one of the three States assisted in the prosecution of cases of maritime piracy by the UNODC-CPP, and to have received funds from a number of powerful States and the United Nations to serve as a “one-stop adjudication shop” for the prosecution of Somalis, and only Somalis, accused of piracy.

The first maritime piracy decision in the Seychelles was handed down in 2010. In Criminal Side 51 of 2009, the Supreme Court of Seychelles found that Mohamed Ahmed Dahir and ten others did, in fact, attack the Seychelles Coast Guard vessel *Topaz* with piratical intent (one can only presume that when they began the attack those convicted of piracy did not know that they were attacking a military vessel). The nexuses, territorial and nationality, in this case were quite clear. The accused were convicted and sentenced to twenty years in prison.

The first decision noting the application of universal jurisdiction was later that same year, but, based on the facts of the case, it has more in common with *R. v. Green* Criminal Appeal No. 94, *Abdirahman Mohamed Roble & Ten (10) Others v. Republic*. As the appeal notes that the case is one of the application of universal jurisdiction without nexus, it merely shows that the Kenyan courts are consistent in adjudicating maritime piracy cases without nexus. This additional case is included in the figures of Table 7.1.
(1705) than with Republic v. Hassan M. Ahmed and Nine (9) Others (2006). The Supreme Court of Seychelles found, in Republic v. Mohamed Sayid and Eight (8) Others (2010), that the accused did in fact piratically attack and take control of two vessels, and fire on the Seychelles’ Coast Guard vessel Topaz. While one of the vessels was Iranian, the other was a Seychelles-flagged vessel. Additionally, all of the crew of the Seychelles-flagged Galante were Seychellois. Finally, the seizing State vessel was the Seychelles Coast Guard vessel Topaz. Clearly, not only was this not a case of universal jurisdiction, the decision was quashed on appeal (Mohamed Sayid v. Republic, Seychelles Court of Appeals - 2 of 2011).

The first case where universal jurisdiction absent territorial or nationality nexus was applied in the courts of Seychelles was decided in 2011. In Criminal Side 76 of 2010, Ise and four others were found guilty in the attempted piratical takings of two French fishing vessels. In this case the seizing State vessel was the Seychelles Coast Guard’s Andromache. In mid-2012 however, there appears a change in the application of universal jurisdiction to maritime piracy. In Republic v. Mohamed Abdi Jama and Six (6) Others (Criminal Side 53 of 2011), the Supreme Court of Seychelles found that the accused did attack the British warship Fort Victoria with piratical intent. This case is both unique and rather shocking in that it appears to be only the second case where

41 There seems to be a numbering error with regard to this case and Criminal Side 75 of 2010 Republic v. Nur Mohamed Aden and Nine (9) Others, as both were initially numbered 75 of 2010. It appears that Republic v. Ise and Others was renumbered as 76 of 2010 at a date subsequent to its filing.
pirates have attacked a military vessel, been captured by the crew of that vessel and not been tried by the State of that vessel.\textsuperscript{42, 43}

In total, through the end of 2014, there have been fourteen maritime-piracy decisions handed down by Seychelles courts.\textsuperscript{44} Two cases were appeals on earlier convictions. Seven of the cases did not involve the application of universal jurisdiction, while two were adjudicated as cases of universal jurisdiction, yet had obvious territorial or nationality nexuses. All six cases involving the application of universal jurisdiction without any nexuses occurred after mid-2012 and, with the exception of the aforementioned appeal, all cases after Republic v. Mohamed Abdi Jama and Six (6) Others were cases of the application of universal jurisdiction without any and all nexuses. As in the Kenyan courts, each and every case where universal jurisdiction was asserted involved Somalis, and only Somalis.

The first case of the application of universal jurisdiction in United States courts was not a case of maritime piracy. Lei Shi was convicted of violating Title 18, Part I, Chapter 111, Section 2280 of the United States Criminal Code—Violence against maritime navigation. Lei Shi, a national of the People’s Republic of China, was convicted of seizing control of a vessel by force, two counts of performing acts of violence likely to

\textsuperscript{42} It appears that the first case where suspected pirates attacked a military vessel, have been captured by the crew of that military vessel and not been tried by the State of that vessel occurred in April of 2009. Presumably the case was heard in the Chief Magistrate’s Court at Mombasa, Kenya; however, a record of the judgment is not available on Kenya Law. The judgment for the appeal on that case, Abdirahman Mohamed Roble & the (10) Others, Criminal Appeal No. 94 [consolidated 94-104] of 2102 was handed down on the 30th of August 2013, by the High Court of Kenya at Mombasa.

\textsuperscript{43} The United Kingdom signed a Memorandum of Understanding with Seychelles to accept suspected pirates for adjudication and sanction in July of 2009.

\textsuperscript{44} Appendix 1 only shows thirteen decisions as the appeal Ali and Others v. the Republic covers both he appeal and the original decision.
endanger the safety of the vessel under Section 2280(1) and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation—1988 (SUA), and killing the captain and first-mate. Although there was no clear nexus absent the enforcement and adjudicative bodies, extraterritoriality was asserted based on universality. Presumably this assertion of universality was rooted in a piracy analogy, yet violations of SUA, absent piracy and maritime depredation (as defined under Section 1651 of the US Code), and murder are not crimes against the law of nations warranting the assertion of universality. Further, the government of Seychelles, which has a proven willingness to assert universality of crimes of maritime depredation, could have asserted extraterritoriality based on territoriality, and China could have just as well asserted extraterritoriality based on nationality. Finally, unlike Piracy, Section 1651 of the US Code, Section 2280—Violence against maritime navigation, requires the presence of the accused within the adjudicating jurisdiction; in this way a nexus between the enforcement and the adjective bodies of the state is established. Seychelles, the government who flagged the vessel Full Means No. 2, waived jurisdiction allowing the United States Coast Guard to board the vessel and secure the accused. The defendant was brought into the court’s jurisdiction involuntarily.

It seems rather far-fetched that the meaning that Congress attributed to Section 2280(b)(1)(C): “the offender is later found in the United States after such activity is committed” includes being forcibly brought into the jurisdiction of the United States from the high seas, and that the meaning of the statute in its entirety is “piracy” when it does not use the word piracy. As the statute does not mention piracy and does not state that
forceful movement of persons from areas that are, under the law of nations, *res nullius* or *res communis*, into United States territory is consistent with federal law and/or international law, it appears that this ruling is constructed on a very weak foundation. Additionally, a conviction based on piratical universality under international law that lacks the charge of piracy is hollow indeed. While SUA does “expressly provide foreign offenders with notice that their conduct will be prosecuted by any state signatory,” (meaning that due process does not require territorial or nationality nexus between the defendant and the United States), there appears no reason why Lei Shi was not charged under Section 1651, or delivered to Seychelles to stand trial.

In total there are have been four decisions where universal jurisdiction has been applied to maritime piracy under the jurisdiction of United States courts, post *Lol-lo and Saraw* (1922), with all four involving a single case, and a single person, Ali Mohamed Ali. Ali was charged with piracy for his part in the operation of a piratical enterprise in the taking of the vessel *CEC Future*. Ali was picked up after the taking of the vessel, by those who took the vessel, en route to waters near Eyl, Somalia, in order to serve as a ransom/hostage negotiator. After approximately 69 days, the vessel was released for a ransom of USD 1.7 million, and a separate payment of USD 75,000 directly to Ali. Ali had engaged in similar work (June-August 2008), negotiating the release of hostages taken from the *Rockwell* for USD 1 million. He also provided translation services to Somalis who had pirated the Turkish vessel *Karagol*, as well as services to those who had pirated other vessels (namely the *Stolt Strength*, the *De Xin Hai*, and the *Lynn Rival*). A warrant was issued for Ali’s arrest in November 2010, with a formal indictment issued in April 2011. In March of 2011, Ali was appointed as the Director General of the Ministry
of Education in Somaliland. He was subsequently invited to take part in a conference in North Carolina, USA, in April 2011, and was arrested upon arrival in Virginia, USA. Ali contended that his goals in assisting in the piracy negotiations were altruistic, and not a part of a piratical conspiracy.

Ali was subsequently found not guilty of piracy, and after a jury deadlocked on two charges of hostage-taking, the federal prosecutors decided in early 2014 to drop all remaining charges against him. Ali is seeking asylum in the United States. In the case of Ali, there was a nexus between the seizing State and the State of the adjudicating body: the United States. Additionally, in case it was not made clear above, Ali is Somali.

**Findings**

In summary, it appears that something very strange occurred after the publication of the second edition of Professor Rubin’s exhaustive account of *The Law of Piracy* (2006): an explosion in the application of universal jurisdiction to maritime piracy.\(^{45}\) Within its pages, Professor Rubin details three known cases of the application of universal jurisdiction to maritime piracy: *R. v. Green* (1705), *People v. Lol-Lo and Saraw*, (1922) and *In re piracy jure gentium* (1934). Yet in each case, while the decisions remark on application of “universal jurisdiction,” the relevance of universal jurisdiction to the decision is based more on a jurisdictional fiction than the facts of the case. I state

\(^{45}\) I am not suggesting that there is a causal relationship between the release of the second edition of Professor Rubin’s book and the increase in the assertion of universal jurisdiction, but merely that perhaps Somali pirates were testing the proverbial application of the rules of extraterritoriality. Perhaps they noted that the international community was not keen to assert universality to the crime of maritime piracy and they thought to test the waters so to speak. Perhaps even Somali pirates are not only fans of Professor Rubin, but also of Peter Leeson. For it was Leeson who suggested that not only are Somali pirates rational economic actors, they too are rational legal actors. (2009, 2010) Or perhaps as I assert, Somali pirates, although perpetrators of a crime subject to universality, are also victims of a reification of inequality in the form of the creative application of international and municipal law.
this not as an attack on legal scholars, but merely as social observation. As discussed above, the territorial and nationality nexuses are just too numerous to consider *R. v. Green* a case of the application of universal jurisdiction, notwithstanding the court’s opinion. Similarly, the decision in *Lol-Lo and Saraw* is not a case of the application of universal jurisdiction to maritime piracy, but one of the misapplication of universality, both territorially (the crime occurred in jurisdiction of a foreign state (Netherlands)) and with regard to the crime (rape is not cognizable under the law of nations).

With regard to *In re piracy jure gentium*, it can be argued that while the nationality of the accused, the nationality of the victims, and the flag of ships were Chinese, through the Treaty of Nanjing (1842) the British enjoyed not only extraterritorial rights, but juridical hegemony in China until Japan’s invasion of China in 1937. That said, the focus of the Privy Council’s decision is not the application of jurisdiction, but whether actual robbery is an essential element in the act of piracy *jure gentium*.

Given the facts, it is reasonable to conclude that through 2006 a true case of the application of universal jurisdiction to maritime piracy does not exist. However, even if we agree with legal scholars and note the three aforementioned cases, there were still only three cases over minimally three hundred years - one in Scotland, one in British-controlled Hong Kong, and one in the American-controlled Philippines. In each of those cases, while universal jurisdiction was asserted, a clear nexus between the enforcement body and the adjudicative body existed notwithstanding other territorial and/or nationality nexuses overlooked by the courts.
Since 2006 there have been five cases asserting universal jurisdiction within United States courts. Four of those cases involve Ali Mohamed Ali, who was subsequently acquitted on all charges. The one case not attributable to Ali concerns the crime of violence against maritime navigation, not of maritime piracy. While violence against maritime navigation, as defined under SUA, is a crime, it is not subject to universal jurisdiction, or, more correctly it had never been a crime of universal jurisdiction until the United States Court of Appeals for the Ninth Circuit creatively reinterpreted the scope of universal jurisdiction to include Section 2280 of the US Code.

With the first maritime piracy case tried in 2006, there have been fifteen cases where universal jurisdiction was applied to maritime piracy within Kenyan courts. In only one case did the assertion fail on jurisdictional grounds; a case on appeal. Eight of the aforementioned were cases appealing or clarifying the application of universal jurisdiction. Perhaps the most noteworthy opinion was that of Justice Ibrahim in Miscellaneous Application 434 of 2009. In Republic v. Magistrate’s Court, Mombasa Ex-parte Mohamud Mohamed Hashi & Eight (8) Others, Justice Ibrahim noted that “[T]he jurisdiction of the Courts of Kenya for the purposes of this Code extend to every place within Kenya, including territorial waters.” He concluded that “Kenyan Courts are not conferred with or given any jurisdiction to deal with any matters arising or which have taken place outside of Kenya.” He was referring to Section 69 of the Penal Code. And while the legislature had already completed the process of replacing that section of the penal code with Section 369 of the Maritime Shipping Act of 2009, Justice Ibrahim was

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46 See Chapter 7, fn 40.
47 See also Wambua 2010:54.
clear in noting in his opinion that the application of universal jurisdiction could only be carried out by the enforcing state.\textsuperscript{48}

In each and every case concerning the application of universal jurisdiction in Kenya, not only were territorial and nationality nexuses lacking, but also an enforcement nexus. The first time this phenomenon occurred was within the Kenyan courts, and subsequently it reoccurred fourteen times over the ensuing eight years.

The first maritime piracy case was tried in the courts of Seychelles in 2010. Subsequent to that decision, there have been six cases where universal jurisdiction was applied to maritime piracy within the Seychelles’ courts. The Seychelles Legal Information Institute notes two additional cases where decisions state that universal jurisdiction was applied; however, other nexuses existed that render the application of universal jurisdiction superfluous. Three other cases of piracy were tried where universal jurisdiction was not asserted. In six of the seven cases where universal jurisdiction was asserted, not only were there territorial and nationality nexuses lacking, but also an enforcement nexus. There exists no decision within the Seychelles courts where the mechanisms for the application of universal jurisdiction are questioned, where the lack of nexus is at issue.

In summary, between 1705 and 2006 legal scholars assert that universal jurisdiction was applied three times; an enforcement nexus existed in each case. Between 2006 and 2014 the courts of the United States, Kenya and Seychelles have asserted universal jurisdiction to the crime of maritime piracy twenty six times, twenty one of

\textsuperscript{48} See Kontorovich 2009c and Wambua 2012.
those lacking a nexus between the seizing State and the State of the adjudicating body; all of them including Somalis, and only Somalis. Additionally, the only courts to apply universal jurisdiction to the crime of maritime piracy without a link to the state of capture are those of Kenya and Seychelles, the only countries to receive support to do so from powerful international states and the international body that represents their interests as expressed via the United Nations Security Council, the United Nations.
Conclusion: A Summary and Retrospective

In a letter from the Secretary-General of the United Nations to the President of the United Nations Security Council, Ban Ki-moon wrote that, six months after appointing Jack Lang as Special Advisor on legal issues related to piracy off the coast of Somalia, he (Ban) had been presented with a comprehensive report outlining a series of juridical recommendations. The mandate of the Special Advisor originated in UNSCR 1918 (2010) which requested of the Secretary-General a report on the problem of Somali piracy. In fulfilling that request, a comprehensive analysis of the problem of Somali piracy and a number of options were presented in mid-2010. While the report was noted as being “exhaustive,” in August of 2010 the Secretary-General appointed a Special Advisor to “identify additional steps that can be taken to assist States in the region, as well as other States, to prosecute and imprison persons who engage in piracy, and explore the willingness of States in the region to serve as potential hosts for any other options for potential new judicial mechanisms set out in [the secretary-General’s] report…to the Council.” (S/2011/30 2011:9)

In fulfilling the mandate of presenting the best options to the Secretary-General, Lang completed a highly thorough analysis of the issues. He conducted high-level meetings with diplomats from the countries of Djibouti, Ethiopia, Kenya, Maldives, Mauritius, Seychelles, Tanzania, China, Denmark, Egypt, France, Germany, India, Italy, Japan, Oman, Portugal, Russia, Ukraine, the United Kingdom, and the United States. He consulted with senior officials from international organizations deeply immersed in the problem of piracy including INTERPOL, UNODC, IMO, UNDP, IGAD, IOC,
EUNAVFOR, CMF, and NATO MARCOM. He met with authorities from the Somali TFG, members of the regional governments of Somaliland and Puntland, the Special Representative of the Secretary-General for Somalia, the Chairman of Working Group 2 (legal) for the CGPCS, United Nation Under-Secretaries for Legal Affairs and Political Affairs, ICJ Judge Yusuf (a Somali judge), experts in commerce and trade, and many leading legal, military, political and diplomatic experts on Somalia. In total, Lang met with over one hundred and fifty organ representatives and experts (S/2011/30 2011:9, 48-56). As mentioned above, his analysis took the better part of six months.

I reference Lang’s report for a number of reasons: its meticulousness; its attention not only to the observable social problem, but also to related social issues and the equity of policy and outcome; its scrupulousness; and sadly, the near complete disregard paid to those parts of it addressing juridical measures by those States and international organs that set policy regarding piracy off the Horn of Africa. In terms of meticulousness, Lang’s report is perhaps the most comprehensive and well-reasoned analysis of Somali piracy prepared on behalf of a government, coalition or international body. Additionally, it is also the most pragmatic from the standpoint of proposing workable solutions to address the social problem.

In terms of the consequences of action, while Lang weighed the merits of third-party jurisdictional piracy courts, he seemed to reject the idea in favor of an international court (see Williams and Pressly 2013) and specialized piracy courts to be located in Somaliland and Puntland, due to what I interpret as the concern that these (third-party) courts would render judgments that were neither independent nor impartial. I suggest that Lang understood this to be a very real potential outcome when one considers that the
funding source for these courts is from powerful States and international organizations whose first priority is eradication of piracy off the coast of Somalia and the maintenance of the status quo with regard to enforcement powers on the oceans’ common, and not the equity of the juridical process or the protection of human rights. This a priori priority bias is systemic. The evidence of this bias, and the preferencing of existing power relations, a disregard for equity in the juridical process and the protection of human rights is manifest in the existence of these courts in apparent violation of the law of nations and customary international law.

A number of critics have suggested that these courts have been established to fill a juridical void. They maintain that accused pirates would simply be set free by interdicting States if these courts did not exist. (S/2011/30 2011:1) This is plainly an untruth. Funding for these courts, both direct and indirect, comes from States who, in addition to being very capable of enforcing anti-piracy laws, have full capacity to prosecute those laws they enforce.¹ These powerful States have fully functioning independent judiciaries, with deep histories of adherence to the rule of law, and functioning, if not flawed, penal systems, subject to local and/or federal oversight. They also have laws sanctioning piracy jure gentium and piracy by statute. I assert that the chief reason these powerful States opted to create these courts was to retain the power of enforcement while removing their responsibility to address the messy human rights issues inherent in adjudication and sanction. Their way around this messy problem was to create sui generis legal organs within sovereign States and to shift the burden of adjudication and sanction to these

¹ For example see United States of America v. Ali Mohamed Ali, 870 F.Supp 2d 10; 885 F.Supp 2d 17; 718 F.3rd 929; and, 982 F.Supp 2d 85
organs, in opposition to the law of nations. Additionally, the States wherein these courts exist and have been operating since 2009, lack both a proven juridical capacity and a respect of human rights as a product of juridical outcomes. This is evident in the wide disparity of sentencing drawn by those convicted of piracy, the lack of attention of addressing minors accused and convicted of piracy, and the “wonky” details of serving sentences: a period of time in the host sanctioning country, with a return to prisons in Somalia at a later date. Additionally, there is concern over the amount of time it takes for trials to begin, the length of trials and appeals, and the lack of due process. Could these irregularities occur in the judicial and corrections systems of powerful States? No legal system is perfect; yet, the protections guaranteed to those accused and convicted are significantly greater.

Lang’s report was more than a precise accounting of the problem of piracy off the coast of Somalia and potential juridical solutions; it was characterized by consideration of a moral element, and a concern for equity. Its twenty-five proposals included considering the safety of vessels and mariners through adherence to BMP4; the monitoring by powerful States of Somalia’s coast for illegal activity when and where the Somali State could not provide that function; international cooperation with the governments of Somaliland and Puntland; and the coordination of international efforts on evidence gathering, policing and the adjudication and sanction of those accused of piracy. It also included the building of capacity within Somalia, including: a prison system; an operational coast guard; the development of a body of law (presumably one with respect

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2 For example see Ali and Others. V. Republic of Seychelles, Appeals 22 of 2012 – Appendix 1.
3 This has been noted a number of times in the decisions handed down by the appellate courts of Kenya and Seychelles.
for and guarantees of human rights); the development of a court system that was capable of addressing maritime piracy; the development of police enforcement apparatuses on land and over the Somali territorial sea and EEZ; the control of open space within the territories of Somalia; means of addressing IUU fishing in Somali waters; and means of assisting Somali governments in exploiting their natural resources. There was little in Lang’s report that was beyond the reach of Somalia and the international community to achieve, which brings me to what was most noteworthy of Lang’s report: the failure of the international community to bring it to fruition. Like the partitioning of the Horn of Africa, like the flawed UNOSOM I and II missions, and like the results produced by the UNPOS, by not paying greater attention to power asymmetries and inequalities the application of law, the international community has once again failed Somalia.

In evaluating the work of the international community based on the recommendations within Lang’s report, it is important to point out that a significant number of the twenty-five proposals presented have either not met with adequate follow-through or, have been disregarded. This is especially true of those concerned with judicial measures. In fact, those proposals that have met with the most resource-intensive effort are those that contain strong elements of enforcement by powerful western States, and certain judicial (third-party jurisdictional piracy courts) and sanction capacity-increase measures (prisons) within less powerful regional States. None of the capacity-building efforts envisioned by Lang for Somalia have been successfully implemented with the exception of Proposal 24 (the construction of prisons in Somaliland and Puntland). The failures by the international community in addressing the problem of Somali piracy include: Proposal 4 (enforcement cooperation with Somaliland and Puntland); Proposal
15 (assisting Somalia with the exploitation of its resources); Proposal 16 (facilitating the declaration of Somali open maritime space); Proposal 17 (adequately addressing IUU fishing within Somalia’s territorial waters and its EEZ); Proposal 18 (establishing governance in lawless areas within Somalia’s borders); Proposal 19 – developing a land-based Somali Coast Guard support function; and, Proposal 25 (the establishment of specialized piracy courts in Somaliland and Puntland). (S/2011/30 2011)

In detailing his recommendations, not only did Lang make the astute observation that it would be in the best interest of all parties to concentrate on the economic development of Somaliland and Puntland, those regions or, more correctly, internationally unrecognized States, where infrastructure exists and government services are functioning (presumably at the expense of other areas to the south, including Mogadishu, where anarchy reins), he also wrote of the importance of establishing a legal framework which demonstrates a “[R]espect for international human rights law, which requires, at the judicial level, a judgment rendered by an independent and impartial court within a reasonable time and with due protection of defendants’ rights…” (S/2011/30 2011:11) In theory and in practice, third-party jurisdictional piracy courts that prosecute Somalis, and only Somalis, have been established and function in violation of customary international law and treaties, and in violation of a number of articles of The Universal Declaration of Human Rights, including: Article 2, “… [F]urthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self governing or under any other limitation of sovereignty […]”; Article 5, “[N]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment […]”;
Article 6, “[E]veryone has the right to recognition everywhere as a person before the law [.]”; Article 7, “[A]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against discrimination in violation of this Declaration and against any incitement to such discrimination [.]”; Article 8, “[E]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law [.]”; Article 10, “[E]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

Of concern to members of the European Union, these same third-party jurisdictional piracy courts are also in violation of a number of articles of the European Convention on Human Rights, including: Section I Article 5, Right to liberty and security, and Article 6, Right to a fair trial.

Lang noted that consensus appeared to be divided on judicial counter-piracy mechanisms to be employed to achieve eradication of piracy in the region. One group advocated for “the creation of an international criminal tribunal,” while the other for the “strengthening [of] the capacities of States in the region without creating an additional mechanism.” (S/2011/30 2011:9) The bases for these disparate views on the judicial component are two-pronged, yet I assert that the second prong is merely an external rationalization for the real reason. The first prong is based on the legal framework of jurisdiction.

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As discussed earlier in this dissertation, the basis for the legal framework to which Lang refers is the assertion of jurisdictional claims over the criminal act of maritime piracy. This involves the application of municipal law that criminalizes piracy *jure gentium*, as well as the application of exterritorial jurisdiction to the act.⁵ In supporting assertions that I have made earlier in this dissertation Lang notes

[T]here is no lack of legal basis allowing States to exercise universal jurisdiction. General international law provides for multiple forms of jurisdiction without establishing priority rules. Examples are the territorial jurisdiction of coastal States over acts perpetrated in their territorial waters; active personal jurisdiction [nationality principle] of Somalia to prosecute Somali nationals who have committed acts of piracy; passive personal jurisdiction [passive personality principle] of the victim’s State; jurisdiction of the ship’s flag State [territorial jurisdiction]; and jurisdiction of the State that carried out the seizure, in accordance with article 105 of the Convention [UNCLOS] [what I refer to in this dissertation as the nexus between the seizing State and the State of adjudication]. (S/2011/30 2011:22 [see also Gathii 2010:375])

It has been established that exterritorial jurisdiction to prosecute piracy exists on a number of levels and that all that is necessary to assert jurisdiction in cases of piracy *jure gentium* is the existence of a certain legal language. First, there must exist municipal law sanctioning piracy, “piracy by statute;” and second, there must exist within the State legal language extending “piracy by statute” to acts of piracy *jure gentium*. It is this framework that powerful States have used as rationale to establish third-party jurisdictional piracy

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⁵ Cases of piracy in Somalia have been prosecuted under Article 486 (*Detention of a Person for the Purpose of Robbery or Extortion*), Chapter 1 Crimes Against Property by Means of Violence, Part XIII Crimes Against Property of The Penal Code – Legislative Decree No. 5 of 16 December 1962. The law does not make any note of questions of jurisdiction. UCSCR S/RES/2125 specifically calls on Somali authorities to “pass a complete set of anti-piracy law without further delay…..” S/RES/2125:6 In February of 2012 the Republic of Somaliland passed *The Law on Combating Piracy* – *Law 52/2012*. The law defines piracy consistent with Article 101 of UNCLOS (1982), but includes a provision that expands piracy to those areas within the territorial waters of the Republic of Somaliland. The law also notes that the enforcement jurisdiction of the Republic extends not only to the territorial waters of Somaliland but to the high seas as well. As of November 2012, Puntland also has a piracy law in place: Puntland Piracy Law – No. 18.
courts to address Somali piracy. The flaw in the reasoning is that if such judicial powers exist under international law, there is no reason to establish other fora to adjudicate piracy *jure gentium*; piracy could, in all circumstances, be prosecuted by the seizing State or by any State asserting national, territorial or security related jurisdiction. Yet this flawed reasoning has been used as the foundation of a solution that serves the interest of powerful States, who, working from the desired outcome backwards, have used it as a rationale to establish the mechanisms necessary to achieve a desired solution, the establishment of these third-party jurisdictional piracy courts. This solution leaves the power to interdict and assert military might with these powerful States, while farming out the messy job of adjudication and sanction to less powerful States all too willing to do the bidding of powerful States in order to be connected to power; obtain a seat on the UN Security Council; obtain partner status in the never ending War on Terror; and be the recipient of military aid and/or capacity-building largess. Importantly, in terms of instrumental inequality, this solution is constructed to allow powerful States to avoid violations of international human-rights law by removing the Somali pirate from its fora of adjudication and sanction; the Somali only touches the territory of the powerful State while on board its warship. Additionally, these States have the power to make sure that the less-powerful States who are responsible for adjudicating and sanctioning Somalis in third-party jurisdictional piracy courts where no nexus to the act of piracy exists never have to answer for violations of international law and/or treaty.

While this form of colonialism, or its current iteration “globalism,” is more akin to Dutch control of trade than Spanish exploitation of land and domination of peoples, it is based on significant power asymmetries, exploitation and inequalities. This is the truth
behind the first prong I mention above. Because there exists under the law of nations a mechanism to prosecute piracy *jure gentium* by the seizing State, no other mechanisms, as referred to by Lang above, are necessary. A methodology that links the ability of a State to prosecute piracy *jure gentium* to the establishment of third-party jurisdictional piracy courts is flawed. It is not merely superfluous, it is spurious. This methodology works if, and only if, there exists a nexus between the State seizing those accused of piracy and the State of the forum of adjudication. This connection has been established by over two thousand years of social commentary, four hundred years of legal commentary, and nearly four hundred years of juridical practice. International law is established by custom and by treaty, yet neither custom nor treaty supports the application of universal jurisdiction absent a nexus between the State seizing those accused of piracy and the State of the forum of adjudication.

An understanding of jurisdictional claims presented, the second prong—the one I suggest is merely an external rationalization for the real reason—is cost. It has been asserted that the establishment and long-term operation of an extraterritorial court to address Somali piracy could cost the international community over USD 100 million;\(^6\) although it has not yet been adequately explained why this court could not serve as the International Court for the Crime of piracy *jure gentium*, thus addressing all cases of piracy *jure gentium*, and not just those involving Somalis who are accused of piracy. The USD 100 million cost to establish an international court for maritime piracy is a gross overestimation. (Williams and Pressly 2013:212) Additionally, there exist other courts

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\(^6\) Field research Nairobi, Kenya July 2013.
where piracy *jure gentium* could be tried, the ICC and ITLOS. Lang estimates the cost of a court, more limited in scope, an extraterritorial Somali specialized court, at closer to USD 2.5 million per annum. It should also be noted that he estimates the cost of prison construction at slightly over USD 7 million. In light of Lang’s proposal and cost estimates, and the USD billions spent on militarization and capacity-building schemes in the areas of and around the Horn of Africa, USD 2.5 million per annum seems to be money well-spent. In fact, the cost of a specialized piracy court that addresses all cases of piracy *jure gentium* would not only cost significantly less than the total real cost of third-party jurisdictional piracy courts in Kenya, Seychelles and other States, it would by design be consistent with The United Nations Declaration on Human Rights, it would be equitable, and it would be consistent with treaties, including UNCLOS (1982) and with customary international law.\(^7\)

At the beginning of this dissertation I made the assertion that the formal rational law is a reification of power asymmetries and instrumental social inequalities, and that the creation of juridical structures and the application of universal jurisdiction to maritime piracy off the coast of Somalia lacking any and all nexuses is empirical evidence of that reification. I have done this through a socio-historical analysis of number of subjects in order to create a framework on which to base an empirical study that focuses on the application of law to a specific form of social deviance. Starting with theoretical significance of the construction of law, I invoked Durkheim, noting that we do not condemn piracy because it is a crime; piracy is a crime because we condemn it. Yet,

\(^7\) See Dutton 2010.
criminality is not normatively determined by merely any social group; the State maintains the legitimate authority to do so. This legitimate authority is based on modern conceptions of power and power relations, and is based on the fact that the State in many cases exerts both “power of” and “power over.” It exerts influence via sanctions and prohibitions, and via what it keeps hidden from the public discourse.

Along with this legitimate authority to define deviance, the State retains the sole legitimate authority to exercise prescriptive, enforcement and adjudicative jurisdiction within its territory and to a certain degree over its nationals when they travel external to its borders. In addition, the State maintains certain types of jurisdiction over particular crimes, based on location, connection to the sovereign, and heinousness, in that territory that is external to the territory of any and all sovereigns, the high seas and other areas of amorphous space.

I bring these conceptions of the law and power together to assert that the law behaves as an instrumental tool of the elite to control subaltern actors. So while the law can be construed as the quintessential Durkheimian social fact, it operates as Marx conceived it, an instrumental tool of oppression and a reification of inequality.

If the law, as I suggest, were an instrumental tool that reifies inequality, it would stand to reason that subaltern actors would not always sit idly by waiting to preform the tasks that hegemonic actors assigned. It is for this reason I raised the issue of the moral economy. It appears that resistance, revolt, riot, and criminal deviance are part of normative relations between hegemonic and subaltern actors. This is true of relations between those subaltern actors who engage in piratical deviance and those wishing to quash such behavior. I assert that while organized crime is not part of the moral
economy, piracy, that is not part of organized crime, is. Further, while some individuals may be participating in an organized criminal activity, their rationale may be a moral enterprise. For these individuals, to engage in piracy is part of the moral economy, even if they contribute to the furtherance of organized criminal enterprises and activities.

While some Somalis who engage in piracy are part of the moral economy and some are part of a criminal enterprise, the international community appears to have a single response to Somali piracy. It also appears that that response is based on Somalia being a case of socio-political exceptionalism and Somalis being a case of exceptional deviants. I assert that while Somalis are in no way any more deviant that any other social group, Somalia’s unique social structure, along with its post-colonial socio-political structures, helps explain why piracy can be construed as a normative outcome of circumstance. It can also lead to an understanding of how powerful actors within the international community have justified the expenditure of enormous resources and the mobilization of significant numbers of personnel in the waters off the Horn of Africa, along with the creation of third-party jurisdictional piracy courts to address Somali piracy, and only Somali piracy. And, further, why no other area of the globe has met with either such concentration of effort or with this *sui generis* juridical response in addressing iterations of maritime piracy not off the coast of Somalia and not including Somalis as deviant actors.

The relationship of the aforementioned Somali exceptionalism to the characterization of maritime piracy off the coast of Somalia as a global social problem that was itself a consequence of the twenty-five year long socio-political quagmire resulting from the clash of the effects of colonization and clan-structures versus an
aggrandized moral panic engineered by powerful States and the multinational corporations that drive foreign and defense policy within those States, has had two effectual outcomes. First, piracy off the coast of Somali is temporally dormant. Proof that nearly unlimited resources and a disregard of four hundred years of socio-legal theory and practice, and for the law of nations, can lead to desired outcomes. Yet, maritime piracy is still alive and well in many other corners of the globe. Still, as mentioned above, these iterations of piracy have not met with the fierce response that has greeted piracy off the Horn of Africa. Additionally, the root causes of piracy off the coast of Somali are just as prevalent as they were fifteen years ago. During an interview with a “pirate interpreter” in Mombasa, Kenya, I commented that the number of attacks off the coast of Somalia had dropped off their highs in 2011. I asked why he thought this was the case? The “pirate interpreter” responded that the pirates were waiting. I asked for what are they waiting? He hesitated, and then smiled. Finally he stated, “for the armies to lose interest.” Piracy has existed for thousands of years; it will not disappear just because powerful States throw all of their might against one of its iterations.


> [O]n 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 person 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.

To clarify, Article 105 states that any State may seize a pirate ship and decide on the
penalties to be imposed upon those who acted piratically. *The seizing State may decide on the penalties imposed.* This exacting language is used purposefully in the most acceded-to treaty after the United Nations Charter, the all-encompassing treaty that delineates boundaries, dictates uses, responsibilities, obligations and privileges in the maritime environments. It is a fact that certain areas within the treaty are nebulous and open to interpretation, but that is by design. Also by design are those areas punctuated by exacting legal language. In other words, where the framers of the convention saw fit to leave room for interpretation or for changes in social and socio-political formations and relations, it used words to reflect this intent. This “fuzzy language” is absent from Article 105. Again, if the language in this treaty is so clear, the only explanation for the existence of third-party jurisdictional piracy courts is the perpetuation of instrumental inequalities.

My assertion that a lack of adherence to Article 105 of UNCLOS is evidence of the existence of instrumental inequalities is not merely based on my reading of UNCLOS; it is based on socio-historical research on conceptions of sovereignty and forms of extraterritoriality (jurisdiction). Constructions of the State, State power, and State relations are integral to juridical functions as exercised by the State. Support for this assertion is hundreds of years in the making and is founded in socio-legal commentary by Cicero, Belli, Ayala, Gentili, von Pufendorf, Bacon, Coke, Selden, Grotius and Bassiouni. This social commentary is not merely autopoietic legal rationale for juridical authority; it is founded in the discourse of social relations. Further, this historical social discourse *had* been reified into juridical practice, and formed a discourse within social practice. I purposely use the word *had*, because the juridical formations surrounding piracy off the coast of Somalia are *sui generis*; they do not conform to historical socio-
legal practice or commentary.

In establishing third-party jurisdictional piracy courts to address piracy off the coast of Somalia, powerful States and the international community have created a *sui generis* response that reifies inequalities into juridical practice, yet which is inconsistent with a historical discourse on extraterritoriality. The application of universal jurisdiction to maritime piracy absent the required nexus between the seizing State and the State of the adjudicating body exists not only antithetically to modern constructions of equity and human rights; it exists in violation to international law and treaty.
### Appendix 1 – All Cases of the Application of Universal Jurisdiction to Maritime Piracy Pre-2006, and for the United States, Seychelles and Kenya from 2006 Forward

<table>
<thead>
<tr>
<th>Country</th>
<th>Case</th>
<th>Date</th>
<th>Identifying Case Number Reference</th>
<th>Court</th>
<th>Territorial Nexus</th>
<th>Nationality Nexus</th>
<th>Setting State Nexus</th>
<th>Enforcement Jurisdiction</th>
<th>Location of Alleged Piracy</th>
<th>Jurisdictional Disposition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scotland (United Kingdom)</td>
<td>R. v. Simm</td>
<td>1791-01-01</td>
<td></td>
<td>High Court of the Admiralty of Scotland</td>
<td>Flag of Pirate Vessel - Scotland</td>
<td>Citizenship of Vessel - Scotland</td>
<td>Setting State - Scotland</td>
<td>Scotland (United Kingdom)</td>
<td>High Seas</td>
<td>Used as a case of the application of UJ, but not only was it not a case of UJ, there was insufficient evidence.</td>
</tr>
<tr>
<td>USA</td>
<td>The People v. L.R.4 and Suczaw</td>
<td>1923-01-01</td>
<td></td>
<td>USA (on Appeal)</td>
<td>USA</td>
<td>USA</td>
<td>Setting State - Adjudicating State</td>
<td>USA</td>
<td>Territory of the United States</td>
<td>USA</td>
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<tr>
<td>United Kingdom</td>
<td>In re piracy at Greenwich</td>
<td>1954-01-01</td>
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<td>Privy Council</td>
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<td>Citizenship of Vessel - Location of Defendants</td>
<td>Setting State - Adjudicating State</td>
<td>United Kingdom</td>
<td>High Seas - Off coast of Present day Hong Kong</td>
<td>Not a case of UJ</td>
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<tr>
<td>USA</td>
<td>United States v. Owners of the 'Mazon'</td>
<td>1964-02-01</td>
<td></td>
<td>District Court, District of Maryland, Massachusetts</td>
<td>Flag of Vessel - Location of Defendants</td>
<td>Citizenship of Vessel - Location of Defendants</td>
<td>Setting State - Adjudicating State</td>
<td>USA</td>
<td>USA</td>
<td>Not a case of UJ</td>
</tr>
<tr>
<td>USA</td>
<td>United States v. Tully et al</td>
<td>1983-11-01</td>
<td></td>
<td>District Court, District of Pennsylvania, District of Maryland</td>
<td>Flag of Vessel - Location of Defendants</td>
<td>Citizenship of Vessel - Location of Defendants</td>
<td>Setting State - Adjudicating State</td>
<td>USA</td>
<td>USA</td>
<td>Not a case of UJ</td>
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<tr>
<td>USA</td>
<td>United States v. Jones</td>
<td>1984-04-01</td>
<td></td>
<td>District Court, District of Pennsylvania, District of Maryland</td>
<td>Flag of Vessel - Location of Defendants</td>
<td>Citizenship of Vessel - Location of Defendants</td>
<td>Setting State - Adjudicating State</td>
<td>USA</td>
<td>USA</td>
<td>Not a case of UJ</td>
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<tr>
<td>USA</td>
<td>United States v. Ross</td>
<td>1983-11-01</td>
<td></td>
<td>District Court, District of Pennsylvania, District of Maryland</td>
<td>Flag of Vessel - Location of Defendants</td>
<td>Citizenship of Vessel - Location of Defendants</td>
<td>Setting State - Adjudicating State</td>
<td>USA</td>
<td>USA</td>
<td>Not a case of UJ</td>
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<tr>
<td>USA</td>
<td>United States v. Jones et al</td>
<td>1984-04-01</td>
<td></td>
<td>District Court, District of Pennsylvania, District of Maryland</td>
<td>Flag of Vessel - Location of Defendants</td>
<td>Citizenship of Vessel - Location of Defendants</td>
<td>Setting State - Adjudicating State</td>
<td>USA</td>
<td>USA</td>
<td>Not a case of UJ</td>
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<tr>
<td>USA</td>
<td>Fish et al v. The Revenge, Brantamet et al</td>
<td>1984-04-01</td>
<td></td>
<td>District Court, District of Pennsylvania, District of Maryland</td>
<td>Flag of Vessel - Location of Defendants</td>
<td>Citizenship of Vessel - Location of Defendants</td>
<td>Setting State - Adjudicating State</td>
<td>USA</td>
<td>USA</td>
<td>Not a case of UJ</td>
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<tr>
<td>Country</td>
<td>Case Description</td>
<td>Date</td>
<td>Identifying Case Number / Reference</td>
<td>Court</td>
<td>Territorial Nexus</td>
<td>Nationality Nexus</td>
<td>Seizing State Nexus</td>
<td>Enforcement Jurisdiction</td>
<td>Location of Alleged Piracy-High Seas/Territorial Waters</td>
<td>Jurisdictional Disposition</td>
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<tr>
<td>USA</td>
<td>United States v. Smith</td>
<td>1820-12-01</td>
<td>27 F.Cas. 1172, No. 16,336a – 19 Viles Reg. 339</td>
<td>District Court, D. Georgia</td>
<td>Location of Defendant</td>
<td>Nationality of Defendant</td>
<td>Seizing State; Adjudicating State</td>
<td>USA High Seas</td>
<td>Not a case of UJ</td>
<td></td>
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<tr>
<td>USA</td>
<td>The Bello</td>
<td>1821-02-26</td>
<td>19 U.S. 152 – 5 L.Ed.229, 6 Wheat 152</td>
<td>Supreme Court of the United States</td>
<td>Flag of Plundered Vessel - USA - at issue</td>
<td>Nationality of Defendant; Claimant – at issue</td>
<td>Seizing State; Adjudicating State</td>
<td>USA High Seas - Cape of St. Antonio, west of Cuba</td>
<td>Not a case of UJ</td>
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<tr>
<td>USA</td>
<td>The Minasian Horn</td>
<td>1822-10-01</td>
<td>16 F.Cas. 736, No. 9,080 – 11 Mass. 116</td>
<td>Circuit Court, D. Massachusetts</td>
<td>Flag of worship (alleged Pirate Ship) (USA) - Location of Defendants</td>
<td>Nationality of Defendants</td>
<td>Seizing State; Adjudicating State</td>
<td>USA High Seas</td>
<td>Not a case of UJ</td>
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<tr>
<td>USA</td>
<td>The Minasian Horn, The Vice Consul of Portugal, Claimant</td>
<td>1825-03-20</td>
<td>24 U.S. 1 – 6 L.Ed.495, 11 Wheat 1</td>
<td>Supreme Court of the United States</td>
<td>Flag of worship (alleged Pirate Ship) (USA) - Location of Defendants</td>
<td>Nationality of Defendants</td>
<td>Seizing State; Adjudicating State</td>
<td>USA High Seas</td>
<td>Not a case of UJ</td>
<td></td>
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<tr>
<td>USA</td>
<td>United States v. Robinson</td>
<td>1826-11-01</td>
<td>27 F.Cas. 971, No. 16,176 – 2 Mason 307</td>
<td>Circuit Court, D. Rhode Island</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>Not a case of UJ; Not a case involving piracy, but one of Fraud</td>
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<td>USA</td>
<td>The Palmyra, Escarras, Master</td>
<td>1827-01-15</td>
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<td>Flag of Plundered Vessel (USA) - Location of Pirate Ship (Monroe)</td>
<td>Nationality of Aggrieved</td>
<td>Seizing State; Adjudicating State</td>
<td>USA UNK - probably the Falkland Islands</td>
<td>Not a case of UJ</td>
<td></td>
</tr>
<tr>
<td>USA</td>
<td>United States v. Gilbert et al</td>
<td>1834-10-11</td>
<td>25 F.Cas. 1287, No. 15,284 – 2 Summ 19</td>
<td>Circuit Court, D. Massachusetts</td>
<td>Flag of Plundered Vessel (USA) - Location of Defendants - Transferred to United States’ custody by seizing State (Great Britain)</td>
<td>Nationality of Aggrieved</td>
<td>Extrading State; Adjudicating State</td>
<td>Britain High Seas</td>
<td>Not a case of UJ</td>
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<td>USA</td>
<td>Davidson v. Salt Skins</td>
<td>1835-01-01</td>
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<td>Circuit Court, D. Connecticut</td>
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<td>Nationality of Aggrieved - (Defendant)</td>
<td>Seizing State; Adjudicating State</td>
<td>USA UNK - near Fort St. Lewis, Eastern Falkland Island</td>
<td>Not a case of UJ</td>
<td></td>
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<tr>
<td>USA</td>
<td>Pater Harmony and Others, Claimants of the Brig Maten, Adelio v. The United States - The United States v. The Cargo of the Brig Maten</td>
<td>1844-01-01</td>
<td>43 U.S. 210 – 2 L.Ed.239</td>
<td>Supreme Court of the United States</td>
<td>Flag of Plundered Vessel (USA) - Location of Pirate Vessel - Location of Defendants</td>
<td>Nationality of Aggrieved</td>
<td>Seizing State; Adjudicating State</td>
<td>USA High Seas</td>
<td>Not a case of UJ</td>
<td></td>
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<tr>
<td>Country</td>
<td>Case</td>
<td>Date</td>
<td>Identifying Case Number Reference</td>
<td>Court</td>
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<td>Seizing State Nexus</td>
<td>Enforcement Jurisdiction</td>
<td>Location of Alleged Piracy - High Seas/ Terri</td>
<td>Jurisdictional Disposition</td>
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<td>USA</td>
<td>United States v. Corkie</td>
<td>1860-04-01</td>
<td>25 F.Cas. 658, No. 14,869 - 1</td>
<td>Circuit Court, D. South Carolina</td>
<td>Flag of Vessel - USA - Location of Defendant - at issue</td>
<td>Nationality of Defendant</td>
<td>Seizing State; Adjudicating State - at issue</td>
<td>USA</td>
<td>N/A</td>
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<tr>
<td>USA</td>
<td>Change to Grand Jury - Treason and Piracy</td>
<td>1861-10-16</td>
<td>36 F.Cas. 1049, No. 18,277 - 2</td>
<td>Circuit Court, D. Massachusetts</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>USA</td>
<td>N/A</td>
<td>Not a case of UJ. Not a case of involving piracy, merely one of definitions.</td>
</tr>
<tr>
<td>USA</td>
<td>United States v. Smith</td>
<td>1861-10-25</td>
<td>27 F.Cas. 1134, No. 16,318</td>
<td>Circuit Court, D. Pennsylvania</td>
<td>Location of Defendant</td>
<td>Nationality of Defendant</td>
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<td>USA</td>
<td>High Seas</td>
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<tr>
<td>USA</td>
<td>United States v. Baker et al</td>
<td>1861-10-30</td>
<td>24 F.Cas. 962, No. 14,501 - 5</td>
<td>Circuit Court, S.D. New York</td>
<td>Location of Defendants</td>
<td>Nationality of Defendants</td>
<td>Seizing State; Adjudicating State</td>
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</tr>
<tr>
<td>USA</td>
<td>United States v. The Ambrose Oak, etc.</td>
<td>1885-09-30</td>
<td>25 F. 498</td>
<td>District Court, S.D. New York</td>
<td>Flag of Plundered Vessel - (USA) - Location of Defendants</td>
<td>Nationality of Aggrieved</td>
<td>Seizing State; Adjudicating State</td>
<td>USA</td>
<td>High Seas - 20 miles west of Cartagena</td>
<td>Not a case of UJ</td>
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<tr>
<td>USA</td>
<td>The City of Mexico</td>
<td>1886-04-19</td>
<td>20 F. 148</td>
<td>District Court, S.D. Florida</td>
<td>Flag of Vessel - (USA) - Location of Defendant</td>
<td>Nationality of Defendants</td>
<td>Seizing State; Adjudicating State</td>
<td>USA</td>
<td>High Seas</td>
<td>Not a case of UJ</td>
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<tr>
<td>USA</td>
<td>Murray v. Hildreth, Marshall</td>
<td>1932-10-28</td>
<td>61 F.2d 483, No. 6670</td>
<td>Circuit Court of Appeals, Fifth Circuit</td>
<td>Flag of Vessel - (USA) - Location of Defendants</td>
<td>Nationality of Defendants</td>
<td>Seizing State; Adjudicating State</td>
<td>USA</td>
<td>Territorial Water of the United States - 200 ft. off the coast of Florida</td>
<td>Not a case of UJ</td>
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<tr>
<td>USA</td>
<td>Miller et al. v. United States</td>
<td>1937-02-15</td>
<td>88 F.2d 102, No. 8033-8035</td>
<td>Circuit Court of Appeals, Ninth Circuit</td>
<td>Flag of Vessel - (USA) - Location of Defendants</td>
<td>Nationality of Aggrieved - Nationality of Defendants</td>
<td>Seizing State; Adjudicating State</td>
<td>USA</td>
<td>Territorial Water of the United States - off the Southern California coast</td>
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<td>USA</td>
<td>United States of America v. Larry M. Crews</td>
<td>1983-01-10</td>
<td>695 F.2d 519, No. 81-5760</td>
<td>United States Court of Appeals, Eleventh Circuit</td>
<td>Flag of Vessel - USA - Location of Defendant</td>
<td>Nationality of the Defendant - Location of the Defendant</td>
<td>Seizing State; Adjudicating State</td>
<td>USA</td>
<td>UNK</td>
<td>Not a case of UJ</td>
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<tr>
<td>USA</td>
<td>United States of America v. Richard Steinmetz</td>
<td>1992-08-21</td>
<td>973 F.2d 212, No. 91-5582 - 1992 A.M.C. 2879</td>
<td>United States Court of Appeals, Third Circuit</td>
<td>Flag of Vessel - USA</td>
<td>Nationality of Appellant - Nationality of Claimant - USA</td>
<td>Seizing State; Adjudicating State</td>
<td>USA</td>
<td>N/A</td>
<td>Not a case of UJ</td>
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<tr>
<td>USA</td>
<td>Kantil v. Scanlon</td>
<td>1995-10-13</td>
<td>W.F.M. 232, No. 94-9069 - 64</td>
<td>United States Court of Appeals, Second Circuit</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>USA</td>
<td>N/A</td>
<td>Not a case of UJ. Not a case of involving piracy, merely one of definitions.</td>
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<td>Country</td>
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<td>Court</td>
<td>Territorial Nexus</td>
<td>Nationality Nexus</td>
<td>Seizing State Nexus</td>
<td>Enforcement Jurisdiction</td>
<td>Location of Alleged Piracy - High Seas/Territorial Waters</td>
<td>Jurisdictional Disposition</td>
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<td>USA</td>
<td>United States of America v. Lei bish</td>
<td>2008-04-24</td>
<td>525 F.3d 709, No. 06-10389 = 2006 A.M.C. 1977</td>
<td>United States Court of Appeals, Ninth Circuit</td>
<td>Location of the Defendant - Appellate (brought into jurisdiction under some force)</td>
<td>Seizing State, Adjudicating State</td>
<td>USA</td>
<td>High Seas - Off the coast of Hawaii</td>
<td>UJ - Not a case of piracy</td>
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<td>USA</td>
<td>United States of America v. Mohamed Ali Said et al</td>
<td>2010-09-16</td>
<td>757 F Supp. 2d 554, No. 2:10cr57 = 2010 A.M.C. 2034</td>
<td>United States District Court, E.D. Virginia, Norfolk Division</td>
<td>Flag of Vessel - USA</td>
<td>Nationality of Aggrieved</td>
<td>Seizing State, Adjudicating State</td>
<td>USA</td>
<td>High Seas - Gulf of Aden</td>
<td>Not a case of UJ</td>
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<tr>
<td>USA</td>
<td>United States of America v. Mohammed Modin Haan, Gubril Abdullah Ali, Abdi Wali Dir. Abdi Mohammed Gurewardhe, Abdi Mohammed</td>
<td>2010-10-29</td>
<td>747 F Supp. 2d 599, No. 2:10cr36 = 2010 A.M.C. 2705</td>
<td>United States District Court, E.D. Virginia, Norfolk Division</td>
<td>Flag of Vessel - USA</td>
<td>Nationality of Aggrieved</td>
<td>Seizing State, Adjudicating State</td>
<td>USA</td>
<td>High Seas - Western Indian Ocean</td>
<td>Not a case of UJ</td>
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<td>Country</td>
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<td>Date</td>
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<td>USA</td>
<td>United States of America v. Mohammad Sanli Shibin</td>
<td>2013-07-12</td>
<td>222 F.3d 223, No. 12-4652 -- 2013 A.M.C. 1917</td>
<td>United States Court of Appeals, Fourth Circuit</td>
<td>Flag of Vessel - USA Nationality of Aggrieved Seizing State; Adjudicating State</td>
<td>Somalia - “defense forces”/USA - delivered to the FBI</td>
<td>High Seas</td>
<td>Not a case of UJ</td>
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<tr>
<td>USA</td>
<td>United States of America v. Ali Mohammed Ali, Defendant</td>
<td>2013-10-3</td>
<td>982 F.3d Supp. 2d 85, No. 11-0106</td>
<td>United States District Court, District of Columbia</td>
<td>Location of Defendant</td>
<td>Seizing State; Adjudicating State</td>
<td>USA</td>
<td>High Seas - Gulf of Aden</td>
<td>UJ - Appeal</td>
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<td>Seychelles</td>
<td>Republic of Mohamed Ahmed Dahir and Ten (10) Others</td>
<td>2010-07-26</td>
<td>Criminal Side 51 of 2009</td>
<td>Supreme Court of Seychelles</td>
<td>Flag of Vessel Attacked - Seychelles Nationality of Aggrieved Seizing State; Adjudicating State</td>
<td>Seychelles</td>
<td>High Seas - Seychelles’ EEZ</td>
<td>Not a case of UJ</td>
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<tr>
<td>Seychelles</td>
<td>Republic v. Abdi Ali and Ten (10) Others</td>
<td>2010-11-03</td>
<td>Supreme Court Crim 14 of 2010</td>
<td>Supreme Court of Seychelles</td>
<td>Flag of Vessel Attacked - Seychelles Nationality of Aggrieved Seizing State; Adjudicating State</td>
<td>UNK, France, Spain, Italy, Seychelles</td>
<td>High Seas</td>
<td>Not a case of UJ</td>
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<tr>
<td>Seychelles</td>
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<td>2010-12-15</td>
<td>Criminal Side 19 of 2010</td>
<td>Supreme Court of Seychelles</td>
<td>Flag of Vessel Attacked - Seychelles Nationality of Aggrieved Seizing State; Adjudicating State</td>
<td>Seychelles</td>
<td>High Seas</td>
<td>Not a case of UJ. Although UJ was cited in the decision, the flag of vessel attacked was the flag of the seizing state.</td>
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<tr>
<td>Seychelles</td>
<td>Republic v. Nur Mohamed Adam and Nine (9) Others</td>
<td>2011-02-28</td>
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<td>Supreme Court of Seychelles</td>
<td>Flag of Vessel Attacked - Seychelles Nationality of Aggrieved Seizing State; Adjudicating State</td>
<td>Seychelles</td>
<td>High seas -- 300 nm off the coast of Mahé</td>
<td>Not a case of UJ</td>
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<tr>
<td>Seychelles</td>
<td>Republic v. Iss and Others</td>
<td>2011-06-30</td>
<td>Criminal Side 75 (or 76) of 2010</td>
<td>Supreme Court of Seychelles</td>
<td>Seizing State; Adjudicating State</td>
<td>Seychelles</td>
<td>High seas -- 240 nm off the coast of Mahé</td>
<td>UJ</td>
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<td>Seychelles</td>
<td>Republic v. Abdulfar Ahmed and Five (5) Others</td>
<td>2011-07-14</td>
<td>Criminal Side 21 of 2011</td>
<td>Supreme Court of Seychelles</td>
<td>Flag of Vessel Attacked - Seychelles Nationality of Aggrieved Seizing State; Adjudicating State</td>
<td>Seychelles</td>
<td>High Seas</td>
<td>Not a case of UJ</td>
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<tr>
<td>Seychelles</td>
<td>Republic v. Osman and Others</td>
<td>2011-10-12</td>
<td>Criminal Side 19 of 2011</td>
<td>Supreme Court of Seychelles</td>
<td>Flag of Vessel Attacked - Seychelles Nationality of Aggrieved Seizing State; EUNAVFOR (Spain)</td>
<td>High Seas</td>
<td>Not a case of UJ. Although UJ was cited in the decision, the flag of vessel attacked was the flag of the adjudicating State</td>
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<td>Seychelles</td>
<td>Republic v. Mohamed Abdil Sana &amp; Six (6) Others</td>
<td>2012-07-25</td>
<td>Criminal Side 53 of 2011</td>
<td>Supreme Court of Seychelles</td>
<td>N/A</td>
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<td>Britain, Norway</td>
<td>High Seas -- ~400 nm off the coast of Somalia</td>
<td>UJ, lacking any and all nexus, including to seizing State</td>
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<tr>
<td>Seychelles</td>
<td>Republic v. Farad Ahmed Sana and Others</td>
<td>2012-11-05</td>
<td>Criminal Side 16 of 2012</td>
<td>Supreme Court of Seychelles</td>
<td>N/A</td>
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<td>CTF-151 (USA)</td>
<td>High Seas</td>
<td>UJ, lacking any and all nexus, including to seizing State</td>
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<td>Seychelles</td>
<td>Republic v. Libon Mohamed Dahir &amp; Twelve (12) Others</td>
<td>2012-12-31</td>
<td>Criminal Side 7 of 2012</td>
<td>Supreme Court of Seychelles</td>
<td>N/A</td>
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<td>Australia, Britain, USA</td>
<td>High Seas -- ~150 nm southeast of Oman</td>
<td>UJ, lacking any and all nexus, including to seizing State</td>
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<td>Seychelles</td>
<td>Republic v. Robbe and Others</td>
<td>2013-07-23</td>
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<td>N/A</td>
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<td></td>
<td>Operation Albatra (Germany), (Netherlands) France</td>
<td>High Seas</td>
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<tr>
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<td>Seychelles High Seas</td>
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<td>Seychelles</td>
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<td>Seychelles Court of Appeals - Seychelles</td>
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<td></td>
<td>Ocean Shield (Denmark)</td>
<td>High Seas</td>
<td>Appeal - UJ, lacking any and all nexus, including to seizing State</td>
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<td>Republic v. Hassen M. Ahmed and Nine (9) Others</td>
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<td>Criminal Case No. 434 of 2006</td>
<td>Chief Magistrate’s Court - Mombasa</td>
<td>N/A</td>
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<td>USA</td>
<td>High Seas -- ~240 nm from the Somali coast</td>
<td>UJ, lacking any and all nexus, including to seizing State</td>
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<tr>
<td>Kenya</td>
<td>Hassen M. Ahmed and Nine (9) Others v. Republic</td>
<td>2009-05-12</td>
<td>Criminal Appeal Nos. 199, 199, 200, 201, 202, 203, 204, 205, 206, 207 of 2009</td>
<td>High Court of Kenya - Mombasa</td>
<td>N/A</td>
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<td>USA</td>
<td>High Seas -- ~240 nm from the Somali coast</td>
<td>Appeal - UJ, lacking any and all nexus, including to seizing State</td>
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<tr>
<td>Kenya</td>
<td>Republic v. Barre Ali Farah and Six (6) Others</td>
<td>2010-01-02</td>
<td>Criminal Case No. 3601 of 2009</td>
<td>Chief Magistrate’s Court - Mombasa</td>
<td>N/A</td>
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<td>Kenya - Mombasa</td>
<td>High Seas</td>
<td>Appeal - UJ, lacking any and all nexus, including to seizing State, Judge found jurisdiction not removed</td>
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<td>Kenya</td>
<td>Republic v. Musa Abdullahi Said and Six (6) Others</td>
<td>2010-09-06</td>
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<td>Chief Magistrate’s Court - Mombasa</td>
<td>N/A</td>
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<td>Germany, Netherlands, Greece</td>
<td>High Seas</td>
<td>UJ, lacking any and all nexus, including to seizing State</td>
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<td>Republic v. Liban Ahmed Ali and Ten (10) Others</td>
<td>2010-09-29</td>
<td>Criminal Case No. 1374 of 2009</td>
<td>Chief Magistrate’s Court - Mombasa</td>
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<td>France</td>
<td>High Seas - 600 nm off the Somali coast</td>
<td>UJ, lacking any and all nexus, including to seizing State</td>
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<td>Kenya</td>
<td>Republic v. Ali Mohamed Ahmed and Seven (7) Others</td>
<td>2010-10-03</td>
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<td>Chief Magistrate’s Court - Mombasa</td>
<td>N/A</td>
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<td>Britain, Russia</td>
<td>High Seas - South of Al Muthara within IRRTC</td>
<td>UJ, lacking any and all nexus, including to seizing State</td>
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<td>Republic v. Juma Abdirrad Farah and Six (6) Others</td>
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<td>Spain</td>
<td>High Seas</td>
<td>UJ, lacking any and all nexus, including to seizing State</td>
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<td>Republic v. Magistrate’s Court, Mombasa Echape, Mohamud, Mohamed, Hashi &amp; Eight (8)</td>
<td>2010-11-09</td>
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<td>High Court of Kenya - Mombasa</td>
<td>N/A</td>
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<td>Germany, USA</td>
<td>High Seas</td>
<td>UJ, lacking any and all nexus, including to seizing State, Judge found jurisdiction lacking</td>
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<tr>
<td>Kenya</td>
<td>Republic v. Abdiullahi Ise Mohammad and Three (3) Others</td>
<td>2011-05-31</td>
<td>Misc. Criminal Case No. 72 of 2011</td>
<td>High Court of Kenya - Mombasa</td>
<td>N/A</td>
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<td>High Seas</td>
<td>UJ, lacking any and all nexus, including to seizing State, Judge within the Magistrate’s court</td>
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<td>Kenya</td>
<td>Republic v. Abdullahi &amp; Twenty Three (23) Others</td>
<td>2011-06-24</td>
<td>Criminal Case No. 2006 of 20011- reference Misc. Application 159 of 2011</td>
<td>Chief Magistrate’s Court - Mombasa</td>
<td>N/A</td>
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<td>Denmark</td>
<td>High Seas - Gulf of Oman</td>
<td>UJ, lacking any and all nexus, including to seizing State</td>
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<td>Siting State Nexus</td>
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<td>Kenya</td>
<td>Attorney General v. Mohamed Mohamed Haithi and Eight (8) Others</td>
<td>2012-10-18</td>
<td>Civil Appeal No. 113 of 2011; reference Misc: Application 43M of 2009 - reversing Misc: Application 43M of 2009</td>
<td>Court of Appeal at Nairobi - on appeal from the judgement and decree of the High Court of Kenya at Mombasa (Brahmagupta) 9th January 2012</td>
<td>N/A</td>
<td>Germany, USA</td>
<td>High Seas</td>
<td>An administrative case that sets the groundwork for the application of UJ without a nexus to the siting State</td>
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<tr>
<td>Kenya</td>
<td>Abdinahman Mohamed Robi &amp; Ten (10) Others v. Republic</td>
<td>2013-08-30</td>
<td>Criminal Appeal No. 94 [consolidated 54-184] of 2012 - Criminal Case 1382 of 2009</td>
<td>High Court of Kenya - Mombasa</td>
<td>N/A</td>
<td>France</td>
<td>High Seas</td>
<td>Appeal - UJ, lacking any and all nexus, including to siting State</td>
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### Regional Analysis of Reports on Acts of Piracy and Armed Robbery 2000 - 2014

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Regional Analysis of Reports of Piracy 2000-2014 -- High Seas
# REGIONAL ANALYSIS OF REPORTS ON ACTS OF PIRACY AND ARMED ROBBERY 2000 - 2014

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Appendix 3 – Methods Summary

Ethnographic Fieldwork:

2013 - July through August

Nairobi, Kenya: Paul Musili Wambua Professor of Law, University of Nairobi School of Law; Kaitlin Meredith, Associate Programme Officer, Legal, United Nations Office on Drugs and Crime—Counter Piracy Program; and, a number of persons who wished to remain anonymous.

Mombasa, Kenya: Jared Magolo, Criminal Defense Attorney; Alex Muteti, Assistant Director of Public Prosecutions; Abdi the “Pirate Interpreter;” and, a number of persons who wished to remain anonymous.

Mahé, Seychelles: Charles Brown, Senior State Counsel, Office of the Attorney General; Nichol Gabriel, Criminal Defense Attorney; Shanaka Jayasekara, Programme Officer, United Nations Office of Drugs and Crime; representatives from the Regional Anti-Piracy Prosecutions Intelligence Coordination Centre; representatives from the Commission De L’Ocean Indien; representatives from the International Criminal Police Organization; representatives from the European Union Naval Force (Operation Atalanta); and, representatives from the Seychelles Coast Guard.

London, United Kingdom: Pottengal Mukundan, Director, ICC-Commercial Crimes Services; and, representatives from the International Maritime Organization.
Washington, D.C., United States: Donna Hopkins, United States Department of State and the Contact Group on Piracy off the Coast of Somalia.

2014 - June through July


Quantitative Data

Maritime Piracy Attacks on the high seas, within the territorial waters of coastal States and in the ports of coastal States for the years 2000-2014:


Legal Decisions Concerning Maritime Piracy—An analysis of nexus in the application of universal jurisdiction:

Decisions prior to 2006:


Decisions from 1788 to 2014:

United States: Westlaw Next;

Kenya: the Kenyan National Council for Law Reporting;

Seychelles: the Seychelles Legal Information Institute;

United Nations Database on Maritime Piracy Court Cases.

Multivariate regression data:

Corporate earnings and profitability data:

Morningstar, Inc.

GDP and inflation data:

International Monetary Fund—World Economic Outlook Database - World Economic and Financial Surveys.
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