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THE ENEMIES OF ALL HUMANKIND: THE FOURTH CIRCUIT’S APPLICATION OF UNIVERSAL JURISDICTION IN *UNITED STATES V. SHIBIN*

*Alicia A. Olive**

INTRODUCTION

On April 27, 2012, a Somali national, Mohammad Saali Shibin, was convicted by a federal jury on fifteen counts and sentenced to multiple terms of life imprisonment for his role in the hijacking of the German and American ships, the *Marida Marguerite* and the *Quest*, respectively, off the coast of Somalia in 2010 and 2011, the latter of which resulted in the execution-style murder of four Americans.¹ Shibin appealed this conviction, arguing that the district court lacked both personal and subject-matter jurisdiction over the case. Specifically, Shibin argued: (1) that the district court lacked subject-matter jurisdiction because Shibin, himself, did not act on the high seas; (2) that the district court lacked personal jurisdiction because he was “forcibly seized in Somalia”² by agents of the United States government, and was brought into the United States involuntarily; and (3) that the United States could not prosecute him for non-piracy counts relating to the *Marida Marguerite* because “universal jurisdiction”³ did not extend to cover those acts.⁴ On July

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¹ See Press Release, U.S. Attorney’s Office for the E. Dist. of Va., Somali Hostage Negotiator in S/V Quest Piracy and Pirating of M/V Marida Marguerite Found Guilty of All Counts (Apr. 27, 2012) [hereinafter Press Release, Somali Hostage Negotiator Found Guilty], available at <http://www.justice.gov/usao/vae/news/2012/04/20120427shibinr.html>; see also *United States v. Shibin*, 2:11CR33, 2012 WL 8231152 (E.D. Va. Apr. 16, 2012), *aff’d*, 722 F.3d 233 (4th Cir. 2013).

² *United States v. Shibin*, 722 F.3d 233, 235 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1935 (2014).

³ “Universal jurisdiction is an international law doctrine that recognizes a ‘narrow and unique exception’ to the general requirement that nations have a jurisdictional nexus before punishing extraterritorial conduct committed by non-nationals.” *Id.* at 239 (quoting *United States v. Hasan*, 747 F. Supp. 2d

12, 2013, the United States Court of Appeals for the Fourth Circuit affirmed Shibin's conviction and sentence holding that the district court possessed both personal and subject-matter jurisdiction over the defendant, Shibin.⁵

On appeal, the Fourth Circuit concluded (1) that the doctrine of universal jurisdiction provided the district court with subject-matter jurisdiction over the crimes of piracy and aiding and abetting piracy, even where such conduct occurs within the territorial boundaries of another State;⁶ (2) that the district court has personal jurisdiction over an accused criminal who is "found in" or "brought into" the United States, neither of which requires a defendant's consent;⁷ and (3) that the charges with respect to the piracy of the *Marida Marguerite* do not depend on universal jurisdiction because the statutes themselves provide jurisdiction.⁸

First, this comment will review the Fourth Circuit's decision and analysis in *United States v. Shibin*. Second, it will argue that the Court correctly held that the crime of aiding and abetting piracy is subject to universal jurisdiction, that the Court had personal jurisdiction even though Shibin was brought to the United States involuntarily, and that domestic statutory law provided an independent basis for subject-matter jurisdiction over Shibin's acts with respect to the *Marida Marguerite*, notwithstanding the lack of a connection between the United States and the German vessel. Lastly, this comment will conclude by considering the implications of *Shibin* in the international context.

I. HISTORY

Piracy *jure gentium*, or "robbery at sea," is "the oldest international offense."⁹ Dubbed "the enemy of all mankind,"¹⁰ the

599, 608 (E.D. Va. 2010), *aff'd sub nom.* *United States v. Dire*, 680 F.3d 446 (4th Cir. 2012)).

⁴ *See id.*

⁵ *See id.*

⁶ *See id.* at 239–43.

⁷ *See id.* at 243–44.

⁸ *Id.* at 244–47.

⁹ ILIAS BANTEKAS, *INTERNATIONAL CRIMINAL LAW* 298 (4th ed. 2010). "Robbery on the seas" has been a condemned activity since ancient times. *See* Dominique Gaurier, *The Enemy of All Mankind*, in *PIRACY IN*

pirate has long been the bane of the international community. For centuries, piracy has posed a significant threat to global trade and maritime navigation.¹¹ In fact, in 2011, the global economic cost of Somali piracy alone was estimated at nearly \$7 billion, with the shipping industry absorbing 80.5% of that cost, and governments bearing the rest.¹² In addition, North American countries spent an estimated \$9.39 million in 2011 on prosecuting and imprisoning pirates.¹³ The human costs are equally staggering, as a total of 3,923 hostages were captured by Somalia-based pirates between 2005 and 2012.¹⁴ While the number of attacks has drastically decreased,

COMPARATIVE PERSPECTIVE: PROBLEMS, STRATEGIES, LAW 25, 25–30 (Charles H. Norchi & Gwenaële Proutière-Maulion eds., 2012) (discussing Roman sentiments on piracy in the Hellenic era (500–300 B.C.), but noting that the Imperial Constitution of Justinian, established in 533 A.D., passively permitted piracy). The Ancient Roman orator, Cicero, referred to pirates as “the common enemy of all races and all people.” *Id.* at 31 (quoting *Actio in Verrem Secunda*, V, xxx, 76) (translating in Latin as “*commune hostem gentium nationumque*”). Eventually rephrased as “the enemy of all mankind,” Judge Edward Coke of England stated “*pirata est hostis humani generis*” which means “a pirate is the enemy of all mankind,” and condemned piracy as a form of treason punishable by death. *Id.* (quoting SIR EDWARD COKE, *THE THIRD PART OF THE INSTITUTE OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN AND CRIMINAL CAUSES* 113 (1797)). This view persists in modern times, featuring prominently over the last four centuries in domestic and international jurisprudence.

¹⁰ In Latin, a “*hostis humani generis*,” or a “sea thief.” See *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 163. n.h (1820).

¹¹ *United States v. Hasan*, 747 F. Supp. 2d 599, 602 (E.D. Va. 2010), *aff’d sub nom. United States v. Dire*, 680 F.3d 446 (4th Cir. 2012).

¹² See Anna Bowden & Dr. Shikha Basnet, *The Economic Cost of Somali Piracy 2011* 1 (One Earth Future Found., Working Paper 2012), available at http://www.oceansbeyondpiracy.org/sites/default/files/attachments/View%20Full%20Report_3.pdf.

¹³ *Id.* at 24 tbl.5. Specifically, North American countries prosecuted and imprisoned 28 persons, spending approximately \$791,952 on imprisonment and \$8,605,940 on prosecution. *Id.*

¹⁴ DANIELLE A. ZACH, D. CONOR SEYLE, JENS CESTERGAARD MADSEN, ONE EARTH FUTURE FOUND., *BURDEN-SHARING MULTI-LEVEL GOVERNANCE: A STUDY OF THE CONTACT GROUP ON PIRACY OFF THE COAST OF SOMALIA* 9 tbl.1 (2013), http://oceansbeyondpiracy.org/sites/default/files/attachments/Burden_Sharing_Apr29.pdf. However, the numbers are currently on the decline: in 2010, 1,016 hostages were taken, but only 470 were taken in 2011 and only 250 in 2012. *Id.*

reaching “its lowest levels in six years” in 2013,¹⁵ piracy remains a significant global threat, having a substantial impact on maritime trade, and the international community must remain vigilant in preventing and punishing piratical acts.¹⁶

A. UNIVERSAL JURISDICTION

In 1792, the United States Supreme Court recognized that jurisdiction over the crime of piracy belonged to all states.¹⁷ The doctrine of universal jurisdiction arose as a means of providing a prosecuting court with subject-matter jurisdiction over internationally condemned behavior, like piracy,¹⁸ where such jurisdiction would not otherwise exist.¹⁹ It is not unusual for domestic courts to apply domestic law in prosecuting extraterritorial conduct, even where the court “exercise[s] wide-ranging extraterritorial jurisdiction.”²⁰

¹⁵ *Somali Pirate Clampdown Caused Drop in Global Piracy, IMB Reveals*, INT’L CHAMBER COM. COM. CRIME SERVICES (Jan. 15, 2014), <http://www.icc-ccs.org/news/904-somali-pirate-clampdown-caused-drop-in-global-piracy-imb-reveals> (reporting that only 264 attacks were recorded in 2013, a 40% decrease since 2011—the peak of Somali piracy—when 237 incidents were reported off the coast of Somalia alone).

¹⁶ See, e.g., RICK “OZZIE” NELSON & SCOTT GOOSSENS, CTR. FOR STRATEGIC & INT’L STUDIES, COUNTER-PIRACY IN THE ARABIAN SEA: CHALLENGES AND OPPORTUNITIES FOR GCC ACTION 3–6 (2011), available at http://csis.org/files/publication/110509_GulfAnalysis_Counter_piracy_inthe_ArabianSea.pdf.

¹⁷ See *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 159–60 (1795) (“That prima facie all piracies and trespasses committed against the general law of nations, are enquirable, and [may be] proceeded against, in any nation where no special exemption can be maintained, either by the general law of nations, or by some treaty which forbids or restrains it.”).

¹⁸ See Michael J. Struett & Mark T. Nance, *Introduction to MARITIME PIRACY AND THE CONSTRUCTION OF GLOBAL GOVERNANCE* 1, 2 (Michael J. Struett, et al. eds., 2013). “[T]he mention of piracy almost automatically brings to mind the concept of universal jurisdiction.” *Id.* at 9.

¹⁹ See M. Cherif Bassiouni, *The History of Universal Jurisdiction and its Place in International Law*, in *UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW* 39, 45–47 (Stephen Macedo ed., 2006).

²⁰ BANTEKAS, *supra* note 9, at 13.

It is not only international tribunals that possess the capacity to take direct enforcement action, but also

II. FACTS AND PROCEDURAL BACKGROUND

Beginning in 2011, Shibin underwent trial for aiding and abetting two separate Somali pirate hijackings.²¹ The Somalis first hijacked a German commercial vessel with no U.S. nationals on board, and nearly a year later, the pirates seized an American sailing ship manned by four Americans.²²

On May 8, 2010, a group of Somali pirates travelling in a high-speed skiff attacked, and hijacked, the *Marida Marguerite* as it traversed the Indian Ocean on its way to join a protected convoy to navigate the Gulf of Aden.²³ The *Marida Marguerite*, a German-merchant vessel carrying a shipment of benzene and castor oil, was operated by a twenty-two member crew from Bangladesh, India, and Ukraine.²⁴ After obtaining the captain's surrender, which was encouraged through the use of rocket-propelled grenades (RPGs), the Somali pirates, armed with AK-47s, took over the ship while in international waters and forced the crew to steer toward Somali waters.²⁵ While on board, the pirates looted the ship and took personal belongings from the crewmembers.²⁶ After stopping at the first anchorage on the east coast of Somalia, which hosted "a

domestic criminal courts. When domestic courts exercise wide-ranging extraterritorial jurisdiction, especially universal jurisdiction over piracy *jure gentium*, war crimes and crimes against humanity, they, too, are acting as international tribunals since they are directly enforcing international law. The prosecution of cases subject to universal jurisdiction in particular, in situations where the forum State does not have any connection to the elements of the offense, necessarily implies that domestic courts assume much more than a mere judicial character; to some degree they may be viewed as discharging that State's obligation to the whole of the international community, in protecting and enforcing fundamental human rights

Id.

²¹ See *United States v. Shibin*, 2:11CR33, 2012 WL 8231152, at *1–2 (E.D. Va. Apr. 16, 2012), *aff'd*, 722 F.3d 233 (4th Cir. 2013).

²² See *United States v. Shibin*, 722 F.3d 233, 235 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1935 (2014).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

‘multitude’ of other hijacked ships,”²⁷ the *Marida Marguirite* was taken to another anchorage off the coast of Garaad (which was controlled by pirates), and there Shibin boarded the ship.²⁸ The ship was eventually taken to Hoboyo, where it, and its crew, remained for many months.²⁹ Shibin stayed on board the vessel for over seven months until he eventually extorted a \$5 million ransom from the vessel’s owners.³⁰ During that time, Shibin and other pirates psychologically and physically tortured³¹ the crew.³²

Shortly thereafter, on February 18, 2011, Somali pirates hijacked an American sailing vessel, the *Quest*, which was manned by four Americans, as it made its way from India to Oman “as part of an international yacht rally.”³³ After learning of the ship’s seizure, the U.S. Navy began shadowing the ship, and eventually established radio communications with the captors.³⁴ The Navy attempted to negotiate with the pirates, but they told the Navy they were only authorized to capture the ships and hostages and take them to Somalia, “where their English-speaking negotiator would arrange a ransom.”³⁵ During attempted negotiations, the lower-level pirates aboard the ship provided the Navy with the name and cell phone number of their negotiator, Mohammad Saaili Shibin.³⁶ On February 22, 2011, the situation intensified after the Navy told the pirates that they could travel no further.³⁷ One of the pirates fired an RPG at a Navy ship as the Navy attempted to place its ship in the *Quest*’s path.³⁸ In the end, Somali pirates shot and killed all four Americans

²⁷ *Id.* at 236.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ As one source notes, the crewmembers were “chained to chairs for days” at a time and “terrorized with simulated executions.” Nicholas Kulish, *A Suspect in Tallying Pirate Spoils*, N.Y. TIMES, May 14, 2013, at A4.

³² Shibin, 722 F.3d at 236.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

as the Navy closed in to prevent the hijacked ship from crossing into Somali waters.³⁹

The FBI, through cooperating with Host Nation Defense Forces in Somalia, eventually identified, located, and apprehended Shibin—the person that the pirates identified as their negotiator.⁴⁰ Within hours, FBI agents arrived, and days later Shibin was forcibly removed and taken to Virginia to stand trial.⁴¹ During its investigations, the FBI learned that Shibin may have been involved in the piracy of the *Marida Marguerite* and that he planned to invest his earnings from the *Marida Marguerite* ransom (\$30,000) into the piracy of the *Quest*.⁴² Ultimately, Shibin was charged with fifteen counts under a superseding indictment.⁴³

³⁹ See *id.* After the Somali pirates fired upon the Navy's *USS Sterett*, "the Navy dispatched SEALs to the *Quest*," where the pirates surrendered, some seen throwing their AK-47s overboard. Press Release, U.S. Attorney's Office for the E. Dist. of Va., Three Somali Pirates Sentenced to Life-in-Prison for Murder of Four Americans Aboard SV *Quest* (Aug. 2, 2013), available at <http://www.justice.gov/usao/vae/news/2013/08/20130802saladnr.html>. The three Somali pirates who shot the Americans were ultimately charged with twenty-six counts, including "piracy, conspiracy to commit kidnapping, hostage taking resulting in death," and various firearm offenses, and were tried before a jury in the United States. See *id.* The court ultimately convicted the defendants, and sentenced all three to life in prison. See *id.*

⁴⁰ See Shibin, 722 F.3d at 237.

⁴¹ See *id.*

⁴² See *id.*; see also Michael J. Stepek, *Challenges of Jurisdiction and Prosecution*, in *PIRACY IN COMPARATIVE PERSPECTIVE: PROBLEMS, STRATEGIES, LAW* 331, 345 (Charles H. Norchi & Gwenaële Proutière-Maulion eds., 2012) (noting that the Financial Action Task Force (FATF) has identified three main sources of revenue for funding piracy for ransom: "(1) a single funder for the whole operation; (2) a shareholder or cooperative structure in which individual pirates invest in the operation and share the proceeds; and (3) a syndicate or committee structure formed by several investors similar to those employed in conventional organized crime").

⁴³ See *United States v. Shibin*, 2:11CR33, 2012 WL 8231152, at *2 (E.D. Va. Apr. 16, 2012), *aff'd*, 722 F.3d 233 (4th Cir. 2013). Shibin was charged as follows:

With respect to the seizure of the *Marida Marguerite*, Defendant faces six charges: Piracy under the Law of Nations, in violation of 18 U.S.C. §§ 1651 (Count One); Conspiracy to Commit Hostage Taking, in violation of 18 U.S.C. § 1203(a) (Count Two); Hostage

Shibin unsuccessfully argued several pretrial motions before the United States District Court in the Eastern District of Virginia, including a motion to dismiss all counts for lack of jurisdiction, and a motion to dismiss the piracy charges in counts one and seven (Piracy under the Law of Nations) because the alleged acts were not carried out on the high seas.⁴⁴ The court declined to rule on the motion with respect to counts one and seven until hearing the evidence at trial, but denied the motion as to all other counts.⁴⁵ The district court ultimately denied all motions when Shibin raised them again at trial.⁴⁶ Shibin was convicted on all counts and sentenced to multiple

Taking, in violation of 18 U.S.C. §§ 1203(a) (Count Three); Conspiracy to Commit Violence Against Maritime Navigation, in violation of 18 U.S.C. § 2280(a)(1)(A) (Count Four); Violence against Maritime Navigation, in violation of 18 U.S.C. §§ 2280(a)(1)(A) and 2280(b)(1) (Count Five); and Using, Carrying, and Discharging a Firearm During a Crime of Violence, in violation of 18 U.S.C. § 924(c)(1)(A) (Count Six).

For his alleged participation in the seizure of the Quest, Defendant faces nine additional charges: Piracy under the Law of Nations, in violation of 18 U.S.C. 1651 [sic] (Count Seven); Conspiracy to Commit Hostage Taking, in violation of 18 U.S.C. §§ 1203(a) (Count Eight); Hostage Taking, in violation of 18 U.S.C. §§ 1203(a) (Count Nine); Conspiracy to Commit Kidnapping, in violation of 18 U.S.C. §§ 1201(c) (Count Ten); Kidnapping, in violation of 18 U.S.C. §§ 1201(a)(2) (Count Eleven); Conspiracy to Commit Violence Against Maritime Navigation, in violation of 18 U.S.C. §§ 2280(a)(1)(H) and 2280(b)(1) (Count Twelve); Violence against Maritime Navigation, in violation of 18 U.S.C. §§ 2280(a)(1)(A) and 2280(b)(1) (Count Thirteen); Using, Carrying, and Brandishing a Firearm During a Crime of Violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and (B)(ii) (Count Fourteen); and Using, Carrying, and Discharging a Firearm During a Crime of Violence, in violation of 18 U.S.C. §§ 924(c)(1)(A) and (B)(ii) (Count Fifteen).

Id.

⁴⁴ See *id.* at *2-4.

⁴⁵ See *id.* at *13.

⁴⁶ See *United States v. Shibin*, 722 F.3d 233, 238 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1935 (2014).

life sentences, “two of which were to be served consecutively.”⁴⁷ Shibin is “the highest-ranking Somali pirate ever brought to the United States.”⁴⁸

III. DISCUSSION

A. REPORT

The Fourth Circuit held that the doctrine of universal jurisdiction provided the district court with subject-matter jurisdiction over offenses codified in 18 U.S.C. §§ 1651 and 1652 (piracy, and aiding and abetting piracy).⁴⁹ Universal jurisdiction is a doctrine of international law that “recognizes a narrow and unique exception to the general requirement that nations have a jurisdictional nexus before punishing extraterritorial conduct committed by non-nationals.”⁵⁰ Significantly, this doctrine provides all nations with the “jurisdiction to define and prescribe punishment” for universally, concerning behavior.⁵¹ The Court noted the parties agreed that the crime of piracy falls within the court’s universal jurisdiction because “pirates are considered . . . the enemies of all humankind.”⁵² The Court framed the first issue narrowly, as a “question of whether the conduct of aiding and abetting § 1651 piracy must itself take place on the high seas.”⁵³

In holding that the conduct need not occur on the high seas, the Fourth Circuit noted that § 1651 incorporates an ever-changing definition of piracy that the U.N. Convention on the Law of the Sea (UNCLOS) accurately articulates.⁵⁴ Article 101 of the UNCLOS defines piracy as:

⁴⁷ *Id.* at 239.

⁴⁸ Press Release, Somali Hostage Negotiator Found Guilty, *supra* note 1 (quoting U.S. Attorney, Neil H. MacBride).

⁴⁹ Shibin, 722 F.3d at 242.

⁵⁰ *Id.* at 239 (citing *United States v. Hasan*, 747 F. Supp.2d 599, 608 (E.D. Va. 2010)) (internal quotations omitted).

⁵¹ *Id.* (citing Restatement (Third) of Foreign Relations Law § 404 (1987)).

⁵² *Id.* at 329–40. (citing *Harmony v. United States (The Makel Adhel)*, 43 U.S. (2 How.) 210, 232 (1844)).

⁵³ *Id.* at 240.

⁵⁴ *See id.*

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

...

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).⁵⁵

The Court reasoned that the crime of aiding and abetting was included in the UNCLOS definition of piracy because Article 101 defines piracy as acts “directed on the high seas against another ship” or “persons or property on board such ship,” as well as conduct “*intentionally facilitating*” such acts.⁵⁶ Shibin agreed that “aiding and abetting”⁵⁷ was the functional equivalent of “intentionally facilitating,” but contended that such conduct could not amount to the crime of piracy—such that it would be subject to universal jurisdiction—unless it was carried out on the high seas.⁵⁸ The Court disagreed, interpreting subsections (a) and (c) of Article 101 as separate and distinct offenses, each defined independently of the other, and found that they were only connected “to the extent that the acts must facilitate Article 101(a) acts.”⁵⁹ In other words, as long as the acts prohibited under subsection (a) took place on the high seas, Article 101 extends to all piratical acts, whether on land or sea.⁶⁰

Shibin also argued that the lack of an extradition treaty between Somalia and the United States necessarily implied that Somalia did not wish for its citizens to be extradited and removed from Somalia against their will.⁶¹ The Fourth Circuit disagreed, holding that the

⁵⁵ U.N. Convention on the Law of the Sea art. 101, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS], *available at* <https://treaties.un.org/doc/Publication/UNTS/Volume%201833/volume-1833-A-31363-English.pdf>.

⁵⁶ *See* Shibin, 722 F.3d at 240 (emphasis added).

⁵⁷ Aiding and abetting is an offense under 18 U.S.C. § 2 (2012).

⁵⁸ *See* Shibin, 722 F.3d at 240.

⁵⁹ *Id.* at 241 (emphasis omitted).

⁶⁰ *See id.*

⁶¹ *See id.* at 243.

lack of an extradition treaty does not limit the court's jurisdiction.⁶² In so holding, the Court relied on the *Ker-Frisbie* doctrine, which provides that "the manner in which the defendant is captured and brought to court is generally irrelevant to the court's personal jurisdiction over him."⁶³ Contrary to Shibin's contention that the *Ker-Frisbie* doctrine does not apply in the absence of an extradition treaty, the Fourth Circuit held that the lack of an extradition treaty was irrelevant to the application of the doctrine. Rather, the Court found that because no extradition treaty existed between the two countries, no limitations existed to "deprive the court of jurisdiction over an extradited defendant."⁶⁴ The Court reasoned that an extradition treaty is a formal agreement that sets forth procedures that a country must follow to obtain custody of an accused, and that the lack of such agreement does not implicitly limit a court's jurisdiction; instead, only the actual existence of such agreement could restrict a federal court's jurisdiction. Ultimately, the Court held that "Shibin's presence in the United States, although against his will, satisfied the personal jurisdiction requirements of 'brought into' or 'found in,' as contained in 18 U.S.C. §§ 1651, 1203, and 2280."⁶⁵

Finally, Shibin argued that the non-piracy charges with respect to the *Marida Marguerite* were not subject to universal jurisdiction, and that the court therefore lacked subject matter jurisdiction.⁶⁶ The Fourth Circuit held that the domestic statutes under which he was charged provided jurisdiction independently of universal jurisdiction pursuant to Congress's valid exercise of its authority to criminalize extraterritorial conduct and to enforce those laws "beyond the territorial boundaries of the United States."⁶⁷ Simply by virtue of being "found in" the United States, even though he was brought against his will, for the purpose of standing trial, the Court found that Shibin was subject to the jurisdiction of the laws of the United States.⁶⁸

⁶² See *id.* at 244.

⁶³ *Id.* at 243 (citing *Frisbie v. Collins*, 342 U.S. 519, 522 (1952); *Ker v. Illinois*, 119 U.S. 436, 444 (1886)).

⁶⁴ *Id.* at 244.

⁶⁵ *Id.*

⁶⁶ See *id.* at 244–45.

⁶⁷ *Id.* at 245 (quoting *United States v. Ayesh*, 702 F.3d 162, 166 (4th Cir. 2012)).

⁶⁸ See *id.* at 247.

B. ANALYSIS

The Court's analysis with respect to the crime of aiding and abetting is consistent with the district court's analysis in *United States v. Ali*, in which the Court of Appeals for the D.C. Circuit held that Article 101(c) acts need not be carried out on the high seas provided they facilitated Article 101(a) acts that *were* carried out on the high seas.⁶⁹ The UNCLOS codified the customary international law definition of the crime of piracy, which is found in Article 101.⁷⁰ In contrast, the U.S. Code does not define piracy independently of its definition under the "law of nations."⁷¹ Though the United States has not ratified the UNCLOS,⁷² the Fourth Circuit held in *United States v. Dire* that Article 101 of the UNCLOS provides the most modern definition of piracy within the meaning of § 1651.⁷³

The idea of applying universal jurisdiction to the crime of aiding and abetting piratical acts is not a novel concept. For example, the U.N. Security Council announced a resolution that "call[ed] upon *all* States . . . to cooperate in . . . [the] prosecution of all persons responsible for acts of piracy . . . off the coast of Somalia, *including anyone who incites or facilitates* an act of piracy"⁷⁴ The Resolution also acknowledged the need to "bring to justice those who are using Somali territory to plan, *facilitate*, or undertake criminal acts of piracy and armed robbery at sea"⁷⁵ Furthermore, as the Fourth Circuit pointed out, a subsequent U.N. Security Council

⁶⁹ See *United States v. Ali*, 718 F.3d 929, 937 (D.C. Cir. 2013).

⁷⁰ See, e.g., Stepek, *supra* note 42, at 337; see also *supra* text accompanying notes 55–56.

⁷¹ See Stepek, *supra* note 42, at 344. Section 1651 of the U.S. Code defines piracy as: "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life." 18 U.S.C. § 1651 (2012).

⁷² See *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as at 29 October 2013*, UNITED NATIONS DIVISION FOR OCEAN AFF. & L. SEA, http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea (last updated Sept. 20, 2013).

⁷³ See *United States v. Dire*, 680 F.3d 446, 469 (4th Cir. 2012).

⁷⁴ S.C. Res. 1950, ¶ 12, U.N. Doc. S/RES/1950 (Nov. 23, 2010) (emphasis added), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1950 (2010).

⁷⁵ *Id.* at ¶ 11 (emphasis added).

Resolution recognized that persons “who incite or intentionally facilitate an act of piracy are themselves engaging in piracy as defined under international law.”⁷⁶ Additionally, in *United States v. Hasan*, the district court stated that “piracy within the meaning of Section 1651 consists of any of the [acts in Article 101] and their elements.”⁷⁷ Moreover, Shibin agreed that acts of aiding and abetting and intentionally facilitating are practically one and the same.⁷⁸ Therefore, the Fourth Circuit’s holding that the acts of aiding and abetting amounted to piracy in this case is consistent with United States precedent and customary international law.

In determining that the district court had jurisdiction over the *Marida Marguerite* offenses without the application of universal jurisdiction, the Fourth Circuit correctly interpreted domestic and international law in finding that Congress has the power to enforce the laws of the United States beyond its territorial boundaries. Such enforcement of United States law is termed “extraterritoriality,” and the United States Supreme Court has held that there is a presumption against its application.⁷⁹ However, when Congress clearly indicates that extraterritoriality applies, “United States law is not subordinate to customary international law or necessarily subordinate to treaty-based international law.”⁸⁰ In affirming the district court’s jurisdiction over the non-piracy charges against Shibin in connection with the *Marida Marguerite* hijacking, the Fourth Circuit again found that the statute’s requirement that the “offender [be] found in the United States” did not require him to be voluntarily in the United States when found.⁸¹ It held that the “statute explicitly reaches hostage taking anywhere in the world, so long as the offender ends up in the United States.”⁸²

Lastly, the Court’s rejection of Shibin’s contention that the *Ker-Frisbie* doctrine did not apply in his case was proper and consistent

⁷⁶ S.C. Res. 1796, ¶ 15, U.N. Doc. S/RES/1976 (Apr. 11, 2011), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1976 (2011).

⁷⁷ *United States v. Hasan*, 747 F. Supp. 2d 599, 640 (E.D. Va. 2010).

⁷⁸ See *United States v. Shibin*, 722 F.3d 233, 240 (4th Cir. 2013), cert. denied, 134 S. Ct. 1935 (2014).

⁷⁹ See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664–65 (involving civil, not criminal, statutes).

⁸⁰ *United States v. Yousef*, 327 F.3d 56, 91 (2nd Cir. 2003).

⁸¹ See *Shibin*, 722 F.3d at 245–46.

⁸² *Id.* at 246.

with federal precedent. In *United States v. Rezaq*, the defendant, a Palestinian, argued that the *Ker-Frisbie* doctrine did not apply because he only came to be “found in” the United States for the purpose of standing trial.⁸³ The court in *Rezaq* held, however, that “the word ‘found’ means only that [the defendant] must be physically located in the United States.”⁸⁴ Similarly, in *United States v. Shi*, the Court of Appeals for the Ninth Circuit held that a statutory requirement that a defendant be “later found” in the United States did not “contain the implicit requirement that the defendant’s arrival in the United States be voluntary.”⁸⁵ The court further opined that had Congress “intended to create such an exception to the *Ker-Frisbie* rule,” it would have done so explicitly.⁸⁶ Additionally, as the Fourth Circuit pointed out, Shubin failed to identify any Somali procedure in place that should have governed his arrest and extradition. Accordingly, the Fourth Circuit correctly applied federal law in holding that Shubin’s presence in the United States alone was sufficient to confer personal jurisdiction on the district court, even if Shubin’s presence in the U.S. was only for purposes of standing for trial.

IV. PRACTICAL IMPACT

Piracy in Somalia is not only a business,⁸⁷ it is a way of life.⁸⁸ That way of life persists because Somalia lacks the ability to confront it.⁸⁹ As one source noted, “[t]he cornerstone of pirates’ freedom of operations remains the safe haven that an ungoverned Somalia provides.”⁹⁰ Despite some evidence of decentralization within certain piracy business models,⁹¹ investigators suspect that “a

⁸³ See *United States v. Rezaq*, 134 F.3d 1121, 1132 (D.C. Cir. 1998).

⁸⁴ *Id.*

⁸⁵ *United States v. Shi*, 525 F.3d 709, 725 (9th Cir. 2008).

⁸⁶ *Id.*

⁸⁷ See, e.g., Douglas Guilfoyle, *Piracy off Somalia and Counter-Piracy Efforts*, in *MODERN PIRACY: LEGAL CHALLENGES AND RESPONSES* 35, 35–44 (Douglas Guilfoyle ed., 2013); see also Stepek, *supra* note 42, at 345.

⁸⁸ See, e.g., Jeffrey Gettleman, *Suddenly, a Rise in Piracy’s Price*, N.Y. TIMES, Feb. 27, 2011, at WK1.

⁸⁹ See *id.* (noting that the “root cause is state failure,” referring to Somalia as “the world’s most failed state”).

⁹⁰ NELSON & GOOSSENS, *supra* note 16, at 5.

⁹¹ See, e.g., Guilfoyle, *supra* note 87, at 42.

significant part of Somali piracy is ultimately controlled by a relatively small number of bosses and financiers.”⁹² The organizers, like Shibin, stay behind on shore, beyond the reach of the law—or so they presume. It is precisely these organizers who perpetuate this cycle, placing their low-ranking pawns out in the international waters to get their hands dirty, while they sit back and wait for their ship to return to safe harbor. Albeit, the frequency of pirate attacks has drastically decreased in recent years, but the underlying cultural and socioeconomic conditions that initially gave rise to the thriving enterprise in Somalia have improved little.⁹³ Without organizers like Shibin, much of the organized piratical acts carried out by Somali pirates would not have been possible. Accordingly, States must remain vigilant in bringing to justice the organizers responsible for perpetuating the Somali business model of piracy.

So far, the international response to piracy has largely focused “on patrols and intervention but has failed to comprehensively address the more complex issues of deterrence and punishment.”⁹⁴ From a policy perspective, the United States’ continued participation in prosecuting piracy is important in the international effort to thwart piracy around the globe, particularly in the Gulf of Aden. Though some regional governments have tried to pick up slack by taking a more active role in counter-piracy efforts, significant issues remain, preventing them from effectively managing the problem.⁹⁵ As a world power, the United States possesses the resources to investigate and prosecute these piratical acts,⁹⁶ and until the regional governments—including Somalia—are better suited to the task, the U.S. must continue to play an integral role in the counter-piracy effort. The Fourth Circuit’s decision in *Shibin* further legitimates that role.

However, the Court’s application of extraterritorial jurisdiction to Shibin’s conduct with respect to the *Marida Marguerite* may pose some concerns in the context of international comity. As one commentator phrased it, “[t]o the extent that countries impose their

⁹² *Id.* (internal quotations omitted).

⁹³ *See id.* at 36–39.

⁹⁴ NELSON & GOOSSENS, *supra* note 16, at 3–4.

⁹⁵ *See, e.g.,* Guilfoyle, *supra* note 87, at 58–59 (noting that a significant concern for Kenya in prosecuting piracy has been “severe prison overcrowding”).

⁹⁶ *See, e.g.,* NELSON & GOOSSENS, *supra* note 16, at 6.

criminal law over defendants with no nexus to them, those countries expose their citizens to being treated in the same manner by other countries.”⁹⁷ The observance of international comity may explain why other domestic courts have exercised restraint in applying extraterritorial jurisdiction in similar cases.⁹⁸

On the other hand, the creation of international criminal offenses results from an interstate consensus as to the nature of the behavior.⁹⁹ The prosecution and punishment of crimes like piracy differs from crimes like genocide, for example, because pirates are private citizens acting for private gain, rather than to achieve some larger ideological or political goal.¹⁰⁰ Piracy is narrowly defined, and “only the crime of piracy as defined in international law [as opposed to other criminal acts associated with shipping] is subject to universal jurisdiction such that the other crimes need a jurisdictional nexus to the prosecuting state.”¹⁰¹ Therefore, because of the unique and pervasive character of the underlying crime in this case, it is unlikely that this recognition of the United States’ right to apply extraterritorial jurisdiction will extend to other kinds of crimes.

CONCLUSION

The Fourth Circuit correctly applied the doctrine of universal jurisdiction to the crime of aiding and abetting piracy, even though Shubin’s facilitating conduct did not take place on the high seas. The recent resurgence of piracy, particularly in the region off the coast of Somalia, has resulted in nearly thirty prosecutions in the United States in the last two decades. The international law with respect to piracy remained relatively static in the years leading up to this influx. The Court’s extension of universal jurisdiction to the crime of aiding and abetting piratical acts will likely substantially improve the efforts to eliminate piracy off the coast of Somalia. However, due to the unique nature of piracy generally, and Somali piracy in particular, the Court’s decision is unlikely to affect the application of universal jurisdiction outside of the realm of prosecuting acts of piracy.

⁹⁷ Stepek, *supra* note 42, at 350.

⁹⁸ *See id.*

⁹⁹ *See* BANTEKAS, *supra* note 9, at 8.

¹⁰⁰ Stepek, *supra* note 42, at 336.

¹⁰¹ *Id.* at 334.

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