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UNITED STATES V. SAID & UNITED STATES V. HASAN

Yes, I am a pirate two hundred years too late. The cannons don't thunder there's nothin' to plunder¹

During the spring of 2010, in two unrelated events, two boats off the coast of Somalia approached United States naval vessels and opened fire.² In both instances, the United States Navy returned fire, gave chase, and arrested the Somali crew members.³ Grand juries in the Eastern District of Virginia returned separate indictments against the arrested Somalis⁴ and charged them with, among other crimes, “[p]iracy under [the] law of nations.”⁵ In both of these nearly identical cases, the defendants filed motions to dismiss the piracy count under Rule 12 of the Federal Rules of Criminal Procedure.⁶ Two federal district court judges, both sitting in Norfolk, Virginia, ruled on the defendants’ motions,⁷ which alleged that the facts pleaded by the United States failed to satisfy the elements of the piracy offense.⁸

Despite the similarities between the cases, the two judges reached opposite conclusions as to whether the alleged action of the defendants—opening fire on another vessel—constituted piracy.⁹ In *United States v. Said*,¹⁰ Judge Raymond A. Jackson granted the defendants’ motion to dismiss, concluding that their alleged conduct could not constitute piracy.¹¹ Less than three months later, in *United States v. Hasan*,¹² Judge Mark S. Davis denied the defendants’ motion to dismiss and determined that the alleged conduct could, “if proven true,” constitute piracy.¹³ *Said* is currently on interlocutory appeal to the United States Court of Appeals for the Fourth Circuit.¹⁴

The distinction between the two opinions centers on the interpretation of the phrase, “piracy as defined by the law of nations,”¹⁵ an issue that has not been

1. JIMMY BUFFETT, *A Pirate Looks at Forty*, on SONGS YOU KNOW BY HEART (MCA Records 1985).

2. See John D. Kimball & Deepa Padmanabha, *What is Piracy?*, MAINBRACE, Dec. 2010, at 1, 1, available at <http://www.blankrome.com/siteFiles/Publications/4C06D5A374838AD71E19895FDF4648E4.pdf>.

3. See *id.*

4. See *id.*

5. 18 U.S.C. § 1651 (2006); see also *United States v. Hasan*, No. 2:10cr56, 2010 WL 4281892, at *1 (E.D. Va. Oct. 29, 2010); *United States v. Said*, No. 2:10cr57, 2010 WL 3893761, at *1 (E.D. Va. Aug. 17, 2010).

6. See *Hasan*, 2010 WL 4281892, at *2; *Said*, 2010 WL 3893761, at *1.

7. See *Hasan*, 2010 WL 4281892, at *1; *Said*, 2010 WL 3893761, at *1.

8. See *Hasan*, 2010 WL 4281892, at *3; *Said*, 2010 WL 3893761, at *1–2.

9. *Hasan*, 2010 WL 4281892, at *38; *Said*, 2010 WL 3893761, at *11.

10. No. 2:10cr57, 2010 WL 3893761 (E.D. Va. Aug. 17, 2010).

11. *Id.* at *11.

12. No. 2:10cr56, 2010 WL 4281892 (E.D. Va. Oct. 29, 2010).

13. *Id.* at *38.

14. *United States v. Said*, No. 10-4970 (4th Cir. argued Mar. 25, 2011).

15. 18 U.S.C. § 1651 (2006). Compare *Hasan*, 2010 WL 4281892, at *37 (“[Section] 1651 requires the act to be ‘piracy as defined by the law of nations,’ and that definition is provided by

addressed by the United States Supreme Court since it defined piracy as “robbery upon the sea” in *United States v. Smith*¹⁶ in 1820.¹⁷ The Constitution explicitly grants to Congress the power to “define and punish” piracy,¹⁸ and in 1819 Congress declared that piracy was defined according to “the law of nations.”¹⁹ The “law of nations” provision of the piracy statute has remained in the United States Code ever since.²⁰

While the Constitution gives Congress the power to define piracy, the judiciary has the authority to determine the weight that international customs may be given in federal courts.²¹ This tension between the constitutional delegation to Congress of the power to define the crime and the federal courts’ duty to determine its contours is squarely presented in *Hasan* and *Said*. In *Said*, the Fourth Circuit must ultimately determine whether federal courts can give credence to modern international law norms regarding piracy or whether they must limit the definition of piracy to the international law norms of the era when Congress enacted the original version of the piracy statute.²² How the Fourth Circuit interprets customary international law as it applies to piracy and whether such an interpretation may include contemporary international standards will ultimately affect whether the violent action of the defendants in *Hasan* and *Said* constitutes piracy under United States law.

contemporary customary international law . . .”), with *Said*, 2010 WL 3893761, at *11 (defining piracy as “sea robbery” and rejecting how “international sources treat the definition of piracy”).

16. 18 U.S. (5 Wheat.) 153, 162 (1820).

17. The court in *Said* noted, “The Supreme Court addressed the issue of § 1651’s scope in [*United States v.*] *Smith*. In fact, *Smith* is the only case to ever directly examine the definition of piracy under § 1651.” *Said*, 2010 WL 3893761, at *4.

18. U.S. CONST. art. I, § 8, cl. 10. The only other crimes that the Constitution specifically reserves to Congress are counterfeiting, *see id.* at cl. 6, and treason, *see id.* at art. III, § 3.

19. *See* Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513–14 (current version at 18 U.S.C. § 1651 (2006)) (providing for the protection of commerce and the punishment of piracy).

20. The Act was to sunset after only one year, *see id.* at § 6, and thus Congress passed the Act of 1820 to extend the provisions in the 1819 Act and to include the slave trade within the definition of piracy, *see Hasan*, 2010 WL 4281892, at *11–12 (citing Act of May 15, 1820, ch. 113, §§ 2, 4–5, 3 Stat. 600–01 (current version at 18 U.S.C. § 1651 (2006))).

21. *See The Paquete Habana*, 175 U.S. 677, 700 (1900). The federal courts may appropriately declare whether customary international laws may be incorporated into United States jurisprudence. *See generally* Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. ONLINE 1762, 1816 (2009) (“U.S. courts decide cases where international law rules or norms (or enactments derived from such rules or norms) potentially supply rules of decision for determining the rights of litigants in cases within their jurisdiction. In such cases, courts must expound and interpret international law, as well as its relationship with U.S. domestic law.”).

22. Brief of the United States at 15, *United States v. Said*, No. 10-4970 (4th Cir. argued Mar. 25, 2011).

I. *UNITED STATES V. SAID*

In *Said*, the court concluded that the action of the Somali defendants did not rise to the level of piracy under 18 U.S.C. § 1651 and reasoned that due process required a concrete definition of piracy grounded in Supreme Court precedent.²³ Because the court was unwilling to move beyond an 1820 customary international law definition of piracy, it concluded that piracy as defined by the law of nations meant robbery or other depredations “committed on the high seas.”²⁴

When the *Said* defendants moved to dismiss the piracy charge,²⁵ the United States made two primary arguments as to why the defendants’ violent action, committed on the high seas, should constitute piracy. First, it argued that the definition of piracy set forth in *Smith*—“robbery or forcible depredations committed on the high seas”²⁶—was limited to the facts of that case and thus not determinative of all potentially “piratical” acts.²⁷ Second, it argued that international judicial decisions, treaties, and scholarly writings include within the definition of piracy the act of a private vessel firing a weapon at another vessel on the high seas.²⁸

Regarding the first contention, the court held that “the discernable definition of piracy . . . ha[d] remained consistent and ha[d] reached a level of concrete consensus in United S[t]ates law since its pronouncement in 1820.”²⁹ The court distinguished post-*Smith* piracy cases, reasoning that they did not expand the statutory definition of piracy beyond the interpretation in *Smith*.³⁰ Several of the post-*Smith* decisions were civil forfeiture cases rather than cases involving criminal conduct.³¹ Additionally, one of the cases did not address § 1651 at all and instead based its holding on Article 1, Section 8 of the Constitution.³² The court reasoned that these cases “[did] not provide concrete examples of [§] 1651 being expanded beyond the definition laid out in *Smith*,” and thus it did not consider them binding on its decision.³³

23. See *United States v. Said*, 2010 WL 3893761, at *10–11 (E.D. Va. Aug. 17, 2010).

24. *Id.* at *8, *11.

25. *Id.* at *1.

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

27. *Said*, 2010 WL 3893761, at *4.

28. *Id.* at *8.

29. *Id.* at *4.

30. *Id.*

31. *Id.* at *5 (quoting and citing *The Ambrose Light*, 25 F. 408 (S.D.N.Y. 1885); *The Chapman*, 5 F. Cas. 471 (N.D. Cal. 1864); *Harmony v. United States (The Malek Adhel)*, 43 U.S. (2 How.) 210 (1844)).

32. *Id.* (quoting and citing *United States v. Shi*, 525 F.3d 709, 721 (9th Cir. 2008)).

33. *Id.* The Government also argued that “even if *Smith* and subsequent case law defined piracy as ‘robbery or forcible depredations,’ this definition include[d] ‘a variety of offense conduct,’” such as the defendants’ attack. *Id.* at *6. Nevertheless, the court held that “[t]he Government’s interpretation of the phrase ‘forcible depredations’ as something other than robbery or plunder [was] contrary to the unambiguous definition of ‘depredation.’” *Id.* at *6.

The court was also unconvinced by the international legal decisions, treaties, and scholarly works that the United States submitted in support of its argument.³⁴ The court noted that the British Privy Council, the Geneva Convention on the High Seas, and the United Nations Convention on the Law of the Sea (UNCLOS) all had adopted a definition of piracy that includes more than robbery.³⁵ Nevertheless, it also recognized that “scholars disagree on whether there is an authoritative definition of piracy in the international community” and many “define piracy just as Justice Story did in the *Smith* decision.”³⁶ Most importantly, the court held that “following any of these international sources as authoritative [would be] questionable” and concluded that relying on them to “formulat[e] [a] definition of piracy under the law of nations” would be “contrary to Supreme Court precedent, and . . . inevitably deny [the d]efendants due process.”³⁷

II. *UNITED STATES V. HASAN*

In *Hasan*, the court reached a conclusion opposite that of the *Said* court and determined that a violent act on the high seas toward another vessel, unsanctioned by any nation’s government, is piracy under § 1651.³⁸ In *Hasan*, the court conducted a comprehensive examination of international sources and legal actions regarding piracy, detailing America’s history of defining and punishing piracy from the founding generation to the present. By doing so, the court persuasively reasoned that Congress intended to define piracy as something other than just “robbery at sea.” Furthermore, by highlighting the historical rationale and international understanding behind the piracy offense, *Hasan* provides a useful framework for analyzing whether allegedly piratical acts may be defined as piracy in accordance with the “law of nations.”

The court began its opinion with a historical discussion of piracy law.³⁹ After examining the background of the “define and punish” clause in the Constitution and concluding that it provided Congress power to “criminaliz[e] piracy in a manner consistent with the exercise of universal jurisdiction,” the court recognized that Congress has exercised this power by enacting legislation that “proscribe[s] piracy as both a ‘municipal’ crime, in violation of the laws of the United States, and as an international crime, in violation of the law of

34. See *id.* at *8–10.

35. *Id.* at *8–9 (quoting and citing Geneva Convention on the High Seas, art. 15, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11; United Nations Convention on the Law of the Sea, art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397; *In re Piracy Jure Gentium*, [1934] A.C. 586 (P.C.)).

36. *Id.* at *9.

37. *Id.* at *10.

38. See *United States v. Hasan*, No. 2:10cr56, 2010 WL 4281892, at *38 (E.D. Va. Oct. 29, 2010).

39. *Id.* at *2–18.

nations.”⁴⁰ The court distinguished between these two types of piracy, noting that while municipal piracy can include “virtually any overt act Congress chooses to dub piracy,” it cannot apply to acts that do not “have a jurisdictional nexus with the United States.”⁴¹ In contrast, general piracy covers acts “irrespective of the presence of a jurisdictional nexus” but only includes “offenses that the international community agrees [are] piracy.”⁴²

Next, the court engaged in an extensive analysis of jurisdictional principles as applied to international law and explained that while a State generally is permitted to exercise jurisdiction only over acts that occur in its sovereign territory and acts that its citizens commit in other countries,⁴³ under the doctrine of universal jurisdiction a State is also permitted to “define and prescribe punishment for any offense recognized by the community of nations as having universal concern.”⁴⁴ Although the court recognized that scholars debate the principle of universal jurisdiction and the efficacy of applying it to modern international law crimes, it ultimately concluded that this debate was not applicable to piracy.⁴⁵ Specifically, it reasoned that universal jurisdiction over piracy “does not raise the same state sovereignty concerns implicated by applying universal jurisdiction to modern international law offenses” because piracy “occurs in areas to which the domestic political process of nations does not extend, involves parties who are not acting under the authority of any nation, and impacts every nation . . . by disrupting global commerce and imperiling navigation.”⁴⁶

The court then surveyed (1) the legislative development of piracy from Congress’s first piracy legislation, An Act for the Punishment of Certain Crimes Against the United States,⁴⁷ to the present,⁴⁸ (2) United States case law prior to the enactment of 18 U.S.C. § 1651,⁴⁹ (3) foreign case law dealing with the definition of piracy in international law,⁵⁰ and (4) the treatment of piracy in the Geneva Convention on the High Seas and the UNCLOS.⁵¹

40. *Id.* at *5 (citing Edwin D. Dickinson, *Is the Crime of Piracy Obsolete*, 38 HARV. L. REV. 334, 335–36 (1925)).

41. *Id.*

42. *Id.* (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 761–62 (2004) (Breyer, J., concurring)).

43. *Id.* at *6 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(1)–(2) (1986)).

44. *Id.* at *7 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1986)).

45. *Id.* at *9.

46. *Id.* at *10.

47. Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 112, 113 (current version at U.S.C. § 1651 (2006)).

48. *Id.* at *10–13.

49. *Id.* at *13–15.

50. *Id.* at *15–17.

51. *Id.* at *17–18.

After completing its historical survey, the court turned to a determination of the definition of piracy under the law of nations. The court examined the Supreme Court's decision in *United States v. Smith* and noted that although the Court defined piracy under the law of nations as "robbery upon the sea," federal decisions since *Smith* have suggested a more expansive definition.⁵² The court did recognize that other federal decisions have concluded that *Smith*'s definition is exhaustive, but ultimately concluded that determining "the contours of *Smith*" was unnecessary "if the definition of piracy under the law of nations [could] evolve over time."⁵³

To determine whether the definition of piracy under the law of nations was fixed as provided in *Smith*, or evolving, the court examined 18 U.S.C. § 1651 and decisions of the United States Supreme Court. First, the court concluded that by including the language "as defined by the law of nations" in § 1651, Congress intended to "adopt a flexible—but at all times sufficiently precise—definition of general piracy that would automatically incorporate developing international norms."⁵⁴ Moreover, it reasoned that allowing the definition to adapt to changing norms was consistent with the legislative history of the statute⁵⁵ and principles of fundamental fairness.⁵⁶ Second, the court examined three Supreme Court decisions, concluding that they "demonstrate[d] that [Congress's] use of the phrase 'law of nations' contemplate[d] a developing set of international norms."⁵⁷ Ultimately, the court concluded that "the phrase 'law of nations,' as used in 18 U.S.C. § 1651, require[d] application of the modern international consensus definition of general piracy."⁵⁸

To determine the definition of piracy at the time the defendants committed the alleged offense, the court considered piracy as defined by various international legal decisions, treaties, and scholarly works. The court's survey included decisions by the British Privy Council, United States federal courts,⁵⁹

52. *Id.* at *19–20 (citing *Ambrose Light*, 25 F. 408 (S.D.N.Y. 1885); *Dole v. New Eng. Mut. Marine Ins. Co.*, 7 F. Cas. 837 (D. Mass. 1864); *Chapman*, 5 F. Cas. 471 (N.D. Cal. 1864)).

53. *Id.* at *19–21.

54. *Id.* at *21.

55. *Id.* In *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818), the United States Supreme Court held that the Act of 1790 did not provide universal jurisdiction over piracy because it "defined piracy too broadly [and] includ[ed] offenses other than robbery that were not understood to provide a basis for invoking universal jurisdiction, such as murder and assaults against captains by their crew." *Hasan*, 2010 WL 4281892, at *22 (citing *Palmer*, 16 U.S. (3 Wheat.) at 630–34). One year after *Palmer*, Congress implicitly remedied this problem by passing the 1819 statute, which defined piracy according to the "law of nations." *Id.* (citing Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513–14 (current version at 18 U.S.C. § 1651 (2006))).

56. *Hasan*, 2010 WL 4281892, at *22–23.

57. *Id.* at *24–28 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *United States v. Ariona*, 120 U.S. 479 (1887); *Antelope*, 23 U.S. (10 Wheat.) 66 (1825)).

58. *Id.* at *28.

59. *See id.* at *33.

and the Government of Kenya,⁶⁰ as well as treaties such as the Geneva Convention on the Law of the High Seas, and the UNCLOS.⁶¹

In *Hasan*, the court used these sources to highlight the development of international norms and standards regarding piracy and thus, unlike the court in *Said*, channeled the role of scholarship as documentarian rather than as adjudicator of a certain standard or outcome.

The court noted that the Geneva Convention and the UNCLOS have been ratified by 63 and 161 countries respectively⁶²—sufficient for their content to be considered modern customary international law.⁶³ The treaties contain nearly identical definitions of piracy:

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

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

(b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(2) 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
....⁶⁴

Because the two treaties contain the same definition of piracy and a high number of signatories, the court interpreted their shared definition as customary

60. *See id.*

61. *See id.* at *31–32.

62. *Id.* at *32. Although the United States has not ratified the UNCLOS because of its provisions related to deep seabed exploration and mining, it has accepted it, with the exception of those provisions, “as customary international law, binding upon the United States.” 1 THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* § 2-2 (4th ed. 2004). Moreover, because customary international law is derived from the practices of the international community rather than those of the United States alone, lack of ratification by the United States does not affect the treaty’s status as customary international law. *Hasan*, 2010 WL 4281892, at *32.

63. *See id.* at *31–32 (citing and quoting *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 137–39 (2010)). According to the court, “[t]he status of [the] UNCLOS as representing customary international law is enhanced by the fact that the state[] parties to it include all of the nations bordering the Indian Ocean on the east coast of Africa, where the incident in the [current case allegedly took] place.”

64. Geneva Convention on the Law of the Seas, art. 15, Apr. 29, 1958, 13.2 U.S.T. 2312, 450 U.N.T.S. 11; *see also* United Nations Convention on the Law of the Sea, art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397. While the content of the two treaties is the same, there are minor stylistic differences. *See Hasan*, 2010 WL 4281892, at *18.

international law.⁶⁵ Moreover, the court noted that United States and British decisions as well as “recent judicial decisions from Kenya, the country currently handling many modern piracy cases,” reflect the UNCLOS definition of piracy.⁶⁶ Finally, the court recognized that contemporary scholarly writings agreed on the core definition of piracy as reflected in the UNCLOS.⁶⁷ Consequently, it adopted the UNCLOS language as the definition of general piracy under the law of nations.⁶⁸

This UNCLOS definition of piracy includes four distinct elements—(1) a criminal act; (2) made with a particular intent; (3) in a certain space; and (4) against a particular target.⁶⁹ These elements clarify the scope of the piracy offense and illustrate why piracy has traditionally been considered a universally jurisdictional crime.

The intent element in the definition focuses on the private non-state sanctioned intent of the party charged with piracy.⁷⁰ Such a definition appears to exempt privateers because they would be acting under the authority of a sovereign state.

The definition also includes a geographical locus element triggering universal jurisdiction—the high seas.⁷¹ This element distinguishes general piracy from a sovereign’s proscription of certain acts within its own territory that it deems to be piracy.⁷² Additionally, by tethering the definition to the high seas, the general piracy charge (and its accompanying universal jurisdiction) is limited to sovereignty-threatening and commerce-frustrating activities. By clarifying that the open seas—even though outside of the territorial sovereignty of any nation—are not a safe haven for pirates, the definition helps to deter the commission of piratical acts.

Finally, the definition identifies the target of piratical acts as “a ship, aircraft, persons or property in a place outside the jurisdiction of any State.”⁷³ This

65. *See id.* at *32.

66. *Id.* at *33.

67. *Id.* at *34.

68. *Id.* at *37.

69. *See* United Nations Convention on the Law of the Sea, *supra* note 64, at art. 101; Geneva Convention on the Law of the Seas, *supra* note 64, at art. 15. In *Hasan*, Judge Davis analyzed the defendants’ conduct using a five-part test consisting of the following elements:

(1) illegal acts of violence, (2) committed for private ends, (3) on the high seas, (4) by the crew of a private ship, (5) and directed against another ship, or against persons on board such ship.

Hasan, 2010 WL 4281892, at *38.

70. *See* United Nations Convention on the Law of the Sea, *supra* note 64, at art. 101; Geneva Convention on the Law of the Seas, *supra* note 64, at art. 15.

71. United Nations Convention on the Law of the Sea, *supra* note 64 at art. 101; Geneva Convention on the Law of the Seas, *supra* note 64, at art. 15.

72. *See* Eugene Kontorovich, *The “Define and Punish” Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 149, 166 (2009).

73. United Nations Convention on the Law of the Sea, *supra* note 64, at art. 101; Geneva Convention on the Law of the Seas, *supra* note 64, at art. 15.

fourth element clarifies that the targets of piratical acts are physically outside of any State's boundaries and thus deserving of universal protection.

Overall, the definition emphasizes the significance of general piracy in terms of jurisdictional, sovereignty, and commerce-based rationales, and distinguishes it from a simple extension of criminal robbery.

III. CONCLUSION

Subsequent to the October opinion denying the *Hasan* defendants' motion to dismiss, a jury found the defendants guilty of piracy under 18 U.S.C. § 1651.⁷⁴ Ultimately, in its determination of the *Said* appeal, the Fourth Circuit will reconcile the *Hasan* and *Said* opinions by deciding the content and scope of general piracy. At present, *Hasan* more clearly delineates the actions that constitute piracy under current customary international law and provides a useful framework for determining whether violent acts committed on the high seas are in fact piracy.

William Crum McKinney

74. Verdict Form for Defendant Gabul Abdullahi Ali, *Hasan*, 2010 WL 4281892 (No. 2:10cr 56), 2010 WL 4786990; Verdict Form for Defendant Abdi Mohammed Gurew Ardher, *Hasan*, 2010 WL 4281892 (No. 2:10cr56), 2010 WL 4786992; Verdict Form for Defendant Abdi Wali Dire, *Hasan*, 2010 WL 4281892 (No. 2:10cr56), 2010 WL 4786991; Defendant Mohammed Modin Hasan, *Hasan*, 2010 WL 4281892 (No. 2:10cr56), 2010 WL 4786989; Verdict Form for Defendant Abdi Mohammed Umar, *Hasan*, 2010 WL 4281892 (No. 2:10cr56), 2010 WL 4786993.

