

proxies, if not directly) military—both submitted to the Court that they *actually agreed on something*: Elahi had waived his right to attach the Cubic judgment.

ARIEL MEYERSTEIN*
Iran–United States Claims Tribunal

*Universal jurisdiction—piracy—international criminal law—UN Convention on the Law of the Sea—
Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*

UNITED STATES V. SHI. 525 F.3d 709, cert. denied, 129 S.Ct. 324 (2008).
United States Court of Appeals for the Ninth Circuit, April 24, 2008.

In *United States v. Shi*,¹ the U.S. Court of Appeals for the Ninth Circuit upheld the conviction of a Chinese national for acts of violence on board a Taiwanese-owned, Seychelles-flagged, Chinese-crewed vessel in the middle of the Pacific Ocean. This remarkable case is the first prosecution brought under the statute codifying U.S. obligations under the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation² (SUA Convention) and perhaps the only case in the world brought under that treaty.³ The court of appeals held that the Convention, which was designed to counter international terrorism, can also be applied to ordinary crimes. *Shi* revives and shows the flexibility of that moribund treaty at a time when an epidemic of piracy makes it especially relevant.

Shi is the first time in nearly two hundred years that a U.S. court has invoked the doctrine of universal jurisdiction over piracy,⁴ and it is a rare assertion by U.S. courts of universal jurisdiction over any international crime.⁵ Ironically, the prosecution was not for the modern human rights offenses that have become most closely associated with universal jurisdiction, but for what the Court saw as old-fashioned piracy.⁶ To sharpen the irony, the offense was committed with edged weapons, like piracies of old. Yet contrary to the Court's view, it did not amount to piracy under international law.⁷

* The views expressed here are those of the author and do not represent the views of the Iran-U.S. Claims Tribunal or any of its members.

¹ 525 F.3d 709, cert. denied, 129 S.Ct. 324 (2008).

² Mar. 10, 1988, 1678 UNTS 201, reprinted in 27 ILM 668 (1988) (entered into force 1992; also known as the "Rome Convention").

³ See Martin Murphy, *Piracy and UNCLOS, in VIOLENCE AT SEA: PIRACY IN THE AGE OF GLOBAL TERRORISM* 178 (Peter Lehr ed., 2007).

⁴ See ALFRED P. RUBIN, *THE LAW OF PIRACY* 127–200 (2d ed. 1998); Samuel Pyeatt Menefee, *Yo Heave Ho!': Updating America's Piracy Laws*, 21 CAL. W. INT'L L.J. 151, 153 n.12 (1990/91).

⁵ Though not the first modern use of universal jurisdiction, it is the first use of criminal universal jurisdiction over conduct that international law makes universally cognizable. Under the Maritime Drug Law Enforcement Act, 46 U.S.C.A. §§70501–70507 (2000 & Supp. V 2005), the United States regularly prosecutes foreign drug traffickers caught on the high seas in foreign-flagged vessels with no demonstrable connection to America. See Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191 (2009). However, international law does not regard drug trafficking as universally cognizable, and the United States' treatment of it as such is idiosyncratic. See *id.*

⁶ See generally Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183 (2004) (discussing the relation between piracy and modern universal jurisdiction crimes).

⁷ See *infra* text accompanying notes 21–27.

The defendant was a young Chinese national working as a cook on the fishing trawler *Full Means No. 2* (p. 718). It was apparently his first time at sea.⁸ He claims that the officers beat and mistreated him. In response to one such incident, Shi stabbed the captain and first officer to death with kitchen knives (*id.*). The defendant went to the bridge and ordered the crew to sail to China; he wanted to go home. Two days after the murders, however, the crew overpowered him and locked him in a storage compartment. In a peculiar twist, the crew, including the two engineers, claimed that they did not know how to operate the radio, which prevented them from contacting the owners for instructions. Instead, they did what must have seemed the next best thing, and sailed for Hawaii (*id.*). A few days later, the *Full Means* was stopped by a Coast Guard cutter sixty miles from Hawaii. The crew explained what happened, and after having received a waiver of jurisdiction from the Seychelles, the ship was brought into harbor. A few weeks later Shi was indicted for violating 18 U.S.C. §2280, which implements the SUA Convention.

In a 2003 order, the district court upheld jurisdiction.⁹ Interestingly, it ruled that the SUA Convention gives no jurisdictional priority to the flag or home state over a nation in which the defendant is “later found.”¹⁰ Shi then filed an unusual motion for reconsideration, arguing that the SUA Convention, and thus the statute pursuant to it, did not apply to nonterrorist acts. In support of the motion, filed in 2005 and rejected by the district court as raising no new substantive arguments,¹¹ the defendant presented a memorandum and academic writings by Malvina Halberstam,¹² a law professor who, while an official at the U.S. Department of State, had “headed the U.S. delegation to meetings at which various drafts of the . . . Convention were considered.”¹³ She argued, in particular, that the Convention “was not intended” to cover anything other than terrorism.¹⁴ The district court had specifically acknowledged in its 2003 decision that the drafting of the SUA Convention by the International Maritime Organization was prompted by the Achille Lauro incident,¹⁵ in which Palestinian terrorists hijacked an Italian cruise liner and threw a wheelchair-bound American Jew overboard. However, the language of the statute, which (like the Convention) includes no reference to terrorists or terrorism, simply makes illegal any “act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship,” as well as the forcible seizure of covered vessels.¹⁶ The district court took the language of the Convention and statute to be both clear and decisive.¹⁷ In November 2005, the jury found Shi guilty; he received a 36-year sentence.

⁸ Appellant’s Brief at 45, 2007 WL 881125.

⁹ *United States v. Shi*, 396 F.Supp.2d 1132 (D. Haw. 2003) (order).

¹⁰ *Id.* at 1135–36. While this holding reflects a straightforward reading of the text, it is significant that the court did not find any implied jurisdictional hierarchy or complementarity requirements.

¹¹ *United States v. Shi*, 396 F.Supp.2d 1136, 1136 (D. Haw. 2005) (request for reconsideration).

¹² *Id.* at 1136.

¹³ Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AJIL 269, 269 n.* (1988).

¹⁴ 396 F.Supp.2d at 1137 (request for reconsideration).

¹⁵ 396 F.Supp.2d at 1134 (order).

¹⁶ Art. 3(1)(a)–(c). This lack of reference is not surprisingly since there is still no established international legal definition of the concept of terrorism.

¹⁷ 396 F.Supp.2d at 1134–35 (order); *see* 396 F.Supp.2d at 1138 (request for reconsideration). The Ninth Circuit affirmed this conclusion with no additional discussion (*see* p. 726).

Shi argued that as a constitutional and statutory matter, federal courts do not have jurisdiction of crimes that lack a nexus with the United States.¹⁸ Moreover, the Due Process Clause of the Fifth Amendment, he claimed, prohibits prosecuting defendants who have no nexus to the United States; at the very least, some “minimal contacts” are required. The court of appeals rejected both arguments. First, the crime was piracy, which Congress could punish under the “Define and Punish” power, and which, under international law, fell under universal jurisdiction. Congress could pass the legislation as a measure “necessary and proper” to implementing the SUA Convention (p. 721). Second, turning to the due process argument, the Court again found piracy law relevant. The universal-jurisdiction status of piracy means that all nations have a nexus with the offense, as the pirate is the enemy of all mankind. With regard to such crimes, no particular nexus is required because “the universal condemnation of the offender’s conduct puts him on notice that his acts will be prosecuted by any state where he is found” (p. 724). The Ninth Circuit thus affirmed the district court’s conviction of Shi on the relevant counts.

* * * *

Neither the district court nor the parties in *United States v. Shi* had mentioned piracy, and the Ninth Circuit Court of Appeals should have steered clear of those uncharted waters. Treating the crime as piracy was both incorrect and unnecessary to the decision. The court described Shi’s crime as piracy under international law because he committed “robbery, or forcible depredations upon the sea” (pp. 721–22). It took this definition from *United States v. Smith*, the Supreme Court’s classic pronouncement on the definition of piracy. Justice Story, in holding a statute punishing “piracy on the high seas” to not be unduly vague, canvassed a vast array of materials in multiple languages.¹⁹ Unfortunately, the Ninth Circuit did not mount a similar effort; indeed, it did not cite any more recent authority than *Smith*.

A 200-year-old case is weak authority for the content of modern customary international law. Today, the definition of piracy is codified in Article 101 of the UN Convention on the Law of the Sea²⁰ (LOS Convention):

Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

¹⁸ Appellant’s Brief, *supra* note 8, at 32–33. His argument here relied on cases decided in 1820 under the 1790 Crimes Act. The Supreme Court there held that the statute could not have been intended to apply U.S. jurisdiction to purely foreign crimes that were not universally cognizable. See generally Eugene Kontorovich, *The “Define and Punish” Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 149, 185–91 (arguing that the 1820 piracy cases show Congress lacks power under the Piracies and Felonies Clause to legislate against non-universally cognizable crimes on the high seas, but noting that the treaty power would often provide authorization for such legislation). Unlike that situation, the SUA Convention clearly gives the United States jurisdiction over crimes like Shi’s, and it seems likely that Congress intended to exercise this jurisdiction to the fullest extent.

¹⁹ 18 U.S. (5 Wheat.) 153, 161–62 & note h (1820).

²⁰ UN Convention on the Law of the Sea, Art. 11, *opened for signature* Dec. 10, 1982, 1833 UNTS 397, *reprinted in* 21 ILM 1261 (1982).

- (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.

Section (a)(1) provides what is known as the two-ship requirement: the attackers must have come from “another ship.”²¹ The requirement screens out cases of mutiny and other internal disturbances by the crew and passengers, which remain within the municipal jurisdiction of the flag state. If piracy extended to all acts of violence on the high seas, the theft of a personal article by one sailor from his bunk mate would be universally cognizable, which would invite external interference in the running and discipline of vessels without any compelling international purpose.²² A line needs to be drawn, and the involvement of the second ship is a good one.

Customary international law was not entirely settled on the above point prior to the LOS Convention,²³ so the International Law Commission made clear that it chose the requirement of “another ship” in order to exclude mutiny and other internal disturbances.²⁴ Ironically, the primary proponent of the broader “one ship” rule had been China.²⁵

While the intent of the International Law Commission and the state parties is reasonably clear, the actual text of Article 101 leaves considerable room for confusion. Paragraph 101(a)(i) requires action against “another” ship, but paragraph 101(a)(ii) merely requires action against “a ship.” Both the *travaux préparatoires* and the structure of the article itself suggest that the two paragraphs were intended to cover distinct situations: 101(a)(i) would apply to the high seas, and 101(a)(ii) to *terra nullius*. Indeed, 101(a)(ii) would otherwise largely be redundant of 101(a)(i) except to the extent that it allows for one-ship piracy—which would, in effect, simply negate 101(a)(i).

Those who dispute a strict two-ship requirement do not say it has no place; rather, they favor a looser version, reflected in prior customary law, in which mutiny *could be* piracy if it was “directed against the vessel” with the intention of stealing it—but not if it was merely designed to depose the captain or to achieve some other end.²⁶ Under this more nuanced definition, whether shipboard rebellions are treated as piracies depends on the relevant motives and circumstances. In jurisdictional matters, however, there are strong reasons to prefer bright-line

²¹ This requirement is often cited as an obstacle to prosecuting terrorists that come on board as crew or passengers, as was the case on the *Achille Lauro*; the SUA Convention has no such limitation.

²² See the comment by the Dutch government on Article 14, 1956 (2) Y.B. INT’L L. COMM’N 64 (“The community of States need not interfere with a change of authority on board the ship so long as the acts of the mutineers are not directed outwards.”).

²³ *Id.* (noting division of authority among treatise writers).

²⁴ See Commentary to the Articles Concerning the Law of the Sea, 1956 (2) Y.B. INT’L L. COMM’N 265, 282 (Art. 39, cmts. 1(vi)) (“Acts committed on board a ship by the crew or passengers and directed against the ship itself, or against persons or property on the ship, cannot be regarded as acts of piracy.”), 6 (“Even where the purpose of the mutineers is to seize the ship, their acts do not constitute acts of piracy.”).

²⁵ China commented as follows, 1956 (2) Y.B. INT’L L. COMM’N 43 (cmt 2):

In a broad sense, any member of the crew or any passenger on board a vessel who, with intent to plunder or rob, commits violence or employs threats against any other member of the crew or passenger and navigates or takes command of the vessel can also be regarded as having committed piracy. This interpretation is fully in accord with the views of writers and authorities on international law and is adopted in the Chinese Criminal Code, which provides for the punishment of both types of piracy.

²⁶ LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE §276 (1905) (emphasis added) (“The crew or passengers who, *for the purpose of converting a vessel and her goods to their own use*, force the master . . . to steer another course commit piracy as well as those who murder the master and steer the vessel themselves.”); *see also* Halberstam, *supra* note 13, at 284–85 (suggesting that the LOS Convention’s rapporteur intended to reflect Oppenheim’s position).

rules that do not require fact-intensive determinations. Attempting to divide mutinies into universal and non-universal categories would lead to confusion and undermine the robustness of a flag state's authority. Moreover, potential prosecution under the SUA Convention reduces the pressure to shoehorn shipboard crimes into the LOS Convention.

A central purpose of universal jurisdiction over piracy is to avoid difficulties in establishing and proving jurisdiction. Given the intertwined nationalities in commercial shipping, with its multinational crews and cargoes, piracy serves as a kind of shortcut. There seems to be no policy reason for extending this jurisdiction to acts within a single ship, which can be fully dealt with by the flag state. When the U.S. Coast Guard boarded the *Full Means*, it was a regular foreign fishing vessel under control of its officers and crew, with a criminal on board. Even under the looser interpretation of the two-ship requirement, this situation was not one of universally cognizable piracy: Shi was not trying to steal the ship. Indeed, even in the nineteenth century, Richard Dana, who thought that universal jurisdiction could apply to some cases of mutiny, described a case exactly like *Shi* as one to which universal jurisdiction would not extend:

If an act of robbery or murder were committed upon one of the passengers or crew by another in a vessel at sea, . . . and the offender were secured and confined . . . , to be taken home for trial,—this state of things would not authorize seizure and trial by any nation . . . within whose limits the offender might afterwards be found.²⁷

The Court's mistake in assimilating mutiny to piracy did not affect its subject matter jurisdiction, as the treaty power clearly authorizes section 2280. The mistake does, however, unsettle the conclusion that due process requires no nexus with the United States. While due process may not apply to universal offenses, the SUA Convention does not create universal crimes (p. 723 n.5). Indeed, the Ninth Circuit in *Shi* disagreed with the Second Circuit in *United States v. Yousef*,²⁸ which had held in an air piracy case that due process requires a nexus even for crimes based on broad treaties like the Montreal Convention²⁹—an airborne analog of the SUA Convention (p. 723). The purported universal nature of maritime piracy distinguishes it from *Yousef*; the Ninth Circuit concluded.³⁰ While it could easily be argued that a jurisdiction-delegating treaty like the SUA Convention satisfies the same notice and fairness concerns as universality, the Court did not explore this issue.

One can only speculate about what inspired the decision to prosecute Shi. In the absence of an extradition treaty with China, the U.S. government was apparently not interested in sending the defendant to his home country,³¹ and the Seychelles apparently were not interested in prosecuting Shi. Once the United States decided not to extradite, it faced the mandatory "extradite or punish" provision of the SUA Convention (Article 6(4)). Such provisions are common in treaties establishing broad or quasi-universal jurisdiction. *Shi* may be an important example of an "extradite or punish provision" in action. Even so, in view of there being no subsequent U.S. prosecutions of this type in the years since Shi's arrest, it is hard to see *Shi* as a sign

²⁷ HENRY WHEATON, WHEATON'S ELEMENTS OF INTERNATIONAL LAW 194 n.83 (Richard Henry Dana ed., 8th ed. 1866).

²⁸ 327 F.3d 56 (2d Cir. 2003) (per curiam).

²⁹ Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 974 UNTS 177, 24 UST 564, reprinted in 10 ILM 1151 (1971).

³⁰ Compare the Ninth Circuit's analysis (p. 724) with *Yousef* at 111–12.

³¹ 396 F.Supp. at 1135 (order).

of increased willingness to exercise universal jurisdiction. In particular, the United States' unwillingness to exercise universal jurisdiction over genuine high seas pirates suggests *Shi* may have been a one-off occurrence in the field of universal jurisdiction over criminal violence on the high seas.³²

A more pragmatic explanation of the unusual decision to bring the case is that it reflects an interest in “dusting off”—and giving a trial run to—legal theories that could be used against international terrorists. *Shi* had been arrested just six months after the 9/11 attacks, which had led directly to the drafting of two additional protocols and proposed amendments to the SUA Convention.³³ The prosecution made no mention of piracy, relying solely on the Convention. *Shi* can be seen against the backdrop of efforts, beginning in November 2001, to revive the SUA Convention as a tool in the legal arsenal against terrorists. However, while the Ninth Circuit was right that the Convention is not limited to terrorism, its continued nonuse in that context raises questions about its importance. While the Convention may cover many offenses, it is in practice not applied to them.

Coincidentally, the ultimate conclusion of the case in late 2008 (with the Supreme Court's denial of certiorari) came during an unprecedented outbreak of international piracy off the Horn of Africa.³⁴ The SUA Convention has increasingly been discussed as a possible basis of jurisdiction over Somali pirates because of the failure of international antipiracy efforts to result in prosecutions by the patrolling nations,³⁵ largely because of concerns about the difficulty of universal-jurisdiction prosecution in domestic courts. The European Union, Britain, and the United States have been experimenting with the transfer of captured pirates to Kenya for trial.³⁶ Such transfers might be illegal under the LOS Convention, however, which allows only the capturing nation to prosecute pirates;³⁷ by contrast, under the SUA Convention any signatory state with personal jurisdiction over the defendant may prosecute.³⁸

Shi is not much of a test case for the use of the SUA Convention against either international piracy or terrorism. If anything, it illustrates the difficulties of any kind of international legal response to piracy—and especially the difficulties of prosecution by a nation with significant criminal procedural safeguards and high burdens of proof. There are many differences between *Shi* and the prosecution of Somali pirates. *Shi* does not involve an organized pirate group, but an action by one erratic individual. Moreover, he was apprehended and turned in by the crew

³² See Eugene Kontorovich, *Why the Piracy Police Isn't Working*, OPINIO JURIS (Feb. 9, 2009), available at <http://opiniojuris.org/2009/02/09/why-the-piracy-police-isnt-working/>.

³³ These changes have not yet entered into force. See Helmut Tuerk, *Combating Terrorism at Sea—The Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 15 U. MIAMI INT'L & COMP. L. REV. 337, 354–66 (2008). It is peculiar that international diplomats expended considerable efforts in marginally beefing up a convention that has apparently never been used to prosecute any terrorists. There are more additional protocols to the SUA than there have been cases under it.

³⁴ See Eugene Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, ASIL INSIGHTS (Feb. 6, 2009), at <http://www.asil.org/insights090206.cfm>.

³⁵ See SC Res. 1846 (Dec. 2, 2008).

³⁶ See Kontorovich, *supra* note 34; Sarah Childress, *Pact with Kenya on Piracy Trials Gets First Test*, WALL ST. J. (Feb. 17, 2009), available at <http://online.wsj.com/article/SB123482019865794481.html#printMode>.

³⁷ See Commentary to the Articles Concerning the Law of the Sea, *supra* note 24, at 283 (commentary on Article 43; emphasis added) (“This article gives any State the right to seize pirate ships . . . and to have them adjudicated upon by its courts. *This right cannot be exercised at a place under the jurisdiction of another State.*”)

³⁸ See SUA Convention, *supra* note 2, Arts. 6(1) (allowing any state party to prosecute defendants found in their territory), 8 (allowing suspects to be turned over to any state party by master of vessel), 11 (allowing for extradition of suspects to any flag state).

itself, easing various enforcement and evidentiary problems. The ship was promptly searched by the U.S. Federal Bureau of Investigation—with the consequence that the initial collection of evidence collection was performed by trained law enforcement personnel rather than military forces. Shi was informed of his consular rights. The prosecution “required the video-taped depositions of 30 material witnesses, each one requiring counsel and Mandarin translators.”³⁹

All of these measures might be impossible or impractical in the Gulf of Aden or other international piracy hotspots. Certainly, detaining the seized vessel and its crew would defeat the very purpose of piracy patrolling—allowing for the uninterrupted passage of international commerce. Even finding translators could be impossible.⁴⁰ Moreover, the real pirates will often insist that they are innocent fishermen,⁴¹ unlike the apparently emotionally disturbed Shi, who admitted to the substance of his offense.

The prosecution of Shi, who posed no danger to international commerce, contrasts sharply with the U.S. practice of not prosecuting Somali pirates for their attacks on foreign ships—which threaten one of the world’s densest maritime channels. This contrast suggests that various practical and legal difficulties have prevented the United States and other countries from using universal jurisdiction against serious international threats. At the same time, *Shi* raises the question of why nations that *have* exercised universal jurisdiction over difficult and politically sensitive human rights cases have not used it to punish Somali piracy.

EUGENE KONTOROVICH

Northwestern University Law School

³⁹ Brief of Plaintiff-Appellee United States of America at 3, 2007 WL 1511823 (the entire crew had been arrested on material witness warrants).

⁴⁰ Travis Kavulla, *Prosecuting Captured Somali Pirates Poses Challenges* (Nov. 26, 2008), at <http://www.foxnews.com/story/0,2933,457827,00.html>.

⁴¹ Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-piracy Operations*, 40 VAND. J. TRANSNAT’L L. 1, 36, 48 (2007) (describing first trial in Kenya of Somali pirates captured by United States).