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Can the Seychelles criminalize possession of piratical equipment, and apply it to foreign nationals found outside of the Seychelles under either universal or protective jurisdiction?

Vijyalakshmi Patel

CASE WESTERN RESERVE
UNIVERSITY
SCHOOL OF LAW

MEMORANDUM FOR THE GOVERNMENT OF THE REPUBLIC OF SEYCHELLES

ISSUE: CAN THE SEYCHELLES CRIMINALIZE POSSESSION OF PIRATICAL EQUIPMENT, AND APPLY IT TO FOREIGN NATIONALS FOUND OUTSIDE OF THE SEYCHELLES UNDER EITHER UNIVERSAL OR PROTECTIVE JURISDICTION?

Prepared by Vijyalakshmi Patel
J.D. Candidate, May 2013
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TABLE OF CONTENTS

BIBLIOGRAPHY OF SOURCES

Statutes and Rules

1. § 5.01. Criminal Attempt, Model Penal Code § 5.01.

2. 12A C.J.S. Burglary § 130.

3. 13 Am. Jur. 2d Burglary § 68.

4. *Additional Article to the Treaty for the Suppression of the African Slave Trade; February 17, 1863*, Lillian Goldman Law Library: The Avalon Project, (last visited Feb, 17, 2012), http://avalon.law.yale.edu/19th_century/br1863.asp.

5. Being Found on Board Piratical Vessel and Unable to Prove Non-Complicity, Cap. 200, § 22 (H.K.) http://www.hklii.hk/eng/hk/legis/ord/200/s22.html (last visited March 15, 2012).

6. *British-American Diplomacy: Treaty between United States and Great Britain for the Suppression of the Slave Trade; April 7,1862*, Lillian Goldman Law Library: The Avalon Project, (last visited Feb, 17, 2012), http://avalon.law.yale.edu/19th_century/br1862.asp.

Cases

7. *Duncan v. State*, 409 N.E.2d 597 (1980).

8. *Hagy v. Com.*, 543 S.E.2d 614 (2001).

9. *In re Piracy Jure Gentium*, [1934] A.C. 586 (P.C.) 587 (appeal taken from H.K.) http://www.uniset.ca/other/cs5/1934AC586.html (last visited Feb. 18, 2012).

10. *People v. Ackerman*, 274 N.E.2d 125 (1971).

11. *Republic v. Abdi Ali et al.*, Judgment, Crim. Side No. 14, 6-7 (2010).

12. *Republic v. Abdukar Ahmed & Five Others*, Judgment, Crim. Side No. 21, 17 (2011).

13. *Republic v. Mohamed Ahmed Ise & Four Others*, Judgment, Crim. Side No. 75 (2010).

14. *Republic v. Mohamed Aweys Sayid et al.*, Judgment, Crim. Side No. 19, 1 (2010).

15. *State v. Briner*, 255 N.W.2d 422 (1977).

16. *State v. Conaway*, 319 N.W.2d 35, 41 (Minn. 1982).

17. *State v. Earp*, 571 A.2d 1227 (Md. 1990).

18. *State v. Flaherty*, 400 A.2d 363 (Me. 1979).

19. *The Kate*, 69 U.S. 350 (1864).

20. *The Republic v. Houssein Mohammed Osman & 10 Others*, Judgment, Sup. Ct. of Seychelles 14 (2011).

21. *The Sarah*, 69 U.S. 366 (1864).

22. *The Weathergage*, 69 U.S. 375 (1864).

23. *U.S. v. Furlong*, 18 U.S. 184, 185-86 (1820).

24. *U.S. v. Gonzalez*, 776 F.2d 931 (11th Cir. 1985).

25. *U.S. v. Romero-Galue*, 757 F.2d 1147 (11th Cir. 1985).

26. *U.S. v. Smith*, 18 U.S. 153, 154 (1820).

U.N. Documents

27. S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008).

28. S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008).

29. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

Law Reviews Articles

30. Eugene Kontorovich, *"A Guantanamo on the Sea": The Difficulty of Prosecuting Pirates and Terrorists*, 98 Cal. L. Rev. 243, 253 (2010).

31. Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 Minn. L. Rev. 1191, 1231 (2009).

32. Eugene Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction*, 103 Nw. U. L. Rev. 149 (2009).

33. Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 Harv. Int'l L.J. 183 (2004).

34. Ryan P. Kelley, *UCLOS, but No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy*, 95 Minn. L. Rev. 2285, 2290 (2011)

Books

35. Barry E. Carter et al., *International Law* (Vicki Been at al. eds., 5th ed. 2007).

36. Joshua Dressler, *Understanding Criminal Law* (4th ed. 2006).

37. Sanford H. Kadish et al., *Criminal Law and its Processes: Cases and Materials* (8th ed. 2007).

Newspaper Articles and Organization Websites

38. Bruno Waterfield, *Somali Pirates Jailed by Dutch Court for Seychelles Attack*, The Telegraph (Aug. 13, 2011, 8:00 AM), http://www.telegraph.co.uk/news/worldnews/piracy/8698359/Somali-pirates-jailed-by-Dutch-court-for-Seychelles-attack.html.

39. *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as of 03 June 2011*, Ocean and Law of the Sea: Division for Ocean Affairs and the Law of the Sea, http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm (last updated June 3, 2011).

40. C.J. Chivers, *Somali Suspects in Hijacking of Iranian Ship Face Piracy Trial in Seychelles*, The New York Times (March 6, 2012), http://www.nytimes.com/2012/03/07/world/africa/somalis-on-iranian-ship-face-piracy-charges-in-seychelles.html.

41. Daniel Howden, *How the Seychelles Became a Pirates' Paradise*, The Independent, (Feb, 8, 2010), http://www.independent.co.uk/news/world/africa/how-the-seychelles-became-a-pirates-paradise-1892279.html.

42. David Eltis & Paul F. Lachance, *Estimates of the Size and Direction of Transatlantic Slave Trade*, http://www.slavevoyages.org/downloads/estimates-method.pdf (last visited Feb 21, 2012).

43. Eugene Kontrorovich, *Equipment Articles: An International Evidence Rule for Piracy*, http://counterpiracy.ae/briefing_papers/Kontorovich%20Equipment%20Articles%20-%20An%20International%20Evidence%20Rule%20for%20Piracy.pdf (last visited Feb. 21, 2012).

44. *Eugene Kontrovich*, Northwestern School of Law, http://www.law.northwestern.edu/faculty/profiles/EugeneKontorovich/ (last visited March 30, 2012).

45. ICC Commercial Crime Services, *Piracy & Armed Robbery Prone Areas and Warnings*, International Chamber of Commerce, http://www.icc-ccs.org/piracy-reporting-centre/prone-areas-and-warnings (last visited March 13, 2012).

46. ICC Commercial Crime Services, *Piracy News & Figures*, International Chamber of Commerce (March 19, 2012), http://www.icc-ccs.org/piracy-reporting-centre/piracynewsafigures/427-piracynewsafigures.

47. James Kraska, *Maritime Security Primer: Global Maritime Security Cooperation in an Age of Terrorism and Transnational Threats at Sea*, 17 (Aug. 4, 2008), http://www.usnwc.edu/getattachment/c7d947ac-5cff-4ecb-99ec-5c25631301c6/Maritime-Security-Primer.

48. *NATO Seizes 'Pirate Mother Ship' off Somalia*, BBC News (Feb. 13, 2011), http://www.bbc.co.uk/news/world-africa-12442330.

49. Oliver Hawkins, *What to do With a Captured Pirate*, BBC News (March, 10, 2009), http://news.bbc.co.uk/2/hi/7932205.stm.

50. Paul Reynolds, *Rules Frustrate Anti-Piracy Efforts*, BBC News (Dec. 9, 2008), http://news.bbc.co.uk/2/hi/africa/7735144.stm.

51. Refworld: The Leader in Refugee Decision Support , *Crimes Ordinance, Cap 200*, United Nations High Commissioner for Refugees, http://www.unhcr.org/refworld/country,,NATLEGBOD,,HKG,,3ae6b53f0,0.html (last visited March 15, 2012).

52. The Cost of Piracy, *The Economic Cost of Piracy*, Save Our Seafarers, http://www.saveourseafarers.com/the-cost-of-piracy.html (last visited March 6, 2012).

I. INTRODUCTION

A. Scope

This memorandum discusses the legality of creating a law that makes the possession of piracy equipment a criminal offense and applying it to non-nationals on non-territorial waters. Although the act of piracy is a universal crime, the possession of piratical equipment is not traditionally considered part of the crime of piracy subject to universal jurisdiction. In addition, this memorandum discusses the application of protective jurisdiction to the crime of possessing piratical equipment.

B. Summary of Conclusions

i. The Seychelles can create a law that makes the possession of piratical equipment a criminal offense.

The Republic of Seychelles can pass a law that makes the possession of piracy equipment a crime in itself. The Seychelles should use other possession of equipment crimes, including the Hong Kong criminal offense for the possession of piracy equipment, as a guide on how to create the law.

ii. The Seychelles may have difficulty in exercising universal jurisdiction over the crime of possession of piratical equipment to non-nationals in non-territorial waters.

Universal jurisdiction in piracy is historically permitted. Moreover, there are many examples in recent cases that apply universal jurisdiction over acts of piracy. However, pirates can raise a legitimate due process argument for lack of notice because states directly connected to the piracy incident probably do not make the possession of piracy equipment a crime. This would conflict if the Seychelles wants to make the possession of piracy equipment a crime because it does not have any connection to the incident except acting as the prosecuting state.

iii. The Seychelles can apply protective jurisdiction to non-nationals in non-territorial waters who commit the offense of possession of piratical equipment.

The United States has applied protective jurisdiction to piracy cases in the past. Moreover, the United States continues to apply protective jurisdiction to drug smuggling cases. The Seychelles can argue that piracy adversely affects its national security, integrity, and vital economic interests, and that criminalizing the possession of piracy equipment minimizes these affects.

II. BACKGROUND

A. Piracy in the West Indian Ocean

In recent times, Somalia has caused the largest proportion of piracy attacks in the world.[1] Currently, 13 vessels and 197 hostages are held by Somali pirates.[2] Moreover, 7 out of 9 current hijackings were caused by Somali pirates.[3] Somali pirates engage in piracy because the Somali government is unable to control the "poor fishermen, farmers, teenagers, and clan leaders" who have become pirates.[4]

Pirates directly affect the national security of the West Indian Ocean by attacking and taking hostages. However, the indirect consequences are large and felt globally. Piracy costs the global economy about $8-12 billion a year.[5] Piracy adversely affects trade and tourism in the

[1] ICC Commercial Crime Services, *Piracy News & Figures*, International Chamber of Commerce (March 19, 2012), http://www.icc-ccs.org/piracy-reporting-centre/piracynewsafigures/427-piracynewsafigures. [Reproduced in accompanying flash drive at folder # 46]

[2] *Id*.

[3] *Id*.

[4] Ryan P. Kelley, *UCLOS, but No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy*, 95 Minn. L. Rev. 2285, 2290 (2011). [Reproduced in accompanying flash drive at folder # 34]

regional countries and increases the price of insurance and goods.[6] As a response to pirate attacks, trade ships have begun carrying armed personnel and rerouting their course to avoid pirates. Additionally, warships from the United States (U.S.), France, India, United Kingdom (U.K.), Germany, and many other countries now patrol the West Indian Ocean.[7]

Combatting piracy has been a costly venture for the Seychelles. Last year, piracy cost the country $9 million out of a $200 million budget.[8] Moreover, the Seychellois economy is highly dependent on the fishing and tourism industries and pirate activity has adversely impacted the country. For example, canning tuna is the Seychelles largest industry. One particular plant provided one-fourth of the European Union's consumption of canned tuna and employed almost 4% of the island population. However, in 2009 the profits from the Seychellois tuna fell by 30% and led to unemployment. Moreover, a ship containing tuna from the Seychelles was held for a multimillion dollar ransom. This incident caused other ships carrying tuna from the Seychelles to maintain armed crew on board or to not port in the Seychelles at all.[9]

Somali pirates are known to operate "mother vessels" far from the coast to launch attacks. As of February 2011, the International Association of Independent Tankers estimated that Somali pirates were operating at least 20 mother vessels in the Gulf of Aden and Indian

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[5] The Cost of Piracy, *The Economic Cost of Piracy*, Save Our Seafarers, http://www.saveourseafarers.com/the-cost-of-piracy.html (last visited March 6, 2012). [Reproduced in accompanying flash drive at folder # 52]

[6] *Id*.

[7] Paul Reynolds, *Rules Frustrate Anti-Piracy Efforts*, BBC News (Dec. 9, 2008), http://news.bbc.co.uk/2/hi/africa/7735144.stm. [Reproduced in accompanying flash drive at folder # 50]

[8] Daniel Howden, *How the Seychelles Became a Pirates' Paradise*, The Independent, (Feb, 8, 2010), http://www.independent.co.uk/news/world/africa/how-the-seychelles-became-a-pirates-paradise-1892279.html. [Reproduced in accompanying flash drive at folder # 41]

[9] *Id*.

Ocean region.[10] The mother vessels allow the pirates to navigate far from the Somali coast and launch small vessels to commit acts of piracy on the high seas and in the territorial waters of other states.[11] This has allowed Somali pirates to geographically expand their operation. In 2005, the pirates typically operated within 165 nautical miles from the coast of Somalia. Now, they operate within 1,300 nautical miles from the coast of Somalia.[12] The attacks now reach Yemen, Oman, Kenya, Tanzania, Mozambique, Madagascar, the Seychelles, the Maldives, Pakistan, India, and United Arab Emirates.[13]

The pirates use hijacked vessels, such as fishing vessels and merchant vessels, to perform piracy attacks.[14] They are also known to use Kalashnikov rifles, AK47s, rocket propelled grenades (RPG), and other equipment against vessels.[15] Moreover, pirates often throw their weapons overboard so that when apprehended, they are not found with them.[16] When apprehended, pirates often argue that they were fishing and seeking assistance from the victim

[10] *NATO Seizes 'Pirate Mother Ship' off Somalia*, BBC News (Feb. 13, 2011), http://www.bbc.co.uk/news/world-africa-12442330. [Reproduced in accompanying flash drive at folder # 48]

[11] ICC Commercial Crime Services, *Piracy & Armed Robbery Prone Areas and Warnings*, International Chamber of Commerce, http://www.icc-ccs.org/piracy-reporting-centre/prone-areas-and-warnings (last visited March 13, 2012). [Reproduced in accompanying flash drive at folder # 45]

[12] *NATO Seizes 'Pirate Mother Ship' off Somalia*, BBC News (Feb. 13, 2011), http://www.bbc.co.uk/news/world-africa-12442330. [Reproduced in accompanying flash drive at folder # 48]

[13] ICC Commercial Crime Services, *Piracy & Armed Robbery Prone Areas and Warnings*, International Chamber of Commerce, http://www.icc-ccs.org/piracy-reporting-centre/prone-areas-and-warnings (last visited March 13, 2012). [Reproduced in accompanying flash drive at folder # 45]

[14] *Republic v. Abdi Ali et al.,* Judgment, Crim. Side No. 14, 6-7 (2010). [Reproduced in accompanying flash drive at folder # 11]

[15] *Id.*

[16] *The Republic v. Houssein Mohammed Osman & 10 Others*, Judgment, Sup. Ct. of Seychelles 14 (2011). [Reproduced in accompanying flash drive at folder # 20]

vessel. However, the pirates often lack basic fishing equipment such as lines, hooks, ice boxes, or other fishing equipment, but are often equipped with weapons.[17]

It is difficult to prosecute pirates if they have not attacked another vessel because many state laws require that the pirates direct an attack at the forum state before the forum state can prosecute.[18] For example, the Danish Navy detained ten armed pirates after they allegedly attacked merchant vessels. However, Denmark could not prosecute the pirates because Denmark law requires that in order to prosecute, the pirates must have attacked Danish citizens or Danish vessels. Therefore, Denmark released the pirates. It is not uncommon for states to detain suspected pirates, confiscate their weapons, and then release them because the states do not know whether they can prosecute suspected pirates absent proof of attack.[19]

B. International Law on Piracy in the Somali Region

The United Nations Convention on the Law of the Seas (UNCLOS) defines piracy as:

> "(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)."[20]

UNCLOS has been ratified by 162 countries, including the Seychelles, the U.K., Kenya, and

[17] *Republic v. Abdukar Ahmed & Five Others,* Judgment, Crim. Side No. 21, 17 (2011). [Reproduced in accompanying flash drive at folder # 12]

[18] Oliver Hawkins, *What to do With a Captured Pirate*, BBC News (March, 10, 2009), http://news.bbc.co.uk/2/hi/7932205.stm. [Reproduced in accompanying flash drive at folder # 49]

[19] *Id*.

[20] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, art. 101. [Reproduced in accompanying flash drive at folder # 29]

Somalia.[21] The UNCLOS declares that states have a duty to cooperate in the repression of piracy on the high seas or at any place that is not in the jurisdiction of any state.[22] Moreover, "the drafters' commentary" to UNCLOS emphasizes that if a state has the opportunity to combat piracy but does not do so, that state will be violating their duty as described by international law.[23]

International law has sought to prevent and suppress piracy through other international instruments as well. For example, the United Nations Security Council (UNSC) Resolution 1816, dated June 2, 2008, applies to piracy in the high seas off the coast of Somalia and in Somali territorial waters.[24] It encourages states that have an interest in the area to "deter acts of piracy" by increasing their efforts and coordinating with other states and organizations, especially with Somalia.[25] Although the resolution did not establish customary international law, it became valid when the Transitional Federal Government (TFG) of Somalia approved it.[26] Moreover, because it is Chapter VII UNSC Resolution, it is legally binding on all states.[27]

UNSC Resolution 1846, dated December 2, 2008, mentions the Somali government's

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[21] *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as of 03 June 2011*, Ocean and Law of the Sea: Division for Ocean Affairs and the Law of the Sea, http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm (last updated June 3, 2011). [Reproduced in accompanying flash drive at folder # 39]

[22] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, art. 100. [Reproduced in accompanying flash drive at folder # 29]

[23] Eugene Kontorovich, *"A Guantanamo on the Sea": The Difficulty of Prosecuting Pirates and Terrorists*, 98 Cal. L. Rev. 243, 253 (2010). [Reproduced in accompanying flash drive at folder # 30]

[24] S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008). [Reproduced in accompanying flash drive at folder # 27]

[25] S.C. Res. 1816, ¶ 2, U.N. Doc. S/RES/1816 (June 2, 2008). [Reproduced in accompanying flash drive at folder # 27]

[26] S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008). [Reproduced in accompanying flash drive at folder # 27]

[27] James Kraska, *Maritime Security Primer: Global Maritime Security Cooperation in an Age of Terrorism and Transnational Threats at Sea*, 17 (Aug. 4, 2008), http://www.usnwc.edu/getattachment/c7d947ac-5cff-4ecb-99ec-5c25631301c6/Maritime-Security-Primer. [Reproduced in accompanying flash drive at folder # 47]

inability to control piracy in its territory and off its coast.[28] Moreover it acknowledges the letter from the TFG, dated September 1, 2008, which thanks the Security Council for its assistance and its interest in working with other states and organizations to suppress piracy. Additionally, the TFG asked for the UNSC Resolution 1816 to be renewed for twelve months. The UNSC Resolution 1846 calls for all states to "seiz[e] and dispos[e] of boats, vessels, arms and other related equipment used" in piracy and "for which there is reasonable ground for suspecting such use."[29] Moreover, the Resolution encourages states to uphold duties of "creat[ing] criminal offences, establish[ing] jurisdiction, and accept[ing] delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation."[30] Because UNSC Resolution 1846 is classified as Chapter VII, it is also legally binding on all states. [31]

III. CRIMINALIZING THE POSSESSION OF PIRATE EQUIPMENT

A. Crime of Possession

A crime of possession is an inchoate or incomplete offense.[32] The purpose of the crime of possession is to allow the police to arrest individuals whom "they suspect will later commit a

[28] S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008). [Reproduced in accompanying flash drive at folder # 28]

[29] S.C. Res. 1846, ¶ 9, U.N. Doc. S/RES/1846 (Dec. 2, 2008). [Reproduced in accompanying flash drive at folder # 28]

[30] S.C. Res. 1846, ¶ 15, U.N. Doc. S/RES/1846 (Dec. 2, 2008). [Reproduced in accompanying flash drive at folder # 28]

[31] James Kraska, *Maritime Security Primer: Global Maritime Security Cooperation in an Age of Terrorism and Transnational Threats at Sea*, 17 (Aug. 4, 2008), http://www.usnwc.edu/getattachment/c7d947ac-5cff-4ecb-99ec-5c25631301c6/Maritime-Security-Primer. [Reproduced in accompanying flash drive at folder # 47]

[32] Joshua Dressler, *Understanding Criminal Law*, 104 (4th ed. 2006). [Reproduced in accompanying flash drive at folder # 36]

socially injurious act."[33]

Courts still require proof of a voluntary act or an omission.[34] A voluntary act is where the "defendant knowingly procured or received the property possessed."[35] An omission is where the defendant failed to remove the object from her possession "after she became aware of its presence."[36] Thus, a person can be liable for possession if there is a "statutory duty to dispossess herself of the property" but she failed to do so.[37] The defendant is not guilty "if the [possession] was 'planted' on her, and she did not have enough time to [remove it] after she learned of its presence."[38]

The possession of an instrument may be innocent, but if it is attached to a criminal intent, the possession of the instrument may become criminal.[39] Therefore, the act of possession is

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[33] Joshua Dressler, *Understanding Criminal Law*, 104 (4th ed. 2006). [Reproduced in accompanying flash drive at folder # 36]

[34] *Id*.

[35] Joshua Dressler, *Understanding Criminal Law*, 104 (4th ed. 2006). [Reproduced in accompanying flash drive at folder # 36] See *People v. Ackerman*. Appellate Court of Illinois held that mere possession of narcotics did not meet the crime of possession. State failed to establish through "acts, declarations, or conduct" to support any inference that the defendant knew the package contained narcotics. Merely collecting a package in the normal course of mail delivery addressed to the defendant did not support a finding of suspicious or abnormal behavior. *People v. Ackerman*, 274 N.E.2d 125, 127 (1971). [Reproduced in accompanying flash drive at folder # 10]

[36] Joshua Dressler, *Understanding Criminal Law*, 104 (4th ed. 2006). [Reproduced in accompanying flash drive at folder # 36] See *State v. Flaherty*. Defendant was convicted with the charge of possession of a firearm by a felon. Defendant maintained that when he became aware of the firearm in his vehicle, he intended to return it. However, after driving a few blocks with the knowledge of the firearm in his vehicle, the police stopped and searched his car. In order to be found guilty of possession, the state had to prove that the defendant was in control of the firearm for a "sufficient period to have been able to terminate his possession." *Id*. at 366. The Supreme Court of Maine stated that "sufficient" "require[d] an evaluation of the surrounding circumstances in order to determine whether the Defendant acted appropriately". *Id.* at 366. The Court concluded that there was no minimum time to discard the firearm, instead, it is the difference between illegal possession and "temporary control incidental to the lawful purpose of terminating possession." Id. at 366. If the possession was in the latter category, then the Defendant is innocent. The Court held that the defendant was in the latter category. *State v. Flaherty*, 400 A.2d 363, 365-366 (Me. 1979). [Reproduced in accompanying flash drive at folder # 18]

[37] Joshua Dressler, *Understanding Criminal Law*, 104 (4th ed. 2006). [Reproduced in accompanying flash drive at folder # 36]

[38] *Id*.

criminal if the purpose for the possession is criminal.[40]

Eugene Kontrovich, Professor of Law at Northwestern University School of Law[41], introduces the idea of "equipment articles." Kontrovich defines equipment articles as a "judicial presumption of guilt" of piracy if "the crew of civilian vessels [possess] certain specified equipment within a defined area of the high seas plagued by pirate attacks." [42]

B. Application of the Crime of Possession

Criminalizing the possession of equipment when criminal intent is attached to it is seen in historical and current statutes and case law. Moreover, the application of this offense is not restricted to a particular criminal offense. The following case studies show how the crime of possession is applied in a variety of situations.

i. Slavery Equipment

A past example of applying the concept of criminal possession of equipment occurred when the U.S. and the United Kingdom U.K. were trying to end the slave trade. Apprehending and arresting merchant vessels for participating in the slave trade after slavery was outlawed was difficult because the vessels had equipment for slavery but no slaves on board to prove that the ship was involved in the slave trade. [43] Therefore, the U.S. and the U.K. entered into the "Treaty

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[39] Sanford H. Kadish et al., *Criminal Law and its Processes: Cases and Materials*, 562 (8th ed. 2007). [Reproduced in accompanying flash drive at folder # 37]

[40] *Id*.

[41] *Eugene Kontrovich*, Northwestern School of Law, http://www.law.northwestern.edu/faculty/profiles/EugeneKontorovich/ (last visited March 30, 2012). [Reproduced in accompanying flash drive at folder # 44]

[42] Eugene Kontrorovich, *Equipment Articles: An International Evidence Rule for Piracy*, 1, http://counterpiracy.ae/briefing_papers/Kontorovich%20Equipment%20Articles%20-%20An%20International%20Evidence%20Rule%20for%20Piracy.pdf (last visited Feb. 21, 2012). [Reproduced in accompanying flash drive at folder # 43]

[43] *Id*.

between the United States and Great Britain for the Suppression of the Slave Trade" (U.S.-U.K. Suppression Treaty), of April 7, 1862.[44]

The U.S.-U.K. Suppression Treaty created a list of requirements including who could search and seize a suspected slave ship, what proof was needed before the ship and its crew could be apprehended, and how to prosecute the offenders.[45] Like in piracy apprehension, only war ships could search and seize suspected slave ships.[46] Only merchant vessels belonging to the U.S. or the U.K. could be searched and seized.[47] Search and seizure could only occur in certain areas: within two hundred miles from the African coast, within thirty leagues from the Cuban coast, within thirty leagues from the coast of Madagascar, within thirty leagues from the Puerto Rican coast, and within thirty leagues from the San Domingo coast.[48] The treaty created ten categories of equipment articles including tanks, shackles, rice, plant, mats, boiler, etc. with general size and quantity indications.[49] For example, one category states "one or more boiler, or other cooking apparatus, of the ordinary size" or " a boiler, or another cooking apparatus, of an unusual size, and larger, or capable of being made larger" than required for the crew of a merchant vessel.[50] Another category simply states "schackles, bolts, or handcuffs."[51] A third

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[44] *British-American Diplomacy: Treaty between United States and Great Britain for the Suppression of the Slave Trade; April 7,1862*, Lillian Goldman Law Library: The Avalon Project, (last visited Feb, 17, 2012), http://avalon.law.yale.edu/19th_century/br1862.asp. [Reproduced in accompanying flash drive at folder # 6]

[45] *British-American Diplomacy: Treaty between United States and Great Britain for the Suppression of the Slave Trade; April 7,1862.* supra note 44. [Reproduced in accompanying flash drive at folder # 6]

[46] *British-American Diplomacy: Treaty between United States and Great Britain for the Suppression of the Slave Trade; April 7,1862,* supra note 44, at art. 1. [Reproduced in accompanying flash drive at folder # 6]

[47] *Id*.

[48] *Additional Article to the Treaty for the Suppression of the African Slave Trade; February 17, 1863*, Lillian Goldman Law Library: The Avalon Project, (last visited Feb, 17, 2012), http://avalon.law.yale.edu/19th_century/br1863.asp. [Reproduced in accompanying flash drive at folder # 4]

[49] *British-American Diplomacy: Treaty between United States and Great Britain for the Suppression of the Slave Trade; April 7,1862,* supra note 44, at art. 6. [Reproduced in accompanying flash drive at folder # 6]

category states "[a] larger quantity of water in casks or tanks" than is required for the crew of a merchant vessel.[52]

The treaty had a low threshold requirement to find guilt. If any category of article was found on board of the vessel or was proven to have been on board during the voyage, then it was prima facie evidence that the vessel was used for the slave trade.[53] The war ship could then detain and seize the vessel without compensation.[54] The vessel had a more difficult standard to prove its innocence. The vessel had to prove by "clear and incontrovertible" evidence to a mixed court of justice that at the time of detention, the vessel was acting legally and that the articles were "indispensable" for the lawful voyage.[55] If the vessel was found guilty of engaging in the slave trade, then it would be punished according to the laws of the country that the vessel belonged to.[56] The U.K. entered into similar treaties with Spain and Portugal in order to prevent the perpetuation of the slave trade. [57]

The U.S. Supreme Court did not apply the treaty strictly. Even if an "equipment article" category was found to meet the prima facie standard of guilt, the court would often look for more

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[50] *British-American Diplomacy: Treaty between United States and Great Britain for the Suppression of the Slave Trade; April 7,1862,* supra note 44, at art. 6. [Reproduced in accompanying flash drive at folder # 6]

[51] *Id*.

[52] *British-American Diplomacy: Treaty between United States and Great Britain for the Suppression of the Slave Trade; April 7,1862,* supra note 44, at art. 6. [Reproduced in accompanying flash drive at folder # 6]

[53] *Id*.

[54] *British-American Diplomacy: Treaty between United States and Great Britain for the Suppression of the Slave Trade; April 7,1862,* supra note 44, at art. 7. [Reproduced in accompanying flash drive at folder # 6]

[55] *British-American Diplomacy: Treaty between United States and Great Britain for the Suppression of the Slave Trade; April 7,1862,* supra note 45, at art. 6. [Reproduced in accompanying flash drive at folder # 6]

[56] *British-American Diplomacy: Treaty between United States and Great Britain for the Suppression of the Slave Trade; April 7,1862,* supra note 45, at art. 9. [Reproduced in accompanying flash drive at folder # 6]

[57] David Eltis & Paul F. Lachance, *Estimates of the Size and Direction of Transatlantic Slave Trade*, 17, http://www.slavevoyages.org/downloads/estimates-method.pdf (last visited Feb 21, 2012). [Reproduced in accompanying flash drive at folder # 42]

evidence to support a finding that criminal intent to participate in the slave trade was attached to the equipment. For example, in *The Weathergage*, the Supreme Court used a wide range of evidence and inferences to find that the vessel was being used for the slave trade.[58] The merchant vessel was found with equipment used for slavery but not for the harmless trade it purported to be engaged in.[59] The court found that the vessel was not built for its purported trade; it had temporary decks below main deck that was not necessary to carry its legitimate cargo.[60] Moreover, its stopover at a particular slave trade port was unusual for that particular voyage if it was harmless trade.[61] Additionally, it carried equipment such as several small boats and oars, large quantities of rope, nails, anchors, boilers, food items, and almost every equipment required in the slave trade.[62] The court stated that "[a]s soon… as the preparations have progressed so far, as clearly and satisfactorily to show the purpose for which they are made, the right of seizure attaches."[63] Essentially, the court declared that preparing the vessel for slave trade was an offense in itself.

In *The Kate*, the U.S. Supreme Court found equipment on a vessel that could be used for both the slave trade and for legitimate trade.[64] To strengthen its finding that the vessel was used for slave trade, the court used evidence that the vessel contained an unusually large amount of equipment such as spars and sails, and carried water-casks and tanks commonly used for slave

[58] *The Weathergage*, 69 U.S. 375 (1864). [Reproduced in accompanying flash drive at folder # 22]

[59] *Id*. at 382.

[60] *Id*. at 381.

[61] *Id*. at 382.

[62] *Id*. at 381-82.

[63] *Id*. at 380.

[64] *The Kate*, 69 U.S. 350, 361 (1864). [Reproduced in accompanying flash drive at folder # 19]

trade.[65] Moreover, some crew members were not accounted for and one crewmember was a known slave trader. [66] In this case, the Supreme Court stated that it could use inferences to prove that the purpose of the vessel was illegal. Because the vessel did not show with "clear explanation by convincing proof" that its trade was lawful, the Supreme Court found it guilty of engaging in the slave trade.[67]

In *The Sarah*, the Supreme Court stated that although individually the evidence was not strong, collectively there was a strong presumption that the vessel was engaged in the slave trade.[68] The Court found equipment that could be used for the slave trade and for legal trade.[69] However, some equipment was in greater quantity than was needed for regular commercial trade such as spars and boats, and others in quantities that were commonly found on slave ships, such as shooks, hoops, rivets, water casks, and food. [70] Additionally, common items traded for slaves were found on board such as muskets and tobacco.[71] Moreover, when the vessel was going to be searched, the crew threw cargo overboard.[72] There was also testimony that one of the crew member's stated that he was going to the coast of Africa and would act as Master of the vessel and go "blackbirding."[73] The Court stated that the "statutory offense [was] completed when the preparations for the voyage…reached a stage which show[ed] satisfactorily that the purpose of

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[65] *Id.* at 364-65.

[66] *The Kate*, 69 U.S. 350, 365 (1864). [Reproduced in accompanying flash drive at folder # 19]

[67] *Id*. at 366.

[68] *The Sarah*, 69 U.S. 366 (1864). [Reproduced in accompanying flash drive at folder # 21]

[69] *Id.* at 371.

[70] *Id*. at 371-72.

[71] *Id*. at 372.

[72] *Id*. at 373.

[73] *Id*. at 375.

the fitting and equipment" was for the slave trade.[74] The court found that the collective evidence supported full proof that the crew had the intent to use the vessel for the slave trade.[75] Because the accused owner of the vessel did not appear in court to rebut the presumption by showing that the vessel was intended to be engaged in legitimate trade, the Supreme Court found the vessel guilty.[76]

These cases illustrate that if a vessel is suspected of engaging in the slave trade and is supported by direct or indirect evidence and inferences, it can be convicted as being an actual slave trader even if there are no actual proof that it carried slaves or traded for slaves. In other words, carrying equipment for the purpose of slave trade is equivalent to participating in the slave trade even if no slaves are found in the vessel. This is directly comparable to piracy because it shows that a vessel carrying equipment for piracy can be charged for the actual act of participating in piracy if collective evidence supports the finding that the vessel intended to use the equipment for piracy. This would be true even if the vessel is not caught attacking another vessel.

ii. Burglary Tools

In American common law, burglary is defined as "breaking and entering a dwelling of another at night with the intent to commit some felony inside."[77] American law also allows for the crime of possessing burglary tools without having to show the defendant committed an actual burglary. American courts generally uphold statutes that make the possession of burglary tools a crime when there is a challenge that the statute is unconstitutionally vague or indefinite for not

[74] *The Sarah*, 69 U.S. 366, 370 (1864). [Reproduced in accompanying flash drive at folder # 21]

[75] *Id*. at 375.

[76] *Id*. at 373-375.

[77] Sanford H. Kadish et al., Criminal Law and its Processes: Cases and Materials, 561 (8th ed. 2007). [Reproduced in accompanying flash drive at folder # 37]

creating a list to define "burglary tools."[78] Furthermore, American courts often require that in a conviction for possession of burglary tools, the prosecution must prove that the accused "intended to use the tools in the perpetration of a crime."[79] Proving general intent to use the tools for committing the crime is enough to establish intent.[80] Moreover, the prosecution does not need to use direct evidence to prove general intent; use of circumstantial evidence is enough to prove guilt.[81]

However, there is no general agreement on whether mere possession of burglary tools is presumptive proof of intent to use the tools to burgle.[82] Proving intent to commit the crime generally "requires more than mere possession in order to support a conviction for possessing an instrument of crime."[83] Yet, some courts have upheld a conviction where intent was proven by "mere possession of tools uniquely or very highly adapted" for burglary, but "the intention to use the ordinary tools for unlawful purposes must appear clearly from the circumstances in which they are found."[84] Additionally, there is no requirement that the prosecution has to link the possession to any past or future burglary.[85]

The following cases illustrate that when possession of tools that can be used for burglary

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[78] 13 Am. Jur. 2d Burglary § 68. [Reproduced in accompanying flash drive at folder # 3] See *Duncan v. State*, 409 N.E.2d 597 (1980). (Lack of an enumerated definition of "burglar tools" does not make the statute unconstitutionally vague) [Reproduced in accompanying flash drive at folder # 7]; See *State v. Briner*, 255 N.W.2d 422 (1977). (A statute making felonious the possession of any picklock, crow, key, bit, or other instrument or tool with intent to burglarize was not unconstitutionally vague or indefinite). [Reproduced in accompanying flash drive at folder # 15]

[79] 12A C.J.S. Burglary § 130. [Reproduced in accompanying flash drive at folder # 2]

[80] *Id*.

[81] *Id*.

[82] 13 Am. Jur. 2d Burglary § 68. [Reproduced in accompanying flash drive at folder # 3]

[83] 12A C.J.S. Burglary § 130. [Reproduced in accompanying flash drive at folder # 2]

[84] *Id*.

[85] *State v. Conaway*, 319 N.W.2d 35, 41 (Minn. 1982). [Reproduced in accompanying flash drive at folder # 16]

is linked to specific or general intent to burgle, the criminal intent requirement for possession of burglary tools is met. Moreover, the court may look at the tools and the circumstances together to find a criminal intent even if the tools and the circumstances may be innocent when viewed separately. Additionally, the tools and the circumstances are viewed in favor of the prosecution, and the defendant carries the burden of rebutting the presumption of guilt.

In *State v. Conway*, the court had to determine whether finding burglary tools and stolen goods was enough to charge the defendant with intent to burgle when it could not be linked to a specific burglary.[86] The defendant was arrested for car theft. Police found stolen goods in his car and burglary tools in his house.[87] The tools included information on "radio frequencies for various departments, books containing lock codes, communication equipment, blank and cut keys, burglar alarm bypass device, and a bulletproof vest." Some tools were old and others were new.[88] To determine whether possession of burglary tools was an offense if it could not be linked to a specific burglary, the Supreme Court of Minnesota used the Pennsylvania standard.[89] The Court affirmed that "when possession of [burglary] tools in a house stands alone," it could be equally guilty or not guilty.[90] However, if possession of tools "peculiarly suited to burglary is coupled with strong circumstantial evidence manifesting criminal intent," the defendant can be convicted.[91] In this case, not only did the defendant possess tools suitable for burglary, but he

[86] *State v. Conaway*, 319 N.W.2d 35, 38 (Minn. 1982). [Reproduced in accompanying flash drive at folder # 16]

[87] *Id*.

[88] *Id*. at 38-39.

[89] *Id* at 42.

[90] *Id*.

[91] *Id*.

was found with goods known to be stolen.[92] There was no requirement to link the tools to a burglary in the past or future.[93] The intent that the state needed to prove was "general intent to use the tools to commit a burglary, not an intent to commit a particular burglary."[94]

In *Hagy v. Com.*, the Court of Appeals of Virginia concluded that the circumstantial evidence proved guilt beyond a reasonable doubt and that all necessary circumstances proved were consistent with guilt and inconsistent with innocence.[95] Police found numerous tools in the defendant's possession that could be used for burglary such as screwdrivers, crowbars, and equipment to open locks.[96] The defendant claimed it was for the legitimate business of construction.[97] However the defendant was known on several occasions to carry large amounts of coins from the vending machine that were later exchanged for currency.[98] Moreover, many of the tools were not necessary to a construction trade but were commonly used in burglaries, and some key tools were missing that would be necessary and expected for construction.[99] Therefore, although the tools and the circumstances could individually be innocent, when viewed together, they created a strong inference of guilt.[100] Additionally, the court stated that it was necessary in a crime of possession to show that the defendant exercised "dominion and control"

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[92] *State v. Conaway*, 319 N.W.2d 35, 42 (Minn. 1982). [Reproduced in accompanying flash drive at folder # 16]

[93] *Id*. at 41.

[94] *Id*.

[95] *Hagy v. Com.*, 543 S.E.2d 614 (2001). [Reproduced in accompanying flash drive at folder # 8]

[96] *Id*. at 616.

[97] *Id*.

[98] *Id*. at 615.

[99] *Id*. at 618.

[100] *Id*. at 617.

over the tools.[101] In this case, the defendant admitted ownership of the tools which showed that he was aware of their presence and type.[102] Moreover, the fact finder did not have to accept the defendant's explanation that he did not possess some of the tools in his car when the other defendant stated that the tools were jointly owned by both defendants.[103] The court was not required to believe self-serving testimony. Before making a decision, the court viewed the evidence in favor of the prosecution.[104] When viewed collectively, circumstantial evidence was consistent with guilt.[105] Thus, the court found that the evidence was sufficient to support a conviction for possession of burglary tools.

These burglary tools cases strengthen the legal reasoning found in the slave trade cases. First, the burglary tools cases state that possession of equipment can be a crime if criminal intent is attached them. Second, circumstantial evidence and inferences can be used to find criminal intent. Third, possession of burglary tools cases do not require the individual to be caught in the act of burgling in order to be prosecuted.

The burglary cases are readily applicable to piracy cases. Pirates are often found with equipment that can be used for innocent or piracy purposes. However, like both burglary cases, much of the equipment is commonly used for piracy and not for legitimate fishing purposes. Additionally, like *Hagy*, the pirates often lack the equipment for the legitimate trade they purport to engage in. Therefore, criminal intent can attach to equipment such as rifles if circumstantial evidence is consistent with the finding of guilt. Thus, a state can prosecute pirates for intending

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[101] *Hagy v. Com.*, 543 S.E.2d 614, 617 (2001). [Reproduced in accompanying flash drive at folder # 8]

[102] *Id*. at 616-17.

[103] *Id*.

[104] *Id*. at 616.

[105] *Id*. at 618.

to commit an act of piracy without having to show an actual act of piracy.

iii. Hong Kong

Current Hong Kong criminal law statute Cap 200(22) makes it a criminal offense for any vessel to be "equipped for the purposes of piracy" within Hong Kong territory. [106] If convicted, the individual will be sent to prison for three years. The only statutory defenses available are that the individual was not on the vessel voluntarily, or that "he did not know that the vessel was equipped for the purposes of piracy." [107] This statute became effective in 1971, if not before, when Hong Kong was under British rule.[108] Thus, violating this statute would have made it an offense against Hong Kong and the United Kingdom.

Although the offense of carrying piracy equipment on board a vessel is only a crime if it occurs in Hong Kong territory, it provides support to the argument that the possession of piracy equipment is a recognized crime. The Hong Kong statute does not enumerate the type of equipment required to be on board in order to be found guilty. This is unlike the U.S.-U.K. Suppression Treaty but consistent with many statutes for the crime of possessing burglary tools.

iv. Possession of Piracy Equipment as a Crime of Attempted Piracy

In *In re Piracy Jure Gentium*, armed Chinese pirates operating a Chinese vessel attacked another Chinese vessel on the high seas. [109] The Hong Kong court held that robbery was a necessary element in the crime of piracy and because no robbery occurred, the pirates were

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[106] Being Found on Board Piratical Vessel and Unable to Prove Non-Complicity, Cap. 200, § 22 (H.K.) http://www.hklii.hk/eng/hk/legis/ord/200/s22.html (last visited March 15, 2012). [Reproduced in accompanying flash drive at folder # 5]

[107] *Id*.

[108] Refworld: The Leader in Refugee Decision Support , *Crimes Ordinance, Cap 200*, United Nations High Commissioner for Refugees, http://www.unhcr.org/refworld/country,,NATLEGBOD,,HKG,,3ae6b53f0,0.html (last visited March 15, 2012). [Reproduced in accompanying flash drive at folder # 51]

[109] *In re Piracy Jure Gentium*, [1934] A.C. 586 (P.C.) 587 (appeal taken from H.K.) http://www.uniset.ca/other/cs5/1934AC586.html (last visited Feb. 18, 2012). [Reproduced in accompanying flash drive at folder # 9]

acquitted.[110] In response to this case, the U.K. Judicial Committee decided that actual robbery was not an essential element of the crime of piracy. It further stated that a frustrated attempt to commit a piratical robbery was equal to piracy.[111]

The U.K. Judicial Committee declaration raises an argument that if an attempt to commit piracy is equal to piracy, then the possession of piracy equipment can also equal piracy if it meets the standard for an attempted crime.

In Anglo-American jurisprudence, a defendant can be punished for attempting to commit a crime.[112] An attempt is any act before completing the criminal goal.[113] There are two types of criminal attempts: complete and incomplete.[114] A complete attempt is when the actor performs all the actions he meant to do but did not achieve his criminal goal. An incomplete attempt is when the actor performed some of the "acts necessary to achieve his criminal goal," but then he quit or was prevented from continuing further.[115]

A criminal attempt under the Model Penal Code (MPC) requires that the defendant had (1) the intent to commit a particular crime, and (2) the defendant's actus reus must have made a substantial step towards the commission of the particular crime.[116] To meet the first element of

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[110] *In re Piracy Jure Gentium*, [1934] A.C. 586 (P.C.) 588 (appeal taken from H.K.) http://www.uniset.ca/other/cs5/1934AC586.html (last visited Feb. 18, 2012). [Reproduced in accompanying flash drive at folder # 9]

[111] *Id*.

[112] Joshua Dressler, *Understanding Criminal Law*, 405 (4th ed. 2006). [Reproduced in accompanying flash drive at folder # 36]

[113] *Id*.

[114] *Id*.

[115] *Id*. at 406.

[116] *Id*. at 441.

the MPC, the prosecution must show that the defendant had the specific intent to commit the particular crime.[117]

In order to meet the second element of the MPC, the prosecution must also show that the defendant took a substantial step in the commission of the crime.[118] In the U.S., a substantial step is taken when the defendant has begun the commission of the offense beyond mere preparation.[119] However, statutes are not in agreement of what precisely constitutes a substantial step for a crime of attempt.[120]

Many courts state that attempt is met when the defendant commits the last act before committing the target crime.[121] This is the "Last Act" test. However, the crime of attempt does not require that the last act be committed.[122] Some courts state that the defendant does not have to commit the last act before committing the target crime, but that he must be "proximate" to the completed crime.[123] In other words, the defendant must begin to engage in the direct commission of the crime so that he can actually complete the crime as long as he is not prevented by external factors.[124] This is called the "Proximity" test.[125]

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[117] Joshua Dressler, *Understanding Criminal Law*, 417-18 (4th ed. 2006). [Reproduced in accompanying flash drive at folder # 36] See *State v. Earp*, 571 A.2d 1227, 1231 (Md. 1990). (Defendant was convicted of attempt to murder. Court stated that if convicting for the *attempt* to commit a murder, as opposed to *intent* to murder, the prosecution must show that the defendant specifically intended to commit the murder.) (Emphasis added.) [Reproduced in accompanying flash drive at folder # 17]

[118] Joshua Dressler, *Understanding Criminal Law*, 406 (4th ed. 2006). [Reproduced in accompanying flash drive at folder # 36]

[119] *Id*. at 405-06.

[120] *Id*. at 423.

[121] *Id*. at 425.

[122] *Id*.

[123] *Id*.

[124] *Id*. at 425-26.

The MPC § 5.01(2) suggests conduct that may be a substantial step if supported by the defendant's criminal intent, and they are sufficient to meet the actus reus requirement in the crime of attempt.[126] Among the suggestions are two that are readily applicable to piracy: (a) "lying in wait, searching for or following the contemplated victim of the crime," and (e) "possession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances."[127]

The burglary tools cases show how the prosecution can use circumstantial evidence to prove criminal intent. The MPC § 5.01(2) illustrates how to prove that a substantial step has occurred in order to be convicted for attempted piracy. For example, pirates use mother ships, small boats, and fishing vessels on the high seas and in territorial waters in order to wait for their victims and launch attacks against them when they appear. This would meet MPC § 5.01(2)(a).

Lying in wait for the victim also meets the "Last Act" tests and the "Proximity" test. If attacking the victim is piracy, then the act before this is waiting for the victim to appear. Therefore, MPC § 5.01(2)(a) can be used to support that "Last Act" test when capturing pirates in the high seas or in territorial waters who have not attacked the victim yet but are equipped to do so. Moreover, the "Proximity" test requires that the pirate's conduct be close to completing the crime. It can be argued that waiting for a victim to appear is "proximate" to committing the crime of piracy because the only act left is to actually attack the victim. Additionally, waiting for the victim is an act towards the direct commission of piracy because the pirates are only

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[125] Joshua Dressler, *Understanding Criminal Law*, 425 (4th ed. 2006). [Reproduced in accompanying flash drive at folder # 36]

[126] § 5.01. Criminal Attempt, Model Penal Code § 5.01. [Reproduced in accompanying flash drive at folder # 1]

[127] *Id*.

waiting in the ocean to commit piracy, not fish. Thus, because the pirates' conduct is directly for the commission of piracy and it is the last act before actually committing piracy, the "Proximity" test and the "Last Act" test are met.

MPC § 5.01(2)(e) can also be used to meet the substantial step requirement for the crime of attempt. The pirates often carry equipment such as weapons on the mother ships, small boats, and vessels. It may be more difficult to prove that mother ships do not have any use for the equipment since many trade ships now carry weapons, but this argument will be weak when applied to small boats and fishing vessels. These boats and vessels when used for legitimate trade do not normally carry the type of weapons and instruments found among pirates, therefore it easier to prove that the pirates were using the weapons and instruments to commit the crime of piracy. This is strengthened by the facts that many pirates lack important equipment for fishing purposes. Therefore, the pirates must be participating in another trade, legitimate or illegal.

Assuming that the principles from the slave trade and burglary tools cases are used to find that criminal intent to commit piracy was attached to the tools, the defendant can be convicted for the crime of possessing piracy tools. The Seychelles can take this further and attach the substantial step requirement to create the crime of attempted piracy. Applying the substantial steps acts from MPC § 5.01(2) can help prosecute pirates for the crime to attempt piracy. Furthermore, because *In re Jure Gentium* states that the crime of attempted piracy is the crime of piracy, the pirates can just be prosecuted for committing piracy even if an actual attack did not occur.

Whether the Seychelles decides to create a law criminalizing the possession of piracy as an offense in itself or as an attempt to commit piracy, the Seychelles will find support from various sources. The slave trade and burglary tools cases specifically created the offenses for the

crime of possession of equipment in order to suppress the full commission of those crimes, slave trade and burglary. Moreover, UNSC Resolution 1816 specifically binds states that have an interest in the Somali region to deter acts of piracy.[128] Article 15 of the UNSC Resolution 1846 gives states the power to create offenses and establish jurisdiction in order to suppress and deter piracy.[129] Therefore, these UNSC Resolutions combined with the slave trade and burglary tools cases provide substantial support that the Seychelles can create an offense that criminalizes the possession of piracy equipment.

IV. UNIVERSAL JURISDICTION

Although states were allowed to exercise universal jurisdiction over piracy, states had historically been reluctant to do so. However, in recent times, states are beginning to apply universal jurisdiction over piracy more frequently, especially to attacks in the Indian Ocean.

A. Universal Jurisdiction over Piracy is Historically Acknowledged

Universal jurisdiction allows states to exercise jurisdiction over offenses that the international community views as a "universal concern," such as piracy.[130] States can exercise universal jurisdiction over these offenses because of customary international law.[131] The forum state is not required to have any links with the territory of the offense or the nationality of the offender or victim.[132]

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[128] S.C. Res. 1816, ¶ 2, U.N. Doc. S/RES/1816 (June 2, 2008). [Reproduced in accompanying flash drive at folder # 27]

[129] S.C. Res. 1846, ¶ 15, U.N. Doc. S/RES/1846 (Dec. 2, 2008). [Reproduced in accompanying flash drive at folder # 28]

[130] Barry E. Carter et al., *International Law*, 713 (Vicki Been at al. eds., 5th ed. 2007). [Reproduced in accompanying flash drive at folder # 35]

[131] *Id*. at 714.

Since the early 1600s, piracy was the only offense subject to universal jurisdiction,[133] largely because the pirate was historically considered as hostis humani generis, or "enemy of all mankind."[134] Pirates did not "discriminate" between their victims by nationality.[135] Moreover, even if they attacked a ship containing goods owned by one state, the attack affected the prices in the destination state. [136] Even if a state was not directly involved in the attack, it still suffered. [137] Additionally, pirates were not sanctioned by their country of origin; therefore, they were unlikely to find legal protection there. [138] "Because pirates committed their crimes beyond the law of the nations, they placed themselves 'beyond the protection of any State'."[139] Consequently, any state that caught a pirate could prosecute him irrespective of the pirate's nationality or where he was apprehended.[140] Piracy was seen as (1) robbery (2) on the high seas (3) "without the permission of a sovereign state." When prosecuting a pirate under universal jurisdiction, a state would have to establish all three elements. [141] There was no universal forum to prosecute a pirate

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[132] Barry E. Carter et al., *International Law*, 714 (Vicki Been at al. eds., 5th ed. 2007). [Reproduced in accompanying flash drive at folder # 35]

[133] Eugene Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction*, 103 Nw. U. L. Rev. 149, 165 (2009). [Reproduced in accompanying flash drive at folder # 32]

[134] Ryan P. Kelley, *Unclos, but No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy*, 95 Minn. L. Rev. 2285, 2286 (2011). [Reproduced in accompanying flash drive at folder # 34]

[135] Eugene Kontorovich, *"A Guantanamo on the Sea": The Difficulty of Prosecuting Pirates and Terrorists*, 98 Cal. L. Rev. 243, 251-52 (2010). [Reproduced in accompanying flash drive at folder # 30]

[136] *Id*. at 252.

[137] *Id*.

[138] *Id*.

[139] Ryan P. Kelley, *Unclos, but No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy*, 95 Minn. L. Rev. 2285, 2294 (2011). [Reproduced in accompanying flash drive at folder # 34]

[140] Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 Harv. Int'l L.J. 183, 190 (2004). [Reproduced in accompanying flash drive at folder # 33]

[141] *Id*. at 191.

so individual states were given the authority to prosecute them.[142]

Although nations were not required to apply universal jurisdiction to piracy, and indeed many did not, it was an available option.[143] In practice, nations found a connection with the piracy incident before prosecuting, such as the act occurred on their territorial waters or nationality of the victims or pirates was the same as the prosecuting country. [144] For this reason, "true universal jurisdiction" in relation to piracy was considered imagined or theoretical.[145]

B. Current Trends in Exercising Universal Jurisdiction over Piracy

Nevertheless, the international practice of exercising universal jurisdiction over piracy is changing. In recent decades, when establishing universal jurisdiction, courts often cite piracy as a precedent. Crimes such as genocide, torture, war crimes, and crimes against humanity justified their use of universal jurisdiction by citing piracy as a precedent.[146]

In the last ten years, states began exercising their right to apply universal jurisdiction over piracy cases more frequently. In 2010, Denmark prosecuted and imprisoned Somali pirates for attacking a Turkish freighter in the Gulf of Aden. [147] In 2011, Dutch naval vessels caught Somali pirates off the coast of Tanzania who had hijacked a South African yacht and kidnapped and set

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[142] Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 Harv. Int'l L.J. 183, 191 (2004). [Reproduced in accompanying flash drive at folder # 33]

[143] *Id*. at 192.

[144] Ryan P. Kelley, *Unclos, but No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy*, 95 Minn. L. Rev. 2285, 2292 (2011). [Reproduced in accompanying flash drive at folder # 34]

[145] *Id*.

[146] *Id*. at 2295.

[147] Bruno Waterfield, *Somali Pirates Jailed by Dutch Court for Seychelles Attack*, The Telegraph (Aug. 13, 2011, 8:00 AM), http://www.telegraph.co.uk/news/worldnews/piracy/8698359/Somali-pirates-jailed-by-Dutch-court-for-Seychelles-attack.html. [Reproduced in accompanying flash drive at folder # 38]

a ransom for two South African citizens.[148] After South Africa refused to prosecute, the Dutch court convicted and imprisoned the pirates.

The Seychelles has also exercised universal jurisdiction over piracy with the approval of the international community. In 2010, the Seychelles convicted Somali pirates for attacking an Iranian vessel[149] on the high seas.[150] Again in 2010, European forces apprehended Somali pirates for attacking two French vessel on the high seas. Although the Seychelles had no connection to the incident, it prosecuted the case.[151] In 2012, the U.S. detained Somali pirates for attacking an Iranian vessel and taking thirteen Iranian hostages.[152] However, Somalia, Iran, and the U.S. did not want to prosecute the pirates. Therefore, the Seychelles prosecuted the Somali pirates even though it had no direct relation to the incident.[153]

These recent cases show that states are beginning to exercise their pre-existing right of universal jurisdiction over piracy. This trend coupled with the historical recognition of piracy as a universal crime make it likely that the Seychelles can continue exercising universal jurisdiction over piracy.

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[148] Bruno Waterfield, *Somali Pirates Jailed by Dutch Court for Seychelles Attack*, The Telegraph (Aug. 13, 2011, 8:00 AM), http://www.telegraph.co.uk/news/worldnews/piracy/8698359/Somali-pirates-jailed-by-Dutch-court-for-Seychelles-attack.html. [Reproduced in accompanying flash drive at folder # 38]

[149] *Republic v. Mohamed Aweys Sayid et al.*, Sentence, Crim. Side No. 19, 3 (2010). [Reproduced in accompanying flash drive at folder # 14]

[150] *Id*. at 1.

[151] *Republic v. Mohamed Ahmed Ise & Four Others*, Judgment, Crim. Side No. 75 (2010). [Reproduced in accompanying flash drive at folder # 13]

[152] C.J. Chivers, *Somali Suspects in Hijacking of Iranian Ship Face Piracy Trial in Seychelles*, The New York Times (March 6, 2012), http://www.nytimes.com/2012/03/07/world/africa/somalis-on-iranian-ship-face-piracy-charges-in-seychelles.html. [Reproduced in accompanying flash drive at folder # 40]

[153] *Id*.

C. Arguments Against Applying Universal Jurisdiction over Piracy

Article 105 of the United Nations Convention of the Law of the Sea (UNCLOS) allows a state to seize a pirate ship on the high seas and arrest the people on board.[154] Moreover, the state that seizes the pirate ship can determine what penalty to impose.[155] The UNCLOS commentary on this subject declares that the state that seizes the pirate must have the right to adjudicate, and that the right to adjudicate cannot be transferred to another state.[156] Therefore, states would violate the UNCLOS by not adjudicating apprehended pirates themselves.[157]

However, the practice of one state seizing pirates and another state adjudicating is widespread as seen in recent piracy cases. Moreover, UNCLOS has not condemned the practice. Additionally, defendants have not challenged the practice of transferring pirates for adjudication. Although no challenges by defendants or declarations by UNCLOS have been raised, it does not mean the issue of transferring pirates has been decided.[158]

Universal jurisdiction is seen as a violation of state sovereignty[159] because the state to which the pirates belong cannot prosecute the case, and this can lead to international hostility.[160] However, international hostility is not seen to be a serious threat because the international community actively encourages combatting piracy, including the "U.N. Security Council,

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[154] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, art. 105. [Reproduced in accompanying flash drive at folder # 29]

[155] *Id*.

[156] Ryan P. Kelley, *Unclos, but No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy*, 95 Minn. L. Rev. 2285, 2297 (2011). [Reproduced in accompanying flash drive at folder # 34]

[157] *Id*. at 2304.

[158] *Id*. at 2307-08.

[159] *Id*. at 2312 .

[160] *Id*. at 2309.

NATO, the EU, and several Asian and African states."[161] Moreover, the international community has historically supported combatting piracy.[162]

The strongest argument against universal jurisdiction is that it will violate the due process of pirates.[163] Pirates would not have adequate notice of the penalties of their piratical actions because they would not know which state's law applies.[164] If the Seychelles makes the possession of piracy equipment a crime on the high seas and in the territories of other states, the pirates will need notice of this. This raises more problems for the notice requirement because most states do not criminalize the possession of piracy equipment. First, if the Seychelles law is applicable in other states' territories, then there may be a conflict of laws if those states do not make the possession of piracy equipment a crime. The second problem is that if a pirate is apprehended by a state that does not make the possession of piracy equipment a crime but then is transferred to the Seychelles even though the Seychelles had no connection to the piracy incident, the pirates can reasonably argue that they were not given due notice. The pirates can argue for a strict interpretation of Article 105 of UNCLOS that the seizing state also prosecute. Thus, the due notice requirement might prevent the Seychelles from applying universal jurisdiction to the crime of possession of piracy equipment.

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[161] Ryan P. Kelley, *Unclos, but No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy*, 95 Minn. L. Rev. 2285, 2312 (2011). [Reproduced in accompanying flash drive at folder # 34]

[162] *Id*.

[163] *Id*.

[164] *Id*.

D. Arguments in Favor of Applying Universal Jurisdiction over Piracy

If the Seychelles is allowed to exercise universal jurisdiction for the possession of piracy equipment, then it will receive support from the historical proclamations that piracy permits universal jurisdiction. [165]

Moreover, exercising universal jurisdiction will support the crimes that justified their use of universal jurisdiction by citing piracy as precedent.[166] Prosecuting war crimes is more difficult because the crime occurred in the far past, which makes gathering evidence challenging, the offenders are often not immediately in custody, and the political nature of the crimes cause international tension. [167] Thus applying universal jurisdiction should be easier in piracy because the pirates have already been captured and international tension is unlikely to arise since piracy is globally viewed as a crime. [168] Moreover, since piracy is a crime that harms all nations, therefore, applying universal jurisdiction is an appropriate legal measure.[169]

Additionally, universal jurisdiction does not prevent transferring pirates from the seizing state to the adjudicating state. [170] Universal jurisdiction is jurisdiction over the offense itself, not only for acts that the state arrested the pirates for.[171] Additionally, UNCLOS has not declared that the state apprehending the pirate must also prosecute. The current practice supports

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[165] Ryan P. Kelley, *Unclos, but No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy*, 95 Minn. L. Rev. 2285, 2313 (2011). [Reproduced in accompanying flash drive at folder # 34]

[166] *Id*.

[167] Eugene Kontorovich, *"A Guantanamo on the Sea": The Difficulty of Prosecuting Pirates and Terrorists*, 98 Cal. L. Rev. 243, 273-74 (2010). [Reproduced in accompanying flash drive at folder # 30]

[168] *Id*.

[169] Ryan P. Kelley, *Unclos, but No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy*, 95 Minn. L. Rev. 2285, 2313 (2011). [Reproduced in accompanying flash drive at folder # 34]

[170] *Id*. at 2309.

[171] *Id*.

transferring pirates.

The strongest argument for applying universal jurisdiction is that states have exercised it in recent piracy cases without concerns raised from the international community. However, because the Seychelles wants to apply universal jurisdiction to a law that is not universally recognized, the crime of possessing piracy equipment, it will face a compelling and legitimate due process challenge. Ultimately, the Seychelles will have to ensure that notice of the law is given and that Seychelles law will apply if it prosecutes the case even if the offense is not recognized by a state that is directly connected to the incident, such as the state of origin of the pirates, the victims the territory, and the apprehender.[172]

V. PROTECTIVE JURISDICTION

A. Definition of Protective Jurisdiction

The Restatement (Third) of Foreign Relations Law of the United States defines protective jurisdiction as a form of extraterritorial jurisdiction that permits states to exercise jurisdiction over "certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests."[173] International law recognizes protective jurisdiction for certain offenses.[174] A state can use protective jurisdiction even if the offense did not affect the state's territory, but the offense should threaten the security,

[172] The U.S. – U.K. Suppression Treaty allowed each state to apply its law to suspected slave ship, even if it was in the territory of a state that was not a party to U.S. – U.K. Suppression Treaty. Therefore, the U.S. – U.K. Suppression Treaty expanded universal jurisdiction to allow the apprehending state to apply its law to the accused solely on the basis that it seized it. See *Additional Article to the Treaty for the Suppression of the African Slave Trade; February 17, 1863*, Lillian Goldman Law Library: The Avalon Project, (last visited Feb, 17, 2012), http://avalon.law.yale.edu/19th_century/br1863.asp. [Reproduced in accompanying flash drive at folder # 6]

[173] Barry E. Carter et al., *International Law*, 703 (Vicki Been at al. eds., 5th ed. 2007). [Reproduced in accompanying flash drive at folder # 35]

[174] *Id*.

integrity, crucial economic interests[175], or the government functions of the state.[176] For example, the U.S. has power to apply its law over non-nationals who commit piracy in non-territorial waters.[177] The purpose of protective jurisdiction is to allow adversely affected states to prosecute if the state of origin of the offenders or the location of the act will not punish for the crime.[178]

Showing that a conduct adversely affects the security of the forum state would normally require proving that a particular conduct actually threatens the forum state.[179] Because this is difficult to prove, the practice of protective jurisdiction is more lenient. Instead, it is sufficient to show that the type of conduct could threaten the forum state. No actual harm to the forum state's interests needs to be shown.[180]

B. Application of Protective Jurisdiction to Anti-Drug Effects Policy

The U.S. has employed protective jurisdiction as a part of its anti-drug effects policy for many decades against vessels carrying drugs, even if those vessels are thousands of miles away from the U.S.[181] The following cases illustrate how the U.S. expanded its jurisdiction under the Marijuana on the High Seas Act (MHSA) to allow prosecution of foreign nationals in foreign vessels on the high seas.

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[175] Barry E. Carter et al., *International Law*, 664 (Vicki Been at al. eds., 5th ed. 2007). [Reproduced in accompanying flash drive at folder # 35]

[176] Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 Minn. L. Rev. 1191, 1231 (2009). [Reproduced in accompanying flash drive at folder # 31]

[177] *Id*. at 1251.

[178] *U.S. v. Gonzalez*, 776 F.2d 931, 941 (11th Cir. 1985). [Reproduced in accompanying flash drive at folder # 24]

[179] Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 Minn. L. Rev. 1191, 1230 (2009). [Reproduced in accompanying flash drive at folder # 31]

[180] *Id*. at 1229.

[181] *Id*. at 1193.

In *U.S. v. Romero-Galue*, the U.S. Coast Guard apprehended a Panamanian ship in the Caribbean Sea for marijuana possession.[182] The U.S. charged the accused with drug possession, intent to import, knowing that it will be imported into the U.S., and for conspiring to import marijuana into the U.S.[183] The accused argued that Congress did not intend to apply the MHSA to foreign nationals on foreign vessels on the high seas.[184] The 11th Circuit Court of Appeals held that when Congress created the MHSA, Congress intended to apply the Act to foreign nationals on the high seas, even if they were on foreign flagged vessels and the U.S. did not have a treaty with the foreign state.[185] The policy reason behind this was that smugglers would otherwise hover outside of areas covered by treaties so that they would not be apprehended, and then sneak by authorities to their destination.[186] Moreover, the MHSA was limited by the class of offenses it could prosecute; its scope of application was not limited to certain geographical locations.[187] The court also cited the definition of protective jurisdiction as support for its decision.[188] Furthermore, the court stated that the U.S. did not have to show an "overt act" by the accused. The U.S. only had to show that the accused intended to possess marijuana within twelve miles of U.S. shores unless a different distance was stated in a treaty with the accused's state of origin.[189]

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[182] *U.S. v. Romero-Galue*, 757 F.2d 1147, 1149 (11th Cir. 1985). [Reproduced in accompanying flash drive at folder # 25]

[183] *Id*. at 1150.

[184] *Id*.

[185] *Id.* at 1154.

[186] *Id*. at 1153.

[187] *Id*. at 1154.

[188] *Id*

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[189] *Id*. at 1153-55.

In *U.S. v. Gonzalez*, the U.S. boarded and apprehended a Honduran vessel on the high seas, about 125 miles from the Florida coast.[190] The crew members were prosecuted under U.S. law for "knowingly and intentionally possessing" marijuana "with intent to distribute."[191] The 11th Circuit Court of Appeals made several holdings. First, it stated that a treaty between the U.S. and a foreign nation did not need to exist before the U.S. Coast Guard could search and seize a foreign nation's vessel and prosecute crew members for drug offenses under the MHSA.[192] The court also found support in Congressional intent to conclude that the language in the MHSA intended to give the U.S. jurisdiction over acts on the high seas without having to make a special treaty with foreign nations. The purpose of the MHSA was to give the U.S. power through international law to prohibit trafficking of controlled substances on the high seas.[193] Moreover, the court argued that the Honduran vessel on the high seas was not protected by UNCLOS Article 6 which declares that states have exclusive jurisdiction over their own vessels on the high seas.[194] The court concluded that because Honduras did not ratify UNCLOS Article 6, Honduras could not be protected by it.[195] Moreover, the court argued that under protective jurisdiction, the U.S. could prosecute non-nationals on foreign vessels even without consent of the foreign nation.[196]

Although the drugs did not reach U.S. territory, it was not an obstacle to establishing jurisdiction. The court stated that protective jurisdiction "does not require that there be proof of

[190] *U.S. v. Gonzalez*, 776 F.2d 931, 934 (11th Cir. 1985). [Reproduced in accompanying flash drive at folder # 24]

[191] *Id*. at 933.

[192] *Id*. at 937.

[193] *Id*. at 934.

[194] *Id*. at 937.

[195] *Id*. at 938.

[196] *Id*.

actual or intended effect inside the United States;" "conduct may be forbidden if it has a potentially adverse effect and is generally recognized as a crime by nations that have reasonably developed legal systems."[197] Due process was not violated because, as the court stated, "a person who violates the law of all reasonable nations" was not required to be "excused on the basis that his own nation" does not want him to be prosecuted by a foreign state.[198] In this case, exercising protective jurisdiction gave the U.S. power to prosecute non-nationals on the high seas because their acts posed a threat to U.S. security and governance.

In *U.S. v. Gonzalez*, the U.S. applied a two-part test to determine whether it could exercise extraterritorial jurisdiction.[199] First, it determined whether Congressional intent allowed for extraterritorial jurisdiction. Congressional intent is generally understood through "the type of crime Congress" wanted to prevent or it is found in the language of the statute.[200] Second, it determined whether applying extraterritorial jurisdiction was "reasonable" under international law. Courts find extraterritorial jurisdiction "reasonable" if it "conform[s] to international principles of extraterritorial jurisdiction."[201]

Although applying protective jurisdiction to non-nationals on non-territorial waters is supported by U.S. case law, the practice outside of anti-drug effects interests is currently rare. There is usually a relationship between the forum state and the conduct being prosecuted.[202] The argument is that if protective jurisdiction applied to non-nationals in non-territorial waters, it

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[197] *U.S. v. Gonzalez*, 776 F.2d 931, 939 (11th Cir. 1985). [Reproduced in accompanying flash drive at folder # 24]

[198] *Id*. at 941.

[199] Ryan P. Kelley, *Unclos, but No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy*, 95 Minn. L. Rev. 2285, 2293-94 (2011). [Reproduced in accompanying flash drive at folder # 34]

[200] *Id*. at 2293.

[201] *Id*. at 2293 -94.

[202] Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 Minn. L. Rev. 1191, 1230 (2009). [Reproduced in accompanying flash drive at folder # 31]

would not only be indistinguishable from universal jurisdiction, but it would be broader because it could apply to more crimes.[203]

C. Application of Protective Jurisdiction in Anti-Piracy Effects Policy

Even though exercising protective jurisdiction beyond drugs cases is rare, the U.S. has applied protective jurisdiction to the crime of piracy in the past. For example, in *U.S. v. Furlong*, an Irishman on a foreign vessel committed a piratical murder on an Englishman on the high seas.[204] The Supreme Court of the U.S. held that the U.S. did not have jurisdiction to prosecute a foreign national for committing a crime against another foreign national on the high seas with foreign vessels involved unless the crime was piracy.[205] The rationale for this decision was that piracy was a crime "against all[] and punished by all" and that any "civilized [s]tate" would prosecute.[206]

The Supreme Court's holding in *U.S. v. Smith* is consistent with *U.S. v. Furlong*. In *U.S. v. Smith*, a foreign national on a vessel registered with the colony of Buenos Ayres robbed a Spanish vessel on the high seas.[207] The court concluded that if the robbery was a punishable act under "'An act to protect the commerce of the United States, and punish the crime of piracy'," then the defendant was guilty. If the act was not listed, then the defendant was not guilty.[208] Like *U.S. v. Furlong*, *U.S. v. Smith* distinguished between piracy and other acts. Moreover, both clearly authorize the exercise of protective jurisdiction over piracy.

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[203] Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 Minn. L. Rev. 1191, 1231 (2009). [Reproduced in accompanying flash drive at folder # 31]

[204] *U.S. v. Furlong*, 18 U.S. 184, 185-86 (1820). [Reproduced in accompanying flash drive at folder # 23]

[205] *Id*. at 197.

[206] *Id*.

[207] *U.S. v. Smith*, 18 U.S. 153, 154 (1820). [Reproduced in accompanying flash drive at folder # 26]

[208] *Id*. at 154-55.

A major argument against applying protective jurisdiction in piracy is that it will reduce state sovereignty. Protective jurisdiction prevents states that are directly involved with the conflict from prosecuting the case. Although exercising protective jurisdiction in recent piracy cases is either rare or non-existent, the Seychelles should not be deterred from applying it. The U.S. continues to apply protective jurisdiction over the drug trade for relatively minor offenses such as possession and intent to distribute marijuana. Moreover, controlling U.S. case law applied protective jurisdiction specifically over piracy.

If the *U.S. v. Gonzales* two-part test for exercising extraterritorial jurisdiction is met, [209] it will provide further support that protective jurisdiction can be applied to the crime of possessing piracy equipment. First, the intent from international laws must support the application of extraterritorial jurisdiction. The UNCLOS and UNSC Resolutions 1816 and 1846 allow for extraterritorial jurisdiction as expressly stated in their text and their insistence in preventing piratical conduct. Moreover, UNSC Resolution 1846 encourages states to establish jurisdiction over piracy. [210] Second, applying extraterritorial jurisdiction is "reasonable" under international law as evidenced through the numerous conventions, treaties, naval forces, organizations, and courts working together to suppress piracy.

Moreover, states not directly involved in the piracy incident are still threatened because their national interests such as security, vital economic interests and functioning of the legal systems are threatened. For example, piracy in the Indian Ocean has caused trade ships to carry armed crew in order to protect civilians. This causes the price of goods to increase to off-set the

[209] Ryan P. Kelley, *Unclos, but No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy*, 95 Minn. L. Rev. 2285, 2293 -94 (2011). [Reproduced in accompanying flash drive at folder # 34]

[210] S.C. Res. 1846, ¶ 15, U.N. Doc. S/RES/1846 (Dec. 2, 2008). [Reproduced in accompanying flash drive at folder # 28]

cost of protection.[211] Moreover, state budgets are increased because they send warships and other weapons to keep the Ocean safe.[212] Additionally, vital economic interests are threatened. For example, the Seychelles' economy depends on fishing and tourism. However, piracy in the region has decreased both industries, thus significantly harming the economy of the Seychelles.[213] Therefore, piracy does threaten the security and safety of a state even if its vessels, territory, or nationals are not involved.

Therefore, the Seychelles should argue that a law criminalizing the possession of piracy equipment prevents or minimizes threats against its security, safety, and vital economic interests. The anti-drugs effects policy the U.S. uses in its protective jurisdiction cases to prevent or minimize the effects of drugs on the U.S. case can be easily applied here. The Seychelles can argue that it is applying protective jurisdiction to the offense of possessing piracy equipment in order to prevent or minimize the effects of piracy on Seychelles' security. This policy coupled with historical piracy cases and current drugs cases applying protective jurisdiction strengthen the support for the Seychelles to apply protective jurisdiction to the possession of piracy equipment.

VI. CONCLUSION

The Seychelles should not encounter grave obstacles when enacting legislation making the possession of piracy equipment a criminal offense. The slave trade and burglary tools cases and the Hong Kong statute provide extensive guidance on how to create an offense for

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[211] The Cost of Piracy, *The Economic Cost of Piracy*, Save Our Seafarers, http://www.saveourseafarers.com/the-cost-of-piracy.html (last visited March 6, 2012). [Reproduced in accompanying flash drive at folder # 52]

[212] Daniel Howden, *How the Seychelles Became a Pirates' Paradise*, The Independent, (Feb, 8, 2010), http://www.independent.co.uk/news/world/africa/how-the-seychelles-became-a-pirates-paradise-1892279.html. [Reproduced in accompanying flash drive at folder # 41]

[213] *Id*.

possessing piracy equipment and how to justify it. Like the slave trade and burglary, piracy itself is a crime. Therefore, the cases show that possession of tools with the intent of committing the crime could also be a crime. The offense should require proof of general intent to meet the criminal intent requirement. Moreover, courts should be able allowed to use circumstantial evidence and make inferences from the piracy equipment and other evidence to find that the individual had the criminal intent to use the piracy equipment to commit piracy. When creating the offense, the Seychelles should not make an exclusive list of equipment as evidence of criminal intent. It will make it difficult for the Seychelles to apprehend and prosecute pirates who do not have the specific tools or weapons. For this reason, the legislation should follow slave trade and burglary case law and emphasize circumstantial evidence to prove that the vessel was or plans to engage in piracy. The Seychelles can refer to the Hong Kong statute that makes the possession of piracy equipment a crime.

The Seychelles may have difficulty in applying universal jurisdiction to the crime of possessing piracy equipment. States always had the option of exercising universal jurisdiction over piracy, and current piracy cases apply universal jurisdiction more frequently. However, the possession of piracy equipment is not traditionally considered a crime of piracy subject to universal jurisdiction. Most states do not have an offense making the possession of piracy equipment a crime. Therefore, if the Seychelles applies this offense to an incident of piracy that it has no direct connection to, pirates can argue that their due process is violated for lack of notice. This can prevent the Seychelles from being able to exercise universal jurisdiction for the crime of possessing piracy equipment.

The Seychelles can apply protective jurisdiction to non-nationals in non-territorial waters for the offense of possessing piracy equipment. The U.S. Supreme Court has applied protective

jurisdiction to convict foreign nationals for committing piracy on non-territorial waters. Moreover, the U.S. frequently applies protective jurisdiction to protect it anti-drugs effects policy. The Seychelles does not have to show actual harm, it only has to show potential harm. The Seychelles can argue that like the U.S., its national security, integrity, and vital economic interests are harmed by piracy even if the state is not directly involved in a piracy incident. The Seychelles can give examples of how its fishing and tourism industry are hurt. Moreover, as an island nation it is surrounded by pirates and piracy threatens the safety of the Seychellois people.