

## RECENT DEVELOPMENT

*United States v. Beyle*: These Seas Are My Seas, These Seas Are Your Seas—Determining the High Seas and the Limits of Constitutional Protection

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### I. OVERVIEW

In 2011, Somali pirates attacked an estimated 3863 individuals, taking 555 of those victims hostage.<sup>1</sup> Thirty-five of those hostages were killed.<sup>2</sup> In February 2011, nineteen pirates, including Abukar Osman Beyle and Shani Nurani Shiekh Abrar, seized a yacht over 900 miles off the coast of Somalia.<sup>3</sup> Aboard the yacht were four American seafarers—Scott and Jean Adam and their two friends, Phyllis Macay and Robert Riggle.<sup>4</sup> The pirates headed to Somalia to negotiate a ransom for the Americans, but they were intercepted by a United States Navy carrier between thirty and forty nautical miles off the coast of Somalia.<sup>5</sup> When the Navy tried to secure the hostages’ safe release, the pirates fired a rocket-propelled grenade at one of the Navy destroyers and began to open fire.<sup>6</sup> During the confrontation, three pirates, including Beyle and Abrar, killed the four American hostages with automatic weapons,

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1. *United States v. Beyle*, 782 F.3d 159, 162 (4th Cir. 2015).  
2. *Id.* at 162.  
3. *Id.* at 162-63.  
4. *Id.*  
5. *Id.* at 163-64.  
6. *Id.* at 163.

shooting the victims between seven to nineteen times.<sup>7</sup> Navy SEALs immediately secured the boat and took the surviving pirates into custody, and they were then taken to the United States where they were criminally tried.<sup>8</sup> Beyle and Abrar were convicted by a jury in the United States District Court for the Eastern District of Virginia on twenty-six criminal counts ranging from armed abduction to murder.<sup>9</sup>

After receiving multiple sentences, Beyle and Abrar appealed the lower court's decision, challenging their convictions on two separate grounds.<sup>10</sup> Beyle argued that the district court lacked jurisdiction over the charges regarding murder and firearms because the hostage killings had not occurred on the "high seas."<sup>11</sup> Beyle maintained that the murders were committed within Somalia's territorial waters, thereby beyond U.S. jurisdiction.<sup>12</sup> Abrar, however, appealed on the contention that he was kidnapped before the piracy operation commenced and was subsequently denied his right to present foreign witnesses that could verify his duress defense.<sup>13</sup> He thus alleged that he was denied his Fifth Amendment right to due process and his Sixth Amendment right to compulsory process.<sup>14</sup> The United States Court of Appeals for the Fourth Circuit *held* that the site of the murders was on the high seas, beyond the 12-mile territorial sea of any nation, because they occurred thirty to forty miles from the Somali coast.<sup>15</sup> The court also *held* that Abrar's inability to summon foreign nationals located abroad did not violate his Fifth Amendment right to due process or his Sixth Amendment right to compulsory process. The court reasoned that the conditions in Somalia made it difficult for the government to obtain witnesses, and Abrar failed to prove how the testimony would aid in his defense. *United States v. Beyle*, 782 F.3d 159, 168, 170 (4th Cir. 2015).

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7. *Id.* at 163-64.

8. *Id.*

9. *Id.* at 161. Beyle and Abrar both filed pretrial motions to dismiss based on the same arguments in their appeals, but the district court denied both motions. *Id.* at 165.

10. *Id.* at 165.

11. *Id.*

12. *Id.* at 166.

13. *Id.* at 169.

14. *Id.*

15. *Id.*

## II. BACKGROUND

### A. *Universal Jurisdiction: Jurisdiction over Piracy*

Since the twentieth century, international treaties have recognized piracy as a crime falling under universal jurisdiction.<sup>16</sup> Universal jurisdiction is defined as “criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.”<sup>17</sup> Universal jurisdiction further provides that a country need not have any link with the offenders, crime, or the victims of the attack.<sup>18</sup> The crime of piracy originated from the notion that a state could carry out punishment “in the interest of public order against [an] enemy of mankind on behalf of the global community.”<sup>19</sup> The United Nations Convention on Law of the Sea (UNCLOS) codified universal jurisdiction over piracy and, under article 105, provides that a country that seizes a pirate ship on the high seas shall have prescriptive, adjudicative, and enforcement jurisdiction over the captured pirates and their unlawful acts.<sup>20</sup>

U.S. courts defer to the United States Constitution and the authority of the United States Congress for their grant of jurisdiction over the prosecution of pirates.<sup>21</sup> Congress is afforded a number of enumerated rights by the Constitution, including the right “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations” under Article I, Section 8, Clause 10, the Define and Punish Clause.<sup>22</sup>

The Foreign Sovereign Immunities Act (FSIA) of 1976 provides the primary basis for establishing jurisdiction over foreign states in U.S. courts.<sup>23</sup> By its terms, FSIA makes it possible for the United States to

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16. Saiful Karim, *Prosecution of Maritime Pirates: The National Court Is Dead—Long Live the National Court?*, 32 WIS. INT’L L.J. 37, 47 (2014); Steven W. Becker, *The Princeton Principles on Universal Jurisdiction*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 18, 21 (Stephen Macedo ed., 2004).

17. Karim, *supra* note 16, at 47.

18. *Id.* The United States has not ratified the UNCLOS, but because UNCLOS reflects customary international law, the United States generally follows the same guidelines. *Id.*

19. Karim, *supra* note 16, at 47-48.

20. *Id.*; United Nations Convention on the Law of the Sea art. 105, Dec. 10, 1982, 1833 U.N.T.S. 437 [hereinafter UNCLOS].

21. *Beyle*, 782 F.3d at 165; *United States v. Dire*, 680 F.3d 446, 455-56 (4th Cir. 2012).

22. U.S. CONST. art. I, § 8, cl. 10.

23. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-43 (1989); *see also* 28 U.S.C § 1605 (2012).

prosecute piracy committed on the high seas.<sup>24</sup> This was established in *Argentine Republic v. Amerada Hess Shipping Corp.*, where the Court relied on sections 1604 and 1330(a) of FSIA, explaining that they must be used in every action against a foreign sovereign to have subject-matter jurisdiction in suits alleging violations of international law.<sup>25</sup> The Supreme Court explained that FSIA explicitly denies immunity to foreign states in suits regarding the theft of property in violation of international law, thereby encapsulating the crime of piracy.<sup>26</sup> Similarly, in *United States v. Shubin*, the Fourth Circuit described universal jurisdiction as an “international law doctrine that recognizes a ‘narrow and unique exception’ to the general requirement that nations have a jurisdictional nexus before punishing extraterritorial conduct committed by non-nationals.”<sup>27</sup>

#### B. *Geographical Boundaries: Defining Piracy and the High Seas*

The crime of piracy has been interpreted as “robbery or forcible depredations committed on the high seas.”<sup>28</sup> Though nations agree on the standard definition of piracy as defined by UNCLOS and section 1651 of the FSIA,<sup>29</sup> U.S. courts must elucidate the individual definitional terms to address defenses raised against their meaning. The High Seas Convention of 1958, ratified by the United States in 1961, defines the term “high seas” as “all parts of the sea that are not included in the territorial sea or in the internal waters of a State.”<sup>30</sup> The geographical boundaries of the high seas, however, depend on what parts of the sea are already under state sovereignty and where that sovereignty ends.<sup>31</sup>

Under international law, nations recognize three geographical zones of the navigable sea.<sup>32</sup> First, a state’s inland, known as its internal waters and those closest to a nation’s shore, are under the complete sovereignty of that nation.<sup>33</sup> Within its inland, a state carries an absolute right to exclusion of foreign vessels.<sup>34</sup> Second, beyond internal waters lies the

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24. 28 U.S.C. § 1605.

25. *Amerada Hess Shipping*, 488 U.S. at 434-35.

26. *Id.* at 435-36.

27. *United States v. Shubin*, 722 F.3d 233, 239 (4th Cir. 2013) (quoting *United States v. Hasan*, 747 F. Supp. 2d 599, 608 (E.D. Va. 2010)).

28. *United States v. Said*, 757 F. Supp. 2d 554, 560 (E.D. Va. 2010), *vacated*, 680 F.3d 374 (4th Cir. 2012) (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820)).

29. *Shubin*, 722 F.3d at 240.

30. Convention on the High Seas art. 1, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.

31. *Shubin*, 722 F.3d at 241.

32. *United States v. Louisiana*, 394 U.S. 11, 22 (1969).

33. *Id.*

34. *Id.*

marginal or territorial sea, where a nation may exercise authority but lacks the right to exclude foreign vessels if their passage is innocent or nonthreatening.<sup>35</sup> The last zone, farthest from a nation's shore, is considered the high seas or international waters not under the jurisdiction of any one nation.<sup>36</sup> In the United States, courts may not redraw these geographical boundaries, but Congress has allowed them to define the terms contained in certain acts.<sup>37</sup> For example, in *United States v. Louisiana*, the Supreme Court was tasked with defining the geographical boundaries of "inland waters."<sup>38</sup> The Court deferred to the definitions provided by the Convention on the Territorial Sea and the Contiguous Zone.<sup>39</sup> Generally, other courts, such as the Fourth Circuit, have accepted that territorial waters extend only 12 nautical miles.<sup>40</sup>

*C. The Fifth Amendment and Sixth Amendment: The Right to Due Process and Compulsory Process Rights*

The Fifth Amendment of the U.S. Constitution ensures the right to due process by stating, "No person shall . . . be deprived of life, liberty, or property, without due process of law."<sup>41</sup> The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."<sup>42</sup> The Fifth and Sixth Amendments act jointly because the right to present material witnesses during trial is viewed as the right to present a defense, which is the essence of due process.<sup>43</sup> However, the right to compulsory process is not absolute for every criminal defendant because this right does not "extend beyond the boundaries of the United States."<sup>44</sup> In order to violate a defendant's right, the sovereign must perform an act or omission that would "cause the loss or erosion of material testimony which is favorable to the accused."<sup>45</sup>

The right to compulsory process can only extend beyond the boundaries of the United States when "[i]t is within the power of the federal government to provide it"; otherwise, defendants could delay trial

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35. *Id.* at 22-23.

36. *Id.* at 23.

37. *Id.* at 34.

38. *Id.* at 34-35.

39. *Id.*

40. *United States v. Shubin*, 722 F.3d 233, 239 (4th Cir. 2013).

41. U.S. CONST. amend. V.

42. *Id.* amend. VI.

43. *United States v. Filippi*, 918 F.2d 244, 247 (1st Cir. 1990).

44. *Id.*

45. *Id.*

when foreign witnesses cannot be secured.<sup>46</sup> Under this principle, the United States' failure to issue a subpoena to a foreign defendant does not create a Sixth Amendment violation.<sup>47</sup>

In *United States v. Valenzuela-Bernal*, the Supreme Court held that the Sixth Amendment does not grant defendants the right to "secure the attendance and testimony of any and all witnesses," only the right to secure ones in favor of the defendant.<sup>48</sup> The Court was also not satisfied with the use of a "conceivable benefit" test, but rather required a showing that the testimony would have actually been material and favorable, and its omission would prejudice the defense.<sup>49</sup> Thus, the Court held there were no Fifth or Sixth Amendment violations due to the mere fact that the government had deported witnesses.<sup>50</sup>

Conversely, courts have also held defendants and their respective counsel responsible for protecting the defendant's right to compulsory process.<sup>51</sup> The Court held in *Valenzuela-Bernal* that a respondent could not establish a Sixth Amendment violation without explaining to the Court how the witness testimony would have been beneficial; such failure would waive the defendant's right to raise a compulsory process violation.<sup>52</sup> Similarly, in *United States v. Filippi*, the United States Court of Appeals for the First Circuit concluded that because the defendant, at the advice of counsel, continued with trial despite arguing that a witness was material to the defense, there was a "knowing and intelligent waiver of [the defendant's] constitutional right."<sup>53</sup> Therefore, the court found that despite a Sixth Amendment violation by the government, if the right to compulsory process is waived and a defendant proceeds with trial, it cannot later be raised as a defense.<sup>54</sup>

### III. THE COURT'S DECISION

In the noted case, the Fourth Circuit relied on UNCLOS to determine that a piratical act thirty to forty miles off the coast of Somalia

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46. *United States v. Greco*, 298 F.2d 247, 251 (2d Cir. 1962).

47. *Filippi*, 918 F.2d at 247.

48. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982).

49. *Id.* at 866-67. The Court also held that Fifth Amendment violations have the same materiality standard because due process guarantees a "fundamental fairness essential to the very concept of justice. In order to declare a denial of it, we must find that the absence of that fairness fatally infected the trial; the acts complained of must [prevent] a fair trial." *Id.* at 872 (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941)).

50. *Id.* at 872-73.

51. *Filippi*, 918 F.2d at 248.

52. *Valenzuela-Bernal*, 458 U.S. at 871.

53. *Filippi*, 918 F.2d at 248.

54. *Id.*

was on the high seas.<sup>55</sup> The court also applied *Valenzuela-Bernal* to deny Abrar's Sixth Amendment violation claim.<sup>56</sup> The court held that while the part of UNCLOS titled "High Seas" involved waters that extend beyond the exclusive economic zone (EEZ), the provisions still apply equally within the EEZ.<sup>57</sup> Moreover, neither UNCLOS nor any court precedent has ever held that Somalia's territorial sea extends past the 12-nautical-mile boundary, because this would disrupt multinational efforts against piracy.<sup>58</sup> The court further held that due to the security issues and domestic troubles in Somalia, it was beyond the power of the government to secure the defendant's witnesses.<sup>59</sup> Lastly, the court could not conclude whether the witnesses actually existed and found it doubtful that the testimony would be material to Abrar's defense.<sup>60</sup>

In its opinion, the court accepted the common international definitions provided in the High Seas Convention and UNCLOS to determine that the high seas consist of any part of the navigable sea beyond the territorial sea of any state or sovereign.<sup>61</sup> Following UNCLOS, the court was forced to address the contention that UNCLOS's recognition of the EEZ creates a "quasi-territorial" zone under Somalia's rule because the EEZ lies outside of Somalia's territorial sea.<sup>62</sup> The court reasoned that Somalia's jurisdiction within the EEZ was limited exclusively to certain economic rights over natural resources and preservation of the marine environment and was inapplicable to matters of navigation.<sup>63</sup> The court rejected that the grant of economic rights was analogous to granting jurisdiction to prosecute piracy.<sup>64</sup>

The court further held that no prior authority had agreed that any nation's sovereignty extended beyond 12 nautical miles from the shoreline, and especially not 200 off the coast.<sup>65</sup> Both Somalia and the United States have common agreements that their territorial seas extend only 12 nautical miles.<sup>66</sup> The court rejected the argument that international law did not apply because Somalia had passed national

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55. United States v. Beyle, 782 F.3d 159, 166-67 (4th Cir. 2015).

56. *Id.* at 169.

57. *Id.* at 166-67.

58. *Id.* at 166, 168-69.

59. *Id.* at 170.

60. *Id.* at 171.

61. *Id.* at 166.

62. *Id.* at 167.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

legislation to extend its territorial sea to 200 miles.<sup>67</sup> The court refuted this argument because Somalia had ratified UNLCOS, thereby committing to a territorial sea that did not extend beyond 12 nautical miles.<sup>68</sup> It explained that even if Somalia had signed and submitted a declaration of nonadherence to the geographical limit provision, UNCLOS does not allow parties to opt out of its provisions, and the United States does not recognize any such claim from Somalia to extend their boundaries.<sup>69</sup> The court also defended its position not to extend the territorial sea to 200 nautical miles because piracy is an international concern, and granting that extension would “[e]mbolden[] gangs of pirates, increase[] ‘investment’ in piracy by Somalia-based financiers, and bridle[] NATO [North American Treaty Organization] and multinational counter-piracy efforts.”<sup>70</sup>

Additionally, the court held that Abrar’s Fifth and Sixth Amendment rights had not been violated because the Sixth Amendment does not guarantee the attendance of any and all witnesses.<sup>71</sup> The court followed precedent that compulsory process is dependent on the court’s ability to secure the appearance of witnesses, and convictions do not become unconstitutional solely because the government could not procure a foreign witness.<sup>72</sup> Based on the facts, the court concluded that the inability to secure the defendant’s witnesses was due to the domestic situation in Somalia and not by any fault of the U.S. government.<sup>73</sup> Further, the court was unsure about the existence of the defendant’s witnesses after an investigation to find them proved fruitless.<sup>74</sup> This led the court to believe that requiring the government to go through dangerous foreign states to find witnesses is not practical and would only delay the justice system.<sup>75</sup> The court also found it material to its decision that the defendant failed to utilize other ways to get witness testimony, such as through telephone, or by eliciting testimony from his alleged kidnappers to support a duress defense.<sup>76</sup> The crux of the court’s decision, however, came from the fact that the defendant failed to meet

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67. *Id.* at 168.

68. *Id.*

69. *Id.*

70. *Id.* at 169.

71. *Id.* at 170.

72. *Id.* at 171.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 172.



the materiality requirement and did not demonstrate how his witnesses would have been material to his defense.<sup>77</sup>

#### IV. ANALYSIS

Due to the universal infamy of piracy among nations, an air of antagonism against pirates can be gleaned from the decisions of U.S. courts during piracy prosecutions. Following precedent, the court denied both parties' motions to dismiss, arguably reflecting some of the negative stigma surrounding piracy.<sup>78</sup> First, the court denied Beyle's argument that Somalia's territorial sea extended beyond 12 nautical miles without consulting any authority from Somalia to confirm or deny Beyle's claims.<sup>79</sup> Instead, the court relied on the definition provided by UNCLOS and the fact that the United States did not recognize any such claim from Somalia.<sup>80</sup> Though Beyle's argument likely would have failed anyway because Somalia has ratified UNCLOS and signatories cannot opt out of its provisions, it still seems only fair of the court to require the United States to prove or disprove Beyle outright.<sup>81</sup>

Next, though the domestic conditions in Somalia prevented Abrar from securing his desired witnesses, the court faulted him for not utilizing alternative resources as other pirate defendants had used in similar past cases.<sup>82</sup> The court also condemned Abrar for not calling two other convicted pirates as witnesses, despite the suggestion that the witnesses would only hurt Abrar's defense because they had purportedly kidnapped him.<sup>83</sup> The court's suggestion that a defendant should have used witnesses that may have been harmful to his case directly violates the Sixth Amendment.<sup>84</sup>

On the other hand, compared to the rising number of piratical attacks, the number of prosecutions for piracy is exceptionally low, which could explain why courts have a low tolerance for piracy and even less sympathy for violent pirates.<sup>85</sup> Being tough on pirates can be viewed as one mechanism to effectively prosecute them, as most of them end up

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77. *Id.*

78. *Id.* at 165, 170.

79. *Id.* at 165-68.

80. *Id.* at 167.

81. *Id.* at 168.

82. *Id.* at 172.

83. *Id.*

84. *Id.*

85. Karim, *supra* note 16, at 40.

slipping through the cracks in the system without any punishment.<sup>86</sup> By not consulting Somali authority, the court was able to speed up the prosecution process, and by deferring to widely accepted international law, the court presented a decisive argument over the pirate's defense.<sup>87</sup> Similarly, despite the dangerous conditions in Somalia, Abrar managed to secure investigators to track down his witnesses and was given a reasonable opportunity to procure his desired witnesses.<sup>88</sup> Given this occasion, Abrar should have employed the other options available to him; his failure made it the court's prerogative to continue with the trial in the interest of justice.

The court further declined to be the first authority to allow the territorial seas definition to extend beyond the 12-nautical-mile limit to avoid inhibiting multinational efforts to stop piracy.<sup>89</sup> This was perhaps the most prudent decision of the court because the political conditions in Somalia create an environment that fosters piracy rather than hinders it.<sup>90</sup> If the court expanded Somalia's territorial sea, it would have given Somali pirates free reign, making it harder for NATO and other international entities to apprehend pirates without Somalia's permission.<sup>91</sup>

Protecting international efforts to reduce piracy is a positive implication of the court's decision, but it is likely that the court's decision will have negative consequences for foreign defendants. Foreign defendants who are ignorant of the law will be punished for inaction and the decisions of poor counsel. Further, they may be left without recourse when forced to continue with trial if the government is unable to secure their witnesses, thus waiving their right to argue Sixth Amendment violations.<sup>92</sup> In the uniform effort to curtail piracy, courts must find the balance between fair prosecution and unjust punishment.

## V. CONCLUSION

The court's decisions to prevent the expansion of Somalia's territorial seas and to deny a claim of Fifth and Sixth Amendment violations are understandable in light of piracy's prominence in today's international community. Expanding the jurisdiction of an essentially lawless government would have allowed the pirates to escape retribution

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86. David Axe, *10 Things You Didn't Know About Somali Pirates*, WALL STREET J. (Apr. 27, 2009, 9:50 AM), <http://www.wsj.com/articles/SB124060718735454125>.

87. *Beyle*, 782 F.3d at 168.

88. *Id.* at 171.

89. *Id.* at 169.

90. AXE, *supra* note 86.

91. *Beyle*, 782 F.3d at 169.

92. *United States v. Filippi*, 918 F.2d 244, 248 (1st Cir. 1990).

after brutally killing four innocent Americans. However, denying pirates their rights runs contrary to fundamental criminal justice and constitutional principles of fairness. Though granting the federal government immunities is necessary to promote preservation of funds and ensure efficiency in the interest of justice, too much immunity can create unfair burdens on foreign defendants and leaves them at the mercy of their appointed counsel's legal competence. Accordingly, in the judiciary's efforts to end piracy, courts must take care not to deprive pirates of their constitutional rights, no matter the heinousness of the crime.

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