

**PIRATES ON THE POOPDECK:
A STUDY OF THE INTERNATIONAL LAW OF PIRACY**

FACULTY OF LAW, UNIVERSITY OF CAPE TOWN

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A dissertation presented to the Faculty of Law, University of Cape Town, in partial fulfilment of the requirements of the degree of Master of Laws in Marine Law, consisting of approved courses and a minor dissertation.

The other part of the requirements of this degree was the completion of a programme of courses. They were Shipping Law, International Law of the Sea and International Trade Law.

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DECLARATION

I declare that this dissertation is my own unaided work. It is being submitted for the degree of Master of Laws at the University of Cape Town, South Africa.

It has not been submitted before, for any degree or examination to any other University, nor has it been prepared under the aegis or with the assistance of any other body or person outside the University of Cape Town.

Warren A Wienburg

Cape Town 21 April 1998

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Introduction

Types of Piracy:

The word "piracy" can be indicative of several different things. Perhaps the most popular sense in which the word is employed, is in connection with the computer software and the music industries. In this sense, piracy indicates the theft of intellectual property rights. This can be considered an odd thing, since the term pirate was originally meant to apply to the subject of this thesis - the maritime criminal who plagues our oceans and threatens our ships. This confusion as to the meaning of the term, and its subsequent adoption by the software and music industries is perhaps very significant. The maritime usage of the word has faded as people began to believe that the only piracy on the high seas was the sort that featured Geena Davis and other Hollywood stars.¹ Consequently the average citizen of the west believed that pirates were a rather romantic bunch of people who daringly stole from the rich and were motivated by the prospects of some good clean fun. Perhaps unfortunately for the world these quaint folk had never existed, even a century ago. This in turn led to an attitude of ignorance mixed with a callousness for the fate of the people who knew exactly what the real pirate was all about, the merchant sailor.

Piracy is perhaps one of the oldest forms of criminal activity recorded. The Romans were plagued by pirates and Julius Caesar is known for his attempts to deal with the problem in his day. Piracy reached its peak in the eighteenth and nineteenth centuries. It developed out of the policy of the British (amongst other governments) to encourage private citizens to plunder foreign

¹ *Cutthroat Island* was produced by Laurence Mark Productions, and was released in 1995.

ships. The government would receive a share of the profits. Thus this piracy was at least partly politically motivated. Other pirates began their careers as sailors on board navy ships. The terribly harsh discipline led to the sailors mutinying and taking the ships for their own use, and own profit. Thus often the motive for piracy was political as well as commercial and many an Englishman was rewarded by the Crown for his efforts in robbing a Spanish Galleon of its gold. Once the piracy plague was started it became very difficult indeed to wipe it out. Pirates became rulers of their territory - particularly in the Caribbean, where the pirate leaders became more powerful than the British Government and in one famous incident actually sacked the main port of Jamaica! Pirates in those days kept close to the coast where the shipping was at its most concentrated.

The scourge of the seas was finally suppressed when the nations gathered together and began to put the old maxim "hostes humani generis" into practice by co-operating in their efforts to wipe the pirates out. This they seemed to have succeeded in doing and by the early twentieth century people had begun to believe that pirates were merely another page in the history books. However new pirates were just beyond the horizon.

Significance of Piracy Today.

Why Piracy is important today? Piracy is the scourge of the seas. It costs lives and property and is a threat to the good order of trade. The danger of piracy has increased with the sophistication of cargo carried on board vessels today. Some types of cargo are extremely hazardous and piracy imposes the danger that these cargo's may be allowed to escape from the holds in which they are secured.

The doomsday scenario of two VLCC'S colliding can become a reality in the narrow straits of South East Asia, where both the super-tankers and the pirates ply their trade. In the case of such a collision, damages might amount to more than ten billion dollars. A recent case showed that a laden VLCC was hijacked by pirates in the Malacca Strait in 1991.² The crew were incarcerated and the ship was left unmanned for almost half an hour. These straits are already massively congested and it was lucky that a disaster did not occur. This gives the real picture that piracy is neither romantic nor confined to the occasional butchery of the Vietnamese boat people or wealthy American yacht owners. It is important to stress this since it seems that the international community will only take action where large sums of money are involved. Piracy may also include attacks on ships for politically motivated ends. The line is, as legal commentators have discovered, increasingly hard to draw. In the past few years, the world has seen the introduction of an entirely new form of pirate - one who attacks ships in order to protect the environment. Ships today carry nuclear waste amongst other things. These ships are targeted by enviro-pirates and their "good" intentions may still have a disastrous result on the environment they are so eager to protect.

The aim of this thesis will be to survey the development of piracy in the law and to examine how it can best be developed to suit the new piracy that we must counter in the modern world.

The Advent of Modern Piracy

² Lloyds List Africa Weekly, February 21 1997

Piracy was eliminated in the last century by the powerful colonial nations banding together to destroy the scourge. They achieved this by attacking the fortified towns in which the pirates lived and destroying them. This often brutal, but effective method of securing absolute control of their colonial territory succeeded in minimising the incidents of piracy. Where there is harsh military control, crime can very often be kept under wraps. However, as the world was to find out in both the former Soviet Union and its satellite states, once this tight control is removed, often the situation simply explodes. This was to be the case in South East Asia. This territory was, as will be discussed below, a potential cold war flash point. Between the fading colonial presence and the combined might of the Royal Navy, American and Soviet fleets, pirates had very little room for manoeuvre. It would take a bold pirate today to challenge a modern warship.³ However in the wake of détente and glasnost came the inevitable decrease in the presence of the three fleets. The bankrupt Soviet Union recalled its entire fleet and the US and Royal Navy fleets were substantially decreased. Their absence opened the door of opportunity to local entrepreneurs who were prepared to fill the power vacuum that glasnost had created.

An increased motive for piracy was presented in the shape of modern technology. Most vessels today, be they small merchant ships or VLCC's, carry expensive communication equipment which can easily be disposed of. Technology has also allowed a substantial decrease in the number of sailors needed to crew a ship. The modern VLCC can often be crewed by as few as

³ This happened once and the pirates were lucky to live to regret it.

eight sailors. This makes it a great deal easier to board and control, than a ship crewed by twenty or thirty "old salts".⁴

The real problem though, is probably the incredible poverty in the regions where piracy is most prevalent. A high incidence of lawlessness in combination with a desperate need for money and the rich pickings to be gained from the soft target that a merchant ship presents, leads to the formation of pirate gangs. The IMB Report on Piracy points out that people in the developing world are no longer prepared to remain impoverished and if they cannot secure wealth by legitimate means, then many are prepared to resort to other means in order to raise their standard of living.

As the attacks originate from the third world and these areas are no longer the preserve of wealthy colonial powers, the states are sometimes close to helpless in their ability to deal effectively with this threat.

Pirates today have begun to garner sufficient wealth to build up their own strongholds. In a manner reminiscent of the Caribbean in previous times, pirates today have built up fortresses and made deals with local governments. They have held countries to ransom and are able to negotiate with them as equals would. This plays an important role in assisting pirates, for in ports belonging to states that are not too inclined to enquire as to the origin of a vessel, the pirates can repaint and refit the ship so that it may guard its ports never be recovered. In a state aware of these possibilities and prepared to vigilantly from being used by pirates, this becomes a great deal more difficult for the pirate.

⁴ IMB Report on Piracy July 1997

Piracy in Asia

The MV Anna Sierra - a case examined

The case of the Anna Sierra, a 12,934 dwt Cyprus-flag cargo ship, is a typical example of ships that are hijacked in South East Asia. The purpose of this attack was to steal the ship and the cargo on board. In 1995, she was sailing in the Gulf of Thailand, when she was boarded from a fast boat by pirates carrying machine guns. The crew were handcuffed in pairs and forced into two small cabins. Later on, the crew were set adrift on a makeshift raft in the middle of the ocean. Recently the case has taken on another twist. In 1996 the pirates were apprehended after the International Maritime Bureau launched an extensive investigation following the attack.⁵ The arresting authorities were the Chinese, and it was hoped that they would hand the pirates over to the flag-state authorities, who were eager to prosecute the pirates. However, the Chinese simply ordered that ten of the fourteen pirates apprehended, be released. In doing this, they ignored the hopes of the International Maritime Bureau (IMB) that the principle that one should either prosecute or extradite criminals might be applied in this case. Although it is true that this principle is strictly applicable only in terms of an extradition treaty, the important nature of this case did seem to point towards a more liberal application of the above rule. The refusal was a bitter disappointment for the IMB who had done everything in their power to see the pirates arrested. China is a major destination for pirated cargo, as the demand for foreign goods increases, and this weak response encourages pirates to ply their trade in the knowledge that the Chinese will release them in the unlikely event that they are actually apprehended.

⁵ Lloyds List Africa Weekly February 21 1997

In March 1997 a cargo ship and crew were hijacked for six days by pirates off Malaysia.⁶ The Pirates had hijacked the vessel shortly after it left Singapore, firing at it and jumping on board. They held the crew at gun point while they transferred a cargo of cigarettes valued at \$5 million dollars onto another vessel. The ship was renamed and repainted to avoid detection. They held the crew for six days before leaving the vessel with the stolen cargo.

An Australian documentary provides the case of the ship which sailed from a port in South East Asia. It disappeared and word was not heard of it for around two years. Then the owner, through a source, heard that it was docked at port. Accompanied by his attorneys and the local police, he boarded the ship and identified it as his own. The crew were interrogated and were pronounced innocent of all collusion in the matter. The owner, perhaps naively, decided to keep them on board. He then returned to Australia to discover that the ship had sailed into the night - it was never heard of again. Upon investigation, it was found that the police had allowed the ship to sail. This was extraordinary since the owner had made it quite clear that the ship was to do no such thing. The police replied that since the piracy had taken place in international waters, rather than in the country's territorial waters, they had no jurisdiction to keep the vessel and to prevent it from sailing. This is quite the opposite problem to that which generally faces the courts - that the pirates were not in international waters when the crime was committed and therefore technically they were not pirates at all. However, the owner assumed this to be merely a front for the real reason the ship was allowed to sail - the police had been bribed. Unfortunately this does not appear to be

⁶ Lloyds List Africa Weekly March 21 1997

such an unreasonable assumption at all. Piracy is rapidly becoming big business. The Australian program describes how from a hotel in Manila which overlooks the bay, one can pick out the ship that one wishes to sail. For as little as \$ 250 000 one can purchase the "pirating" of the ship of one's choice. The uses of a pirated ship seem to be almost endless. A floating base for illegal activities - a temporary hideout, or even a new ship to trade stolen goods in.

Pirates often steal the ship and refit it. They carry stencils and spray paint and alter the name of the ship and disguise it by repainting the funnel and other cheap yet effective methods of disguise. They then arrive in port and tout for cargo. Once they have secured a cargo they disappear with it, repaint the ship, restencil the cargo and then sell the contents off (often to the original and now desperate consignee.) The documentary describes how a cargo of palm oil was restencilled, and was about to be resold when the pirates were apprehended. These pirates were no ordinary seafarers but members of a gang. The Chenko Brothers, the leaders of the gang, were arrested as a result of outstanding police work and international co-operation. They remained in prison for only a few months before one was shot "attempting to escape." The surviving brother believes that it is only a matter of time before he is also "liquidated".⁷ This is because they simply know too much about the working of this international crime syndicate to be left alive. In order to see the problems inherent in law enforcement, it is necessary to understand the scope of the problem. The law was designed for the old style piracy, where single ships worked on their own "beat". These days however, pirates are often members of large "Mafia style" gangs which have the ability to

⁷ The Documentary on Piracy produced by Australian TV.

manipulate governments as ably as the pirates in the Caribbean did two centuries ago. There the solution was to buy them out. It was not unknown for a Governor of Jamaica to start his career under the "Jolly Roger", rather than the Union Jack. However, today's governments are reluctant to take that route, and as lawyers we need to find a better solution to the problem. The piracy scourge is so bad in Asia, that at least one government has in fact sold out to the pirates already.⁸

Due to the region being so economically poor the pirates tend to become part of the community in which they live. The communities comprise extended families and entire clans and protect these people and care for them. As a result they are seen as Robin Hood figures and the community serve as their early warning system. The journalists who made contact with a pirate gang were watched by villagers carrying AK 47's and searched by these people before being allowed to interview the pirate chief. These gangs carry on an ugly warfare of their own and this results as well in many casualties. The callousness of the pirates involved is terrifying. They will quite easily kill on the slightest pretence. Due to the status of the pirates in their communities it is not a simple matter to rout them out at their bases - the traditional method for destroying pirates. They have a sophisticated "bush telegraph" which enables them to avoid capture.⁹

More problematic is the fact that these pirates are becoming international criminal syndicates. The rewards for piracy mean that the syndicates are becoming increasingly powerful and ruthless. They make sure that they do not operate in the territorial waters of the state in which they base themselves. Thus this state will have neither the need nor the inclination to rout them out.

⁸ Ibid

Unless they feel inclined to undergo international investigations they have little choice but to ignore the pirates in their own waters and worry about those who have based themselves elsewhere. They consider themselves to lack jurisdiction to prosecute crimes that are not committed inside their own territorial waters. This makes the need to establish a proper international regime and a clear structure in law so important. Only international co-operation can help root out the international crime syndicates.

Piracy in South America

"Sabre-rattling pirates flying the skull and crossbones as they plunder their way across the seven seas may be a thing of the past but the act of piracy has far from died out in the coastal waters of Brazil."¹⁰

Another problem area for piracy is the east coast of South America. Here the problem is located around the waters of Brazil. Pirates here tend to aim for small prize such as the cash and valuables on board ships. They board by means of grappling hooks thrown from high speed motor boats. Some of the more sophisticated ones even use scuba gear to approach the ship silently in the dead of night while they are anchored at the roadstead. They then board and touting submachine guns, they raid the ship for all the valuables they can gather. If any resistance is shown they deal with it ruthlessly. The result has been that the Brazilian Ports have been branded a pirates den and ships are now beginning to look elsewhere to refit or refuel. This will surely be responsible for a longer term impact on the Brazilian economy. The dangers of piracy recently led in part at least, to an oil rig choosing to repair and refit in

⁹ Ibid

¹⁰ The Argus December 3 1997

Cape Town rather than in Brazil.¹¹ In response to the threat, ships in the area now carry large steel weights which they place strategically around the sides of the ship. When they capture a pirate on board, they throw the weights over onto the speedboat below. The weights generally smash right through the hull and sink the boat. They then break the pirates legs and throw him overboard. This sort of extreme violence has come about as a reaction to the increasing menace of the problem. Vigilante justice has always created a long term problem for the law.

Piracy in the Caribbean

*"Where there was supposed to be life there was nothing. The half submerged yacht appeared like a phantom just under the surface of the water. Like a dead carcass it rose in the water as a swell rolled by showing its side to the men on the passing ship."*¹²

Piracy in the Caribbean attacks the small pleasure cruisers that wealthy Americans take on their holidays. Only recently a US Senator and his son came across the deceased occupants of a luxury yacht, murdered for apparently witnessing a drug sale. These yachts are perfect targets for pirates. They are small, and easy to hide or dispose of. They are worth millions of dollars and are crewed by only a few sailors - who are generally civilians taking a holiday and are unable to resist the pirates at all.

Some passengers on board passenger liners now tell stories of liners carrying a full range of weaponry in order to repel boarders. These include bazookas and surface to surface missiles to destroy the pirates before they board the ship. Quite clearly this is both very costly and very dangerous. The use of

¹¹ Conversation with the master of the Neampt in September 1997.

such equipment will inevitably lead to misuse and disaster in the hands of semiskilled civilian seamen. Even Navy warships have very strict regulations regarding the issuing of personal firearms on board ship.¹³ Only the Marines on board US warships are allowed to carry firearms. The South African Navy no longer issues sailors with firearms, even when they are on guard duty.¹⁴ This is because firearms on board a structure made of steel are simply too lethal for all concerned even when those carrying them are highly trained fighters.¹⁵ If this is the case for US Marines, how much more so for at best semi-skilled civilian merchant sailors. That doesn't even take into account the scenario of a firefight on board an oil or petroleum tanker. Rather, both the Navy, and merchant ships who are prepared for boarders, have watchers equipped with powerful firehoses, to blow away potential pirates before they manage to take control of the ship.¹⁶ This method has seen successful results and is considerably safer than the use of firearms. However, the use of water is limited against determined aggressors, particularly those armed with automatic rifles.

Piracy in International Law

Piracy is an international problem that has spanned the centuries. Thus it is no surprise that the law has produced different ways of dealing with the problem. The sources of piracy law can usefully be divided into three areas. The first is international customary law. This comprises the case law of different states over a period of time as well as the decisions of the international courts, and international documents. Perhaps the least

¹² "Death on the Ocean: Mystery and Myth Romance and Riddles" The Argus December 3 1997

¹³ Conversation with a senior officer in the South African Navy.

¹⁴ Ibid

¹⁵ Ibid

¹⁶ Ibid

recognised of the three by the subsequent documents and conventions, although by no means the least important is state practice. State Practice is surely critical when discussing the form that the law should take, in order to be of practical assistance when combating the pirates at sea. The second is the municipal law of the different states, as expressed in their own statutes. Finally there are the modern conventions on the law of the sea.

Customary International Law

Customary International criminal law is a difficult area of the law to pinpoint. There are no classical forms of legal authority today that deal with the subject. There are no courts, prosecutors or statutes. There are no international jails either. While at certain times these have existed - most famously the Nuremberg trials - they have not taken a permanent form. Thus customary international criminal law consists of an accumulation of state practice, case precedents and documents throughout the legal world. The cases which deal with piracy, date back to the nineteenth century. There are a number which deal with the issues which face us today and these are useful indications of how the law is situated at the present time.

In re Piracy Jure Gentium is a Privy Council case which dealt with the question of piracy.¹⁷ In it, the court considered what constituted international law, when dealing with the topic of piracy.¹⁸

"The sources from which International Law are derived include treaties between various states, State papers, municipal acts of parliament and the decisions of municipal courts, and last but not least, opinions of

¹⁷ Lloyds Law Reports [1934] at 411

¹⁸ Ibid at 415

jurisconsultants or textbook writers. Speaking generally, in embarking upon international law, their Lordships are to a great extent in the realm of opinion and in estimating the value of opinion it is permissible not only to seek a consensus of views, but to select what appear to be the better views upon the question...¹⁹

As we shall see, these sources of law interlink in different ways. In the US, piracy is defined in terms of international law, while in the UK there is an existing law of piracy in addition to the international treaties that the UK has ratified.

Thus customary international law is, in the opinion of the Privy Council, substantially influenced inter alia, by the case law and state practice of different countries.

The Content of the Concept of "Pirate" in International Law

A pirate is "*hostis humani generis*" - An enemy of all mankind. On board his ship, he sails the seas, avoiding the control of any nation. He attacks all those he cares too, and is subject to no law, but his own. All states hate and fear pirates and all states wish to purge the seas of this curse. However, what makes a pirate different from any other type of criminal? This is the problem which the courts grappled with a century ago.

The first question to ask, is what must a pirate do in order to be considered a pirate? This might be the most difficult question to answer. Is violence for its own sake enough to constitute piracy? Must one also rob in order to be considered a pirate? This is the question most often grappled with by the

¹⁹ Ibid

courts. Its relevance to today can be clearly seen when the problem of maritime terrorism is considered.

In the Magellan Pirates case, Dr Lushington analysed the content of the term pirate in two stages.²⁰ He first defined the crime as it existed under English Law:

*"in the administration of our criminal law, all persons who commit piratical acts are held to be pirates; and piratical acts are robbery and murder on the high seas...it was never, so far as I am able to find, deemed necessary to inquire whether parties so convicted of these crimes had intended to rob on the high seas or to murder on the high seas indiscriminately."*²¹

He then examined international law and found that the same opinion existed under the "law of nations."²² Dr Lushington then continues, and decides that subjects of one country who commit acts of violence against that country can still be considered as something other than pirates by third parties. He then discusses whether or not they become pirates if their acts of violence are aimed at third parties. He concludes that this is indeed the case. Thus his reasoning is that a pirate is not defined by the purpose which he alleges motivated his act, but by the party upon whom his act was inflicted. This objective line of reasoning is far more workable in practise than the subjective inquiry as to the motive of the accused. To inquire as to the motive of the accused when he attacks a ship, is hardly a sensible manner of defining his status. Men attack ships for many different reasons. Most times it is virtually impossible to define quite why they attacked the ship. Vengeance, political motive, robbery or extortion are often interlinked. What of the terrorist who

²⁰ 164 Eng Rep 47

²¹ Ibid

kills people on board a ship in order to extort money from other ship owners? What is his motive? Distinguishing on this subjective basis is most often simply not practical. Thus Dr Lushington's objective approach is perhaps the best way of approaching the problem.

Dr Lushington then logically extends his definition to include those who pirate as part of a national policy, and with the approval of the state.²³ This surely makes a mockery of the public/ private distinction which the later conventions would rely on. If a person attacks a ship in order to rob it, with the encouragement of his state, how can this be fitted into the concept of a public/ private divide? The definition of Dr Lushington appears to be far simpler and more logical than that proposed by Professor Bingham almost a century later.

The second question, is where must one attack, in order to be considered a pirate? Initially, Dr Lushington restricts his definition to those acts of murder or robbery committed on "*the high seas*."²⁴ However, he then decisively rejects this restriction. He includes in his definition of the sea, any port, river or creek. He goes even further to cite with approval a case in which a person was convicted of piracy after having fired a musket from a sandbank and killed someone on board a ship a hundred feet out at sea. This example is particularly interesting in light of the practice today of the "*Tamil Tigers*" in Sri Lanka, to fire surface to surface missiles at ships anchoring in the bays around the island.²⁵

Thus it appears that most acts of criminal violence committed on the sea would be considered to be piratical acts by Dr Lushington. The end result of

²² Ibid

²³ Ibid

such an approach would be to give all states interested in preventing violence on the sea, the jurisdiction to arrest and try those found guilty of such acts. Not a few criminals have escaped trial on the grounds that the arresting state lacked the jurisdiction to try them.²⁶ However, it does pose the problem of casting the net too wide. Not everyone criminal who acts on water need be called a pirate. The English law addition, that the crime needs be a felony, and upon which Dr Lushington clearly relies, is not sufficient to narrow the definition into workable terms. This the Kings Bench would accomplish later in the Republic Bolivia case.²⁷

The United States dealt with the problem of piracy early on in its history.

In US v Smith, the court conclusively decides that there does exist an international law of piracy.²⁸ Justice Storey, writing for the majority, provides a definition that he declares is common to all opinions - that is, robbery upon the sea.²⁹ It is interesting to note that he does not narrow the definition by limiting it to the *high seas*. Rather any sea seems to be the general consensus. He does not deal with the question of whether or not an act of violence unaccompanied by robbery can be considered piracy. In the case in question, this is not necessary, and its absence does not indicate that robbery is an essential part of the crime.

The test suggested by the Magellan Pirates to distinguish pirates from revolutionaries was employed in Republic Bolivia v Indemnity Mutual Marine

²⁴ Ibid at 49

²⁵ Lloyds List Africa Weekly

²⁶ The recent release by the Chinese of the pirates involved in the capture of the Anna Sierra and the problems of the Achille Lauro graphically illustrate this problem.

²⁷ [1909] KB 784

²⁸ 18 US 153

²⁹ Ibid at 161

Insurance Company Limited.³⁰ Here a vessel chartered by the Bolivian government, was sent up the Amazon to resupply troops who were fighting revolutionaries. On the way up the river, the rebels seized the ship and stole the cargo. The owners claimed that the loss was due to piracy.

The court held that if a man operates against the property of a particular state for a particular public end, then that man should not be considered a pirate.³¹ Thus if the rebels acted specifically against and only against, the state that they oppose they are "freedom fighters" and not pirates. Thus the court seemed able to adequately distinguish on the basis of the target attacked, rather than the motive inherent in the attack. This casts in doubt the validity of the apparent motivation for the document's inclusion of the "*public ends*" purpose, which was the supposed inability of a court to distinguish adequately on the grounds of the target attacked, rather than the perpetrators' motive during the attack. It seems that deciding piracy on the basis of the target attacked is at least as accurate (or inaccurate) as deciding upon the motivation of the perpetrators. However, it should be borne in mind that courts are forced to pronounce upon the motives of an accused everyday, when dealing with criminal cases, and that therefore they are at least practiced in deciding cases on this basis.

Another point of interest, was the way in which the definition of piracy was restricted to the "*highways of the sea*" rather than accepting the wider definition proposed in the Magellan Pirates.³² This is probably a wise restriction, since otherwise there is no clear distinction on which to differentiate piracy from a land-based crime. There is no evidence though,

³⁰ [1909] KB 784

³¹ Ibid at 796

³² Ibid at 799

that "*highways*" is meant to mean "the high seas" in the specialised terminology of the Law of the Sea Convention.³³ Rather it seems to be a colloquial expression used to refer to the paths regularly used by ships *at sea*, as opposed to those that are sitting in port.

In re Piracy Jure Gentium was brought before the Privy Council by the Attorney-General.³⁴ He asked that the Law Lords decide whether piracy need include the actual theft of property in order to be considered a piratical act. This question of law was the result of a Hong Kong court deciding to acquit twelve accused of the charge of piracy. They had not actually managed to rob their victims when they were apprehended. The Attorney-General brought the question of law to the Privy Council for their lordships consideration.

The question was particularly interesting, since it was phrased "*piracy jure gentium*". This meant that the court would decide not on the basis of English law, but rather on the basis of international customary law. This was made clear in the arguments of counsel for the Attorney General, who argued on the basis of both Oppenheim's International Law and Smith's International Law.³⁵ Counsel for the contrary view, Sir Leslie Scott, also saw the matter in this light. "*The question was expressed in terms which seemed to invite from their Lordships an expression of view almost as if they were sitting as a Permanent Court of Justice at the Hague on a pure question of International law...*"³⁶ While Sir Leslie did go on to say that there were considerations to modify this view, and that the case should be considered in the nature of an indictment on an accused, the tenor of his case was directed at an

³³ UN Convention on the Law of the Sea 1982

³⁴ See note 17.

³⁵ *Ibid* at 412 col 2.

international stance and not merely one in terms of British law. Their Lordships clearly saw the case in this light as well: "*In considering such a question, the Board is permitted to consult and act upon a wider range of authority than that which examines when the question for determination is one of municipal law only.*"³⁷

The facts of the case were that in 1931 two pirate junks happened upon a merchant ship and attacked it. It was clearly the purpose of these junks to seize the cargo of the merchant junk. The ship fled and was attacked with gunfire as it tried to escape. Fortunately for it, a warship was summoned in time and it arrested the junks. As no property had actually been taken, the question was could the aggressors be legally classified as "pirates." This would make a considerable difference to future accused, since the penalty for piracy was hanging, while for attempted robbery, a few years in jail would probably be their maximum sentence.

Their Lordships first dealt with the question of whether the act need be successfully concluded to fall within the bounds of piracy. They quote the civil law expounded by Molloy. He defines a pirate as "*a sea thief or hostes humani generis who for to enrich himself, either by surprise or by open force, sets upon merchants and others trading by sea.*"

Their Lordships go on to quote the author as saying that if the pirates are captured in an unsuccessful attempt, they may be tried and hanged as pirates.³⁸ They then distinguish Sir Leslie's chief case, Damsons' Case, as not attempting to provide a true definition of piracy. In discussing their own criminal law, their Lordships are careful to point out that the case is one of

³⁶ Ibid

³⁷ Ibid at 415 col 1.

piracy jure gentium, and that the English statutes on the matter are not relevant to the case.³⁹

Their Lordships then deal a devastating blow to the notion that piracy need include the concept of robbery:

*"When it is sought to be contended, as it was in this case, that armed men sailing the seas on board a vessel, without any commission from any State, could attack and kill everybody aboard another vessel sailing under a national flag without committing the crime of piracy unless they stole, say, an article worth sixpence, their Lordships are almost tempted to say that a little common sense is a valuable quality in the interpretation of international law."*⁴⁰

Their Lordships also quote the distinguished author, Sir James Stephens, who says that :

"It is doubtful whether persons cruising in armed vessels with intent to commit piracies are pirates or not" and clarifies this point in a footnote, by saying :

*"The doubt expressed at the end of the article is founded on the absence of any expressed authority for the affirmative of the proposition and on the absurdity of the negative."*⁴¹

Thus it is clear that the Privy Council saw fit to disregard the recently published Harvard Convention, and to decide that piracy could quite clearly include the concept of violence without clear monetary gain.

³⁸ Ibid at 416

³⁹ Ibid at 417

⁴⁰ Ibid at 417-418

⁴¹ Ibid at 418

The Conventions

There are three main documents which deal with piracy. The first is the Harvard document.⁴² This is an international scholarly attempt to define piracy. The latter two are conventions. The first is the Geneva Convention on the High Seas.⁴³ The second is the Law of the Sea Convention.(LOSC)^{44, 45}

The Harvard Document

The first modern attempt to draw up an international regime for piracy took place at a conference in Harvard in 1929. The resulting document had vital consequences for the subsequent development of the law of piracy, for it moulded the shape of the international treaties to come. Both the Geneva Convention of the High Seas, and the LOSC, followed almost entirely the draft which was compiled at Harvard and reported on by Prof Bingham. This document was drafted by people who had very different ideas as to what constituted piracy. Many thought that piracy was a romantic fossil belonging to the past. This consequently influenced the draft, as they tried to shape their law around circumstances which had ceased to exist centuries earlier. The result was a document that is flawed for those today who see piracy as a modern threat - not merely an ancient footnote in the history of maritime navigation.

The key provision of the Harvard document is found in article 3. It defined piracy as :

⁴²American Journal of International Law v 26 (suppIV) [1932] at 768

⁴³ Geneva Convention on the High Seas 1958

⁴⁴ See note 33

"Any of the following acts, committed in a place not within the territorial jurisdiction of any state:

- 1) Any act of violence, or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without a national character.
- 2) Any act of voluntary participation in the operation of a ship with the knowledge of facts which make it a pirate ship.
- 3) Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article.⁴⁶

This article narrows the definition in a number of important ways. It is these restrictions that have imposed the problems with which international law is confronted today. The first restriction is that the attack could only take place on the high seas. The second and most often debated is the insistence on the attack being privately motivated. The third is that the attack can be either from the sea or from the air, but it cannot be from land. The fourth is that the attack must include two craft.

While each of these principles are open to extensive criticism, to be fair to the drafters, there were some important developments subsequent to the drafting of the document that they could not have taken into account.⁴⁷

⁴⁵ This latter Convention has a great deal of influence on international maritime law. Articles 101-108 deal with piracy.

The High Seas Debate

Article three begins by limiting the scope of the crime of piracy to those acts committed "*not within the territorial jurisdiction of any state.*"⁴⁸ The reporter though in providing the *travaux preparatoires* has shown that the choice of sources to prove this point was highly selective.

The document cites the *Magellan Pirates* as a source in favour of the exclusion of piracy *jure gentium* from a state's territory.⁴⁹ However the quotation is a misleading one. It quotes Dr Lushington as ruling that "*robbery and murder done on land and not by persons notoriously pirates, would not be robbery...*"⁵⁰

This is of course undisputed by all commentators. Piracy is a crime committed at sea. However, this quote hardly proves that piracy is a crime *jure gentium* only on the high seas. In fact, Dr Lushington continues to state that even though the vessels were taken *in port* (my emphasis) he would favour the argument that they be considered pirates. The fact that the pirates were taken on the high seas, simply obviates the need for him to deliver a *ratio decidendi* on the matter. Obiter, though, he quite clearly infers that a pirate remains a pirate, no matter how close he was to land when he committed his foul deeds.⁵¹ When cases cited are so grossly distorted, one finds it difficult to regard the document as reflecting international customary law. Surely such an instrument should contain more intellectual integrity?

⁴⁶ Harvard Document note 42 at 768-9

⁴⁷ See below

⁴⁸ See note 42 at 786

⁴⁹ Ibid at 789

⁵⁰ See note 20 at 50.

⁵¹ Ibid

It must be remembered that at the time that this draft was written, the United States still regarded territorial jurisdiction as being limited to a maximum of three nautical miles. Thus piracy was any act *outside of three nautical miles*. This subsequently changed to twelve nautical miles, which is of course four times the distance. Most shipping traffic is going to be found closer to the coast than this latter distance and such a large geographical exclusion virtually removes the crime of piracy from the realm of practical application altogether.

The importance of classifying a crime as piracy, rather than say robbery or murder, is that piracy is a crime which is subject to universal jurisdiction. Any state can arrest a pirate and try them. If we are to limit this crime to acts which take place outside the territorial waters of all states, then in effect we have removed universal jurisdiction over most acts of piracy. We then have no choice, but to leave the crime to be eradicated by each individual state, many of whom are completely without the will or means to stamp out this scourge.

There is also the position of the state that claims a territorial sea that is regarded as excessive by other states, and consequently is not recognised by them. Is this sea to be regarded as within a state's territorial waters or not? Certainly the state that claims the area would regard it as within national jurisdiction.⁵² From a technical point of view, it would seem that the answer to this problem would lie in article 3 of the LOSC. Here it states that

"Every State has a right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles..."

⁵² Environmentalism, Piracy and International Law by S Menefee
California Western International Law Journal [1993] v 24 at 5

There does not seem to be any state that can rightfully call itself a persistent objector to this concept.⁵³ Thus all states would have to recognise at least the minimum 12 miles mentioned above. However, the LOSC goes further to limit all claims to the above limit. This would seem to mandate that at least all signatories to the LOSC should allow the pursuit and arrest of pirates outside this limit, by foreign warships. Since the LOSC has been ratified by over 120 states this would indicate that there is little chance of the problem occurring in practise.⁵⁴ However, there are states that have signed the LOSC, and have claimed more than the 12 miles allowed by the convention.⁵⁵ Indeed there are 12 that have claimed a full 200 nautical miles.⁵⁶ Numbered amongst these are Argentina and Brazil. As noted above, it is within the waters of the above two states that a considerable portion of the world's piracy takes place. All of the piracy would certainly happen within 200 nautical miles of the coastline. Argentina is only 300nm away from the Falkland Islands.⁵⁷ Thus the possibility of British warships pursuing suspected pirates into waters claimed by Argentina as territorial waters, but recognised by Britain as the High Seas, is far from being a remote possibility. The result could certainly see the question answered in an international court. It would seem that the pursuing warship would have a right to rely on the LOSC limits provided by article 3. However, this problem will have to wait for a court's pronouncement, before an answer can be given with any certainty.

The situation was exacerbated by the introduction of the exclusive economic zone (EEZ) in the LOSC.⁵⁸ The EEZ is 200 nautical miles wide. While the

⁵³ The Law of the Sea R Churchill and A Lowe 1988 at 67-68

⁵⁴ *Ibid* at 354

⁵⁵ *Ibid* at 343

⁵⁶ *Ibid* at 353

⁵⁷ Encyclopaedia Britannica - Micropaedia v 4 at 666

⁵⁸ LOSC Part V articles 55-59

majority of the Earth's seas are still considered "high seas" today, almost none of those areas, hundreds of miles away from land, have been particularly threatened by pirates.⁵⁹ The High Seas are given a precise technical meaning in the LOSC. The draft defines the act in a broad manner - *"any act not within the territorial jurisdiction of any state."*

As Gerald P McGinley points out, states do not have criminal jurisdiction within their EEZ.⁶⁰ Consequently, according to the Harvard draft, the piracy provisions would apply to the EEZ. However, the LOSC defines piracy in a specific positive sense. Rather than broadly leaving it as the Harvard draft did, the LOSC changes the wording to the precise:

"all acts committed on the high seas."

Article 86 of the LOSC defines High Seas as:

"all seas that are not included in the EEZ or territorial seas.."

Thus, it might be argued that when this term is used, it is meant to exclude the EEZ from application. Consequently, in practical terms, this provision would negate the point of article 105, which gives jurisdiction to all states which capture pirates. If pirates only operated on the high seas, they would not be much of a problem in the first place. In the Harvard draft, the authors excluded from universal jurisdiction the first three miles off the coast of a state. Here by slightly altering the terminology without consideration of the changes made to the rest of sea law since 1932, they might have excluded the first 200 nm.⁶¹ However, Brown points out that article 101 (a) ii defines

⁵⁹ The "High Seas" as defined by the LOSC art 3 still constitute approximately 70% of the oceans size. However, maritime traffic traditionally hugs the coastline, rather than sailing the middle of the coeans. The pirates naturally, follow their prey.

⁶⁰ The Achille Lauro Affair - Implications for International Law by G McGinley
Tennessee Law Review v 52 [1985] at 696.

⁶¹ The width of the Territorial Sea as defined by LOSC article 57.

piracy as an act beyond the jurisdiction of a state.⁶² Since states do not possess criminal jurisdiction beyond their territorial sea, they would consequently not possess the requisite jurisdiction, and the EEZ would fall into the category of piracy according to the LOSC. This is however, another example of the ambiguous drafting of the articles relating to piracy.

The Private Ends Debate

This issue has been the most vociferously debated. It has never been quite clear just how this term should be interpreted. It seems clear that the aim behind this wording in the Harvard draft, was to simplify matters by excluding all political attacks at sea.⁶³ In the 1920's those fighting for independence were viewed in the light of the heroes of the American independence struggle. These were soldiers who abided by the conventions of "civilised war" and who would not dream of attacking innocent bystanders. This dated view of warfare, came from writers such as W Hall, who wrote that:

"...a man who acts with public motives may do like acts to a certain extent, but his moral attitude is different, and the acts themselves will be kept within well-marked bounds. He is not only not the enemy of the human race, but he is the enemy solely of a particular state."^{64,65}

In this century we have witnessed the most foul and despicable acts of senseless violence committed as of "public acts" and more specifically in independence struggles. To view independence struggles in the same light as a century ago is simply no longer a viable proposition.

⁶² International Law of the Sea E Brown 1994 at 300

⁶³ See note 42 at 786

⁶⁴ Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety by M Halberstam American Journal of International Law v 82 [1988] at 275. Quoted from W Hall, International Law Oxford 1884.

Private ends seem to have been narrowly interpreted to mean *animus furandi* -an intent to rob.⁶⁶ The comment on the document states that:

*"There is no good reason why one who does an act with intent to kill, wound, rape, enslave, imprison, or to steal or maliciously destroy property, which would be piracy if done to rob, should not be subjected to more probable retribution through the common jurisdiction of all states, instead of a lesser chance of apprehension and punishment by a single state which may not have the present force, or opportunity or interest to serve the cause of local security and order in the locality."*⁶⁷

It thus seems quite clear that private ends does not simply mean robbery. It is something rather more complicated. The comment on the draft states that:

*"the convention excludes from its definition of piracy all cases of wrongful attacks on persons or property for political ends, whether they are made on behalf of states, or of recognised belligerent organisations, or of unrecognised revolutionary bands."*⁶⁸

Halberstam interprets the comment to mean that the draft excludes acts that are illegal merely because the parties who commit them are not recognised belligerents.⁶⁹

This is a reasonable interpretation. The draft clearly wished to exclude revolutionary bands who had not yet succeeded in attaining the status of a belligerent, from being classified as pirates for doing the very acts which would enable it to attain this belligerent status under international law.⁷⁰

⁶⁵ Ibid

⁶⁶ Ibid at 277

⁶⁷ See note 42 at 786.

⁶⁸ Ibid

⁶⁹ See note 64 at 278-9.

⁷⁰ See note 42, Comment on the Draft at 858.

Otherwise a group wishing to attain the status of a belligerent would be condemned as pirates under international law for precisely the same actions acts which after they had committed a sufficient number thereof, would be considered acts of "war" against a legitimate enemy.

This would clearly create a circular situation in which an act by a "belligerent" group could be classified as either an act of piracy or war depending upon what stage in the belligerents campaign it was committed. To prevent this circular reasoning from beginning, it consequently had to exclude potential belligerents from this category of violence. It clearly wished to leave such fights between the two conflicting parties, rather than to allow all other states to become involved under the universal jurisdiction allowed by piracy. This would mean that acts that would be illegal regardless of the status of those committing them, could be classified as piracy. Of course, the ruthless murder of innocent civilians is always illegal.

The other interpretation would be that all acts committed with a political end in mind would not be piratical acts. This of course would again rely on a subjective intention of the aggressor at the time of the action. As noted above, this will always be unreliable, and very often virtually impossible to achieve with any degree of certainty.

Attacks from Sea or Air

This excludes attacks mentioned by the Magellan Pirates case, which originate on land.⁷¹ This sort of attack might usefully be fitted into a new

⁷¹ See note 20 at 49

convention. Dr Lushington also regards the acts of those who are in the midst of a pirate "adventure" to be potentially piratical in nature, even if their acts originate on the land as well as on the sea.⁷² The surface to surface missiles which are used by groups such as the *Tamil Tigers* are often part of a concerted attempt to rule the seas by intimidation.⁷³ Today, modern technology allows these attacks to originate on land and this approach would allow all states to protect commercial shipping against the fearsome attacks that missile technology makes possible. Indeed, the comment on the draft makes the same point when it notes that it includes attacks from the air because someday in the future technology will allow pirates to pose a threat through use of the air.⁷⁴ It makes the point that law should adapt to the new circumstances imposed by technological development.⁷⁵ A pirate base might be equipped with weaponry which is sufficiently advanced to attack ships from the land. It makes sense to include these acts as piratical in order to allow warships the universal jurisdiction which is needed in order to wipe out the pirate bases. However, the problems which are certain to be created in the political sphere by foreign troops landing on sovereign territory are probably too complicated to allow this category to be included in a new convention.

The Two Craft Requirement

The original purpose behind this requirement was to protect merchant ships from attack from the pirates of old. Thus there would be no problem with using a two craft requirement to distinguish between piracy and mutiny. This would prevent all acts at sea from becoming categorised as piratical acts. If a

⁷² Ibid at 50

⁷³ See for example *Lloyds List Africa Weekly* - October 31 1997.

⁷⁴ See note 42 at 809.

sailor robbed or murdered his fellow on board, this would hardly make him a pirate. In this age, where cruise liners carry passengers from all over the world, pirates are as likely to attack from within as from without, and the old definition no longer can be relied upon to distinguish the pirate from the common criminal.⁷⁶ Piracy should require the absence of jurisdiction.⁷⁷ In a case such as common murder, the flag state of the ship has jurisdiction, and there would be no point in allowing all states universal jurisdiction over the matter. The comment explicitly excludes mutiny from the acts which are to be considered piratical.⁷⁸ This would also be considered a matter solely for the jurisdiction of the flag state. The draft looks upon the internal loss of control from the point of view of a merchant or naval ship. Only one state is involved here, and the problem is purely an internal criminal matter. Thus if the flag state could be considered to be in control of the ship, or having jurisdiction over the crime, then no other state could intervene.⁷⁹

However, the *travaux preparatoires* discuss the situation where the flag state is not in control of the ship.⁸⁰ Mutiny has also sometimes been included within the above definition.⁸¹ However, the comment on the draft specifically excludes mutiny as a form of piracy.⁸² In this situation, the criminal is held to be the enemy of all mankind and subject to every states jurisdiction.⁸³ When the criminals gain control of the ship, the flag state cannot be held responsible for the actions of those on board the ship, and the criminals on

⁷⁵ Ibid.

⁷⁶ An Analysis of the United States' Response to the Achille Lauro Hijacking by T Madden. Boston College Third World Law Journal v VIII no 1 [Winter 1988] 137 at 144.

⁷⁷ Ibid

⁷⁸ See note 42 at 810.

⁷⁹ Ibid

⁸⁰ Ibid at 818

⁸¹ Ibid at 809

⁸² Ibid at 810

board become liable to be classified as pirates. The flag state does of course retain jurisdiction. However, this jurisdiction will remain exclusive only for so long as the ship does not attack another vessel. If it does, the criminals then become classified as pirates under international law and become liable to universal jurisdiction.

This draft was of course written before the advent of modern terrorism, whereby the aggressive actions of the criminals would be directed against a multitude of nationals on board a passenger liner without ever having to attack a second ship.

Thus while the notion that two craft need always be involved in order for the act to be considered piracy may have fit the beginning of the twentieth century, it is hardly appropriate for the latter half.

The Harvard Draft, and its successors, the Geneva Convention and the LOSC, certainly have a great deal of influence in international law today. However, In re Piracy Jure Gentium, sees the Harvard Draft in a different light.⁸⁴ While it calls it "*a most valuable treatise on the subject of piracy*", it most certainly does not regard it as the final word on the matter. In fact it only mentions it in passing. The court also took care to quote the opinions of countries which disagreed with the report, particularly Romania. The LOSC, has of course a great deal more weight in international law. Over one hundred and twenty countries have signed it, and there is no denying that it is

⁸³ Ibid

⁸⁴ See note 17 at 420

the dominant word on the law of the sea. Thus while one might want to disagree with the document, there is no possibility of ignoring it.

Summary of International Law

International law regarding piracy can be quite different, depending upon the priority ones gives the conventions. If the final word is given to the LOSC, then the law of piracy does unfortunately become inflexible. This it seems is the only approach that one may legitimately take. While "private ends" may be broadly interpreted, it is difficult to see how the same can be said for "the high seas". Very few pirates operate on the high seas. By examining the problem in practise we shall see how modern incidents of supposed piracy fit into the definitions offered by the cases of yesteryear and the conventions of today. There is not much point in a law so precise that it fits no case, nor in one so broad that it fits all. While Dr Lushington may have fallen to a certain extent into the latter category, it seems that the LOSC has fallen into the former.

Contemporary Piracy and Law

Terrorism and Piracy. Old Age Solutions for New Age Problems?

A great problem of the modern era has been the advent of terrorism. This form of warfare has entered the world in the post world war two era in a heightened form and has captured world attention. Terrorism stemmed from the desire of smaller groups to combat countries with vastly superior resources.⁸⁵ It has often focused on attacking civilian populations of the

⁸⁵ Low Intensity Conflict by L Goldie Syracuse Journal of International Law and Commerce

countries involved. A particular concern of the western world has been the hijacking of commercial airliners. This form of terrorism has seen a major response, in the forms of conventions signed and security efforts increased. Shipping has not been fortunate enough to receive the same care.⁸⁶

Terrorism has been usefully classified as "low intensity warfare".⁸⁷ Goldie explains how in low intensity warfare, the weaker adversary can gain an advantage over the more powerful combatant. He does this by exploiting weak links in the enemies' armour, and then vanishing back into his hideout before the more powerful forces can be used against him. However this assumes that the warfare is directed against the enemy. In modern terrorism, it seems that everybody is a target. However, not everybody is an enemy. This distinction is a crucial one to draw, since whether or not the target is an enemy one, can play a major role in deciding whether the attack was conducted for "private or for public ends". If the attack was conducted against the avowed enemy, then it would probably be considered for "public ends" and not fall within the LOSC definition of piracy. However, if the target is not considered a legitimate one, then the attack cannot be justified on the grounds of some public purpose, and can fall within the bounds of s102 of the LOSC. Of course, the very act of deciding what constitutes a legitimate enemy target is fraught with controversy. The basic line of a terrorist, whose goal is the destruction of the State of Israel, might be that since a certain country is not taking active measures to destroy Israel, they thereby help to perpetuate it's existence. This provides the justification for acts of violence

[1988] 597-637 at 600-602.

⁸⁶ This of course is the general situation in respect of shipping. Where when an airline crashes, it makes world news, while when a ship sinks, it hardly merits publishing in the news at all.

⁸⁷ See note 77

against such States. Notable terrorists, such as Carlos the Jackal were even more callous about their violence.⁸⁸ Carlos once said that all victims were victims of the same struggle - whether they fought on the battlefield or lived on another continent altogether.⁸⁹ However, international legal opinion is hardly created by terrorists, and their blatant attempts to justify their own actions, have never been accepted as law. Neither the west, nor for that matter the former Soviet Union, ever justified or condoned the killing of civilians, even though both sides did engage on occasion in training groups who did just that. There is no serious legal justification for the killing of innocent civilians which can be found anywhere in international law.

Goldie cites a recent article in the *Economist*, which makes a useful distinction between the *bona fide* guerrilla and the terrorist.⁹⁰ The guerrilla strikes at military targets only. While civilians may be injured in the action, this is not the goal of the soldiers in question. Legitimate warfare is only conducted between participating combatants. Civilians are not legitimate targets. A terrorist uses the fear created by attacking civilians, to pressure the enemy into bowing to his demands. The *Economist* stresses that the trademark characteristic of the terrorist is the fact that the link between the object of the violence and the target of the violence is completely severed. The victims who are killed or taken hostage are merely pawns in the great game of international politics. When Abu Nidal threw grenades into a health spa in Italy, he did so quite impersonally. This utter disregard for the sanctity of human life, with no purpose other than satisfying a thirst for violence and providing Nidal with a measure of personal satisfaction in killing Americans,

⁸⁸ To the Ends of the Earth: The Hunt for the Jackal by D Yallop 1993 at 439-440

⁸⁹ Ibid

can hardly be considered a "public end". Indeed there is authority to suggest that the killing of civilians in this fashion is most certainly not a legitimate goal. In Eain v Wilkes, the court, had to decide whether or not a man responsible for bombing schoolchildren in Israel could prevent his extradition on political grounds.⁹¹ It held that :

*"Indiscriminate bombing of a civilian populus is not regarded as a protected political act, even when a larger political objective of a person who sets off a bomb, may be to eliminate the civilian population of the country..."*⁹²

Then there is the question of terrorism by these same "freedom fighters" for purely commercial purposes. Yallop describes how Carlos often led terrorist activities in order to extort funds for the organisations who commissioned his services. Indeed the Geneva Convention's definition of piracy, includes the masterminding or inciting of piratical activities.⁹³ Can someone be said to be acting for "public purposes" when he incites others to launch a terrorist "fund-raiser"? The only point to many of the hostages taken and civilians murdered throughout the 1970's and 1980's, was to scare people into giving the terrorist organisations much needed cash.⁹⁴ Can this be classified as a "public purpose"? Thus the line between private and public has become so blurred that making a legal distinction on these grounds creates far more problems than it solves.

To illustrate a way in which the problem can be solved, one can examine two famous incidents of modern maritime violence.

⁹⁰See note 85 at 603

⁹¹ 641 FR 2d 504

⁹² Ibid

⁹³ See note 42 Article 15 para 3.

⁹⁴ See note 88 at 415

The Santa Maria

In 1961, *The Santa Maria*, a Portuguese cruise liner, was seized by men rebelling against the Portuguese dictator Salazar. Some of the men had boarded the ship as passengers, while others had been part of the original crew. In the process of taking over the ship, they killed one crew member and wounded several others.⁹⁵ The leader, Galvao, declared the seizure to be the first step towards overthrowing the Portuguese Dictator, Salazar. In a radio broadcast, he declared that "he had captured the *Santa Maria* in the name of the Independent Junta of liberation led by General Humberto Delgado, the legally elected President of the Portuguese Republic who had been fraudulently deprived of his rights by the Salazar Administration."⁹⁶ The Portuguese government reacted by labelling the men "pirates", and called on the Dutch, French and British to help search for and seize the ship, under the guise of the universal jurisdiction afforded all nations in the struggle against piracy.⁹⁷ This request appears to have been favourably received by these nations. The ship was sighted by US and British forces and boarded by a US naval commander. The official US reaction appeared to be an acceptance of the Portuguese claim that the seizure constituted piracy:

*"orders had been given to intercept the liner under the well-defined terms of international law governing piracy and insurrection aboard ship"*⁹⁸

However, it would appear that the US reaction in practice was a little more cautious than that. The US wished to be seen acting in concert with it's

⁹⁵ See note 64 at 286

⁹⁶ Ibid

⁹⁷ Contemporary Piracy and International Law by S Menefee
Institute of Marine Law (U.C.T.) [1995] at 30

⁹⁸ The State Department quoted in Menefee, see note 97 at 31. This surely constitutes the only time that the international law regarding piracy has been referred to as "*well defined*".

declared ally, the dictator Salazar. However, when the US did gain control of the ship its reaction was quite different. It negotiated the release of the ship, under the condition that the men be treated as insurgents and be allowed to go free at the nearest available port.⁹⁹ This indeed did happen, and Galvao and his men were ultimately allowed to go free.

This case is an interesting one. The men clearly claimed to be acting for a public end. They claimed to be acting for an established revolutionary movement. They hijacked a Portuguese vessel and attacked only the Portuguese crew. In fact they reportedly treated the passengers with a great deal of courtesy. If one had to regard the crew of the vessel as innocent civilians, then perhaps they might be regarded as attacking someone other than their target, the Government of Portugal. Naturally, they "failed" the "two craft test" for piracy which the Geneva High Seas Convention insisted on. However, this fact does not seem to have interested any of the parties involved. Indeed, when the US and the British evaluated the situation, neither of them seemed to regard this as a factor which might change the legal definition of the problem. They seemed concerned with the motives and actions of the men aboard the vessel, not how they got there.¹⁰⁰ This is of course the better approach to take in practise. The actions of states do influence the content of international law, and it would appear clear that Portugal, the US and Britain found no relevance in the "two craft requirement" of the High Seas Convention. In the end, it appears that the men were treated as insurgents. The object of their attack corresponded to the object of their campaign. They probably did not attack civilians at all. They were

⁹⁹ See note 65 at 287

¹⁰⁰ See note 97 at 30-31

careful to treat those bystanders well. There was a clear link between the object of their violence and the target of their violence.

These men were not pirates, but were rather rebels, and it was this category of men that the Harvard draft was endeavouring to protect with their "*public-private*" divide.

The Achille Lauro

In 1985, terrorists belonging to a sub-branch of the PLO, hijacked the *Achille Lauro*, an Italian-flag cruise liner. At the time of the hijacking the ship was somewhere near the border of Egyptian territorial waters. The terrorists immediately ordered the ship to move out of these waters. They had come on board the cruise liner as passengers and had intended to make their way quietly to Ashdod, a port on the Israeli coast. It was apparently their objective to blow something or someone up there. However, they were surprised in their cabin while cleaning their weapons, and decided that they had no choice, but to take over the ship. They did this with a great deal of brutality towards the multinational crew and passengers on board the vessel. They took hostage all those on board, and herded them into one area of the ship, where they kept them until their eventual release. In exchange for their hostages, they demanded the release of a number of terrorists from Israeli jails. Later they executed one of the passengers, the partially disabled and wheel chair bound American Jew, Leon Klinghoffer. When later asked why they had done this, the terrorist jokingly replied that "*he had been trying to make a swim for it.*"¹⁰¹

¹⁰¹ See note 88 at 425

The United States, had early on in this saga decided to become involved. They initially sent out a SEAL team to the area, in the hope of rescuing the hostages immediately.¹⁰² However, US intelligence lost the ship, and by the time the Mossad had located it for them, the ship had moved into Egyptian territorial waters. The terrorists then negotiated with the Egyptian government the release of the hostages, in exchange for a flight to freedom. En route to Syria, the Egyptian aircraft was intercepted by US Navy F14's and forced to land at a NATO base in Sicily.¹⁰³ The US justification for such extraordinary action, was that the terrorists were legally pirates and therefore *hostes humani generis* and subject to the jurisdiction of all nations. The incident provides a useful basis to examine whether the US claim that terrorists can indeed be called pirates is an accurate one.

The initial problem is, of course the fact that the terrorists were already passengers on board the ship, when they hijacked it. This clearly does not fit into the traditional notion of the two craft requirement as described by the LOSC. However, if one uses the interpretation as described above, whereby one examines whether or not the flag state could be considered to be in control of the vessel when the violence was done; then clearly the terrorists in this case would fit into the category of pirates. However, a strict interpretation of the LOSC would see this argument fail.

¹⁰² The SEAL's (Sea Air Land) are the elite special forces unit of the US Navy. They are experts in counter-terrorism.

¹⁰³ The saga does not of course end there. The Italians let Abul Abbass, the most notorious of the terrorists free, and refused to extradite the rest to the US. Abbas is now a senior member of the PLO National Council, and a potential successor to Yassar Arafat. Recently members of the US Congress and Senate called for his extradition to the US, on the grounds of piracy.

The question whether the pirates were acting according to public or private ends can be hotly debated. It seems clear that there need be no robbery in order to consider the act a piratical one. That much at least seems to be reasonably clear. However, what does constitute the divide. The terrorists certainly claimed that they were acting for public purposes. However, the object of their attack certainly differed from the target of it. Italy was on friendly terms with the PLO at the time that the incident occurred. The passengers were multinational and the manner in which the incident occurred certainly indicates that the terrorists did not consider the passengers or crew their target. If there were Israeli's on board, they were not, unlike say the Entebbe incident, singled out as particular victims. Thus the terrorists were acting against innocent civilians who had nothing to do with the target of their violence. Thus using the standard laid down in Eain v Wilkes these men had acted for a private motive.

The next problem is the location of the ship throughout the crime. The LOSC does state that the crime is a continuing one, and that a crime committed in territorial waters can be considered piracy if the pirates subsequently move onto the high seas. This did subsequently happen when the ship moved into the EEZ. As discussed above, the EEZ is for the purposes of the LOSC to be considered in the same light as the high seas.

The United States though, did not seem to take the LOSC into consideration here. In the same way that the requirement for the "two craft" was ignored in the deliberations over whether the rebels aboard *The Santa Maria* were pirates, so in this case, they ignored the fact that *The Achille Lauro* had

never entered the High Seas. Rather they relied on the far broader interpretation offered by customary international law. It seems that as long as the conventions continue to be appropriate for the eighteenth century, they will be ignored by those in the twentieth.

The Green Pirates

There has now appeared a phenomenon that was surely not anticipated by the authors of the Harvard draft.¹⁰⁴ That of the radical environmentalist who attacks and sinks ships in order to protect whales in particular and the environment in general. The charge made by those attacked by these radicals, is that they are pirates. The interesting question here is one of the public-private divide. Are these people acting for public ends? The Harvard Draft and its *travaux preparatoires* are certainly less than helpful here. No one has anticipated such a turn of events. Traditionally, these sort of actions would be set in the context of belligerents attacking a particular state.

However, except in very rare occasions, the victims of such an attack would be private commercial vessels. They would constitute both the object and the target of the attack. Yet it does not seem clear that these people should be considered pirates. Environmentalists do not make obvious enemies of mankind. Perhaps the best approach would be to review the purpose behind the classification of the law of piracy. It is to provide jurisdiction to all states, where none would otherwise possess it, and thus to give all states a license to hunt down (and originally to hang) those ruthless individuals who had no state and no loyalty, but to themselves. The reluctance of the courts even to

fine these individuals points the way towards the less than clear solution. In cases such as these, the attackers generally belong to companies themselves. They are citizens of states. They do not attempt to randomly attack all people. They are most certainly not the enemy of all mankind, and the flag state would certainly have the jurisdiction necessary to prosecute them. There is no need on part of modern criminal law to hunt them and try them. They do not pose a threat to modern commercial shipping as a whole or the world's safety. It would seem as if they would be better left to the jurisdiction of individual states. They do not pose a threat to all mankind, and there is as much danger in casting the net of piracy too widely as too narrowly. It can render the term meaningless.

Piracy in Insurance Law

There is little in commercial law today, that is as international as the law relating to maritime insurance. Most of the maritime insurance is done out of Lloyds on standard form contracts that have not changed in almost a century. The case law that has emerged from the UK can be considered a fair reflection of how the law is around the world. Most maritime contracts of insurance will have either a choice of law or a choice of forum (if not both) which point towards the UK.

Marine insurance for the purposes of this topic can be divided into two main areas, hull and machinery, and war risks. Generally a ship would always have hull and machinery (H&M) cover . It would not automatically hold war risks cover. The standard H&M policy includes a clause which covers

¹⁰⁴ See note 52 at 15

"Pirates, Rovers, Thieves". The courts have had occasion to discuss just what constitutes piracy in the law of insurance.

One needs first to distinguish pirates from rovers and assailing thieves, the two categories which share a clause with pirates in the contract. Rovers is certainly the most obscure of the three. As Hazelwood points out, the court in The Andreas Lemos was forced to confess that it was not sure what rovers were at all.¹⁰⁵ Kahn points out that Rovers were the old Moorish Pirates (perhaps those encountered in *Othello*) that plundered vessels as a matter of national policy.¹⁰⁶ He continues, perhaps not surprisingly, to state that the term is now redundant.¹⁰⁷ However, it might be useful to remember that the orders of a state to attack foreign commerce may not have ended yet. The incidents in the South China Seas involving vessels belonging to Taiwan, are a reminder that roving may yet make a return to the seas.¹⁰⁸

Assailing thieves seem to involve those who come aboard from land in order to rob.¹⁰⁹

Piracy is more complex. The two cases which deal with the subject are the Republic of Bolivia case and the Andreas Lemos.¹¹⁰

The Andreas Lemos was a ship attacked within the waters of Bangladesh. It was anchored two miles out to sea, and was considered to be within port limits. It was most certainly within the twelve mile territorial sea. The ship was attacked at night and equipment was stolen off it. The ship was insured

¹⁰⁵ The Peril of Pirates all at Sea by S Hazelwood Lloyds Maritime and Commercial Law Quarterly [1983] 283 at 288

¹⁰⁶ Pirates, Rovers, Thieves by L Kahn Tulane Maritime Law Journal v20 [1996] 293 at 308

¹⁰⁷ Ibid

¹⁰⁸ See note 97 at 20-24

¹⁰⁹ See note 106 at 312

¹¹⁰ The Andreas Lemos Lloyds Law Reports [1982] 2 at 483

with the regular H&M policy. This contained an exceptions clause which excluded piracy. The ship was however insured for war risks, which did include piracy. The court had to decide whether the hull insurers or the war risks underwriters had to pay the claim.

One of the marine insurance requirements for piracy is that the attack must occur "at sea". The court initially dealt with the question of whether the fact that the action had happened within territorial waters excluded the possibility of piracy. The court quoted several authorities who argued that piracy only occurred on the high seas.¹¹¹ It also examined the view held in the Magellan Pirates, that in all places where great ships go, be they under bridges or up rivers, there piracy can exist.¹¹² It rejected this argument as well. However, it introduced a simple test to discover whether or not a ship could legally be pirated. The question was "was the ship at sea"?¹¹³ Could the attack be considered a maritime offence? If the answer to that was in the affirmative, then piracy could be considered a possibility for the purposes of an insurance policy.¹¹⁴ The court found it a better idea to discover what the ordinary sensible meaning of a pirate might be in practise, rather than accepting the ideas suggested by the many scholars writing on public international law.¹¹⁵

Conclusion

Piracy in international law is at best uncertain. It comprises of relatively ancient case law, and unclear and outdated conventions.

¹¹¹ Ibid at 487-9

¹¹² Ibid at 490

¹¹³ Ibid

¹¹⁴ Ibid

¹¹⁵ Ibid

The final word on the subject rests at the moment with the LOSC. This convention demands that all the strict criteria of the Harvard Document be fulfilled before the crime is considered piracy *jure gentium*. There must be two craft involved, they must be outside territorial waters, and the crime should (although this is uncertain) be privately motivated.

This is clearly unsatisfactory. The problem on the seas is one which requires immediate attention. Yet only co-operation by the regional states will see the end of this problem. Only a clear and useful law will allow that to happen. It is time that the law regarding piracy is given a thorough overhaul. If the law cannot deal with the situation now, then the law needs changing soon. We need a convention on piracy sooner and not later.

The suggested solution would be for the IMB to convene a new conference on piracy. The end result would be a convention which would allow for previous errors to be corrected. This convention would take priority over the LOSC.

The following aspects should be corrected. The two craft requirement should be removed. The private/public motivation test should be replaced by a target legitimisation test. Civilian vessels are never a legitimate target. No one has ever considered allowing anyone a special status when hijacking a civilian airliner, and the same principles should apply when dealing with cruise liners and merchant ships.

The high seas debate is rather more difficult. No state wishes to compromise on its territorial sovereignty. Yet there seems to be no way in which to stamp out piracy without allowing this compromise. Perhaps the solution would be found in a number of regional agreements in which regional states create

multilateral treaties amongst themselves. This will require the development of a great deal of trust among the parties involved.

The problem with piracy seems to be that few take it seriously. Men and women are attacked at sea on a daily basis by ruthless gangs and individuals. Yet very little is done about it. Until the world begins to see piracy as a serious problem and not a romantic fiction, sailors and passengers alike will continue to be robbed and murdered. Their deaths will go unmourned by a legal community too entranced with a romantic and fictional past to care much for a very bitter present and a bleak future.

One hopes that this essay may contribute something towards allowing romantics of the future to once more talk about piracy as a footnote in the past.

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Appendix A

United Nations Convention on the Law of the Sea - Selected Articles

Article 100 - Duty to co-operate in the repression of piracy

All states shall co-operate to the fullest possible extent in the repression of piracy on the high seas, or in any other place outside the jurisdiction of any state.

Article 101- Definition of piracy

Piracy consists of any of the following acts:

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

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

(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).

Article 102- Piracy by a warship, government ship or government aircraft whose crew has mutinied

The acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.

Article 103 -Definition of a pirate ship or aircraft

A ship or aircraft considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

Article 104- Retention or loss of the nationality
of a pirate ship or aircraft

A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the state from which such nationality was derived.

Article 105- Seizure of a pirate ship or aircraft

On the high seas, or in any other place outside the jurisdiction of any state, every state may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy any under the control of pirates and arrest the persons and seize the property on board. The courts of the state which carried out the seizure may decide upon the penalties to be imposed and may also determine the action to be taken with regard to the ships, aircraft, or property, subject to the rights of third parties acting in good faith.

Article 106- Liability for seizure without adequate grounds

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the state making the seizure shall be liable to the state the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure.

Article 107- Ships and aircraft
which are entitled to seize on account of piracy

A seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorised to that effect.